FINAL COURSE STUDY MATERIAL

PAPER 8

INDIRECT TAX LAWS

MODULE – 1: CENTRAL EXCISE

BOARD OF STUDIES
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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Edition	:	November, 2015
Reprint Edition	:	November, 2016
Website	:	www.icai.org
Department/ Committee	:	Board of Studies
E-mail	:	bosnoida@icai.in
ISBN No.	:	
Price	:	
Published by	:	The Publication Department on behalf of The Institute of Chartered Accountants of India, ICAI Bhawan, Post Box No. 7100, Indraprastha Marg, New Delhi-110 002, India. Typeset and designed at Board of Studies.
Printed by	:	

SYLLABUS

PAPER 8 : INDIRECT TAX LAWS

(One paper – Three hours – 100 marks)

Level of Knowledge*:* Advanced knowledge

Objectives:

(a) To gain advanced knowledge of the principles of the laws relating to central excise, service tax and customs

(b) To acquire the ability to apply the knowledge of the provisions of the above-mentioned laws to various situations in actual practice

Contents:

Section A: Central Excise (25 marks)

Central Excise Act, 1944 and the Central Excise Tariff Act, 1985

Section B: Service Tax (50 marks)

Law relating to service tax as contained in the Finance Act, 1994 as amended from time to time

Section C: Customs and Foreign Trade Policy (25 marks)

Customs Act, 1962, Customs Tariff Act, 1975 and Foreign Trade Policy to the extent relevant to the Customs Law

Note – If new legislations are enacted in place of the existing legislations relating to central excise, customs and service tax, the syllabus will accordingly include such new legislations in place of the existing legislations with effect from the date to be notified by the Institute.

A WORD ABOUT STUDY MATERIAL

In the scheme of our national economy, 'Indirect Taxes' have gained considerable importance over the years. In the fiscal legislations, augmented weightage is being given to the levy of indirect taxes as it constitutes a major source of revenue. Tax management and planning, especially in the corporate sector, necessarily entails a great degree of indirect taxes management and chartered accountants are expected to advise clients and organizations in this area of tax management. Accordingly, adequate emphasis has been given to this subject in the chartered accountancy curriculum by including a separate paper on indirect tax laws in the syllabus of the Final Course.

Paper 8: Indirect Tax Laws at Final Level has three sections namely, Section A: Central Excise, Section B: Service Tax and Section C: Customs and Foreign Trade Policy. Students are expected to acquire advanced knowledge in these indirect tax laws at Final Level.

The Study Material on Indirect Tax Laws includes laws relating to central excise, service tax and customs and provisions of foreign trade policy, to the extent relevant to customs law. It has been divided in three modules. Module 1 on Central Excise has 18 Chapters; Module 2 on Service Tax has 8 Chapters and Module 3 on Customs and Foreign Trade Policy has 16 Chapters. The subject matter of the Study Material is based on the law as amended by the Finance Act, 2015 and notifications/circulars issued till 30.04.2015.

The amendments made by the Finance Act, 2015 and the notifications and circulars issued between 01.05.2014 and 30.04.2015 have been given in *italics*/***bold italics***. Further, certain provisions of the Central Excise, Customs and Service Tax laws contain references to specific provisions of the Companies Act, 1956. The corresponding sections under the Companies Act, 2013 have been given as a footnote at the relevant places in this Study Material solely for the information of the students, since the said indirect tax laws are yet to be amended to incorporate references to the sections under the Companies Act, 2013.

Though the law is vast, an attempt has been made to make the Study Material simple yet comprehensive. The Chapters are organized in a logical sequence so as to facilitate easy understanding of the law. Students may keep in mind that though the Study Material covers the entire syllabus, it is of utmost importance to refer to the Bare Acts and related Rules in addition to this Study Material. This would be helpful for solving problems, answering a variety of questions and remembering sections and rules.

In India, tax legislations undergo frequent amendments, both at the statutory and judicial fronts, every year. Students are advised to update themselves regularly with such amendments. The annual publications brought out by the Board of Studies namely, "Supplementary Study Paper" and "Select Cases in Direct and Indirect Tax Laws" would be helpful in keeping abreast with the statutory and judicial developments respectively. Whereas

the "Supplementary Study Paper" contains the amendments made by the annual Finance Act in direct and indirect tax laws, "Select Cases in Direct and Indirect Tax laws" is a compilation of significant judicial rulings of the Supreme Court and High Courts. **The Supplementary Study Paper – 2016 and the Select Cases in Direct and Indirect Tax Laws – 2016 [September, 2016 edition] containing the statutory and judicial update, respectively, are relevant for students appearing in May, 2017 and November, 2017 examinations.**

Students are advised to read this Study Material along with the Supplementary Study Paper – 2016 explaining the amendments by the Finance Act, 2016 and the significant notifications and circulars issued between 1.5.2015 and 30.4.2016, relevant for May, 2017 and November, 2017 examinations. The Supplementary Study Paper – 2016 has also been divided into chapters in line with the Study Material to facilitate ease of reading. The significant notifications and circulars issued after 30.04.2016 but relevant for May 2017 and November 2017 examinations would be given in the Revision Test Paper (RTP) for the said examinations.

No efforts have been spared in making this Study Material lucid and student friendly. Nevertheless, students are requested to send their suggestions/feedback on how to make the Study Material more useful to them in the Feedback Form given in the Study Material. They may also write to Faculty, Indirect Taxes at smita@icai.in and shefali.jain@icai.in.

Happy Reading and Best Wishes!

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1

Basic Concepts

1.1 Constitution of India

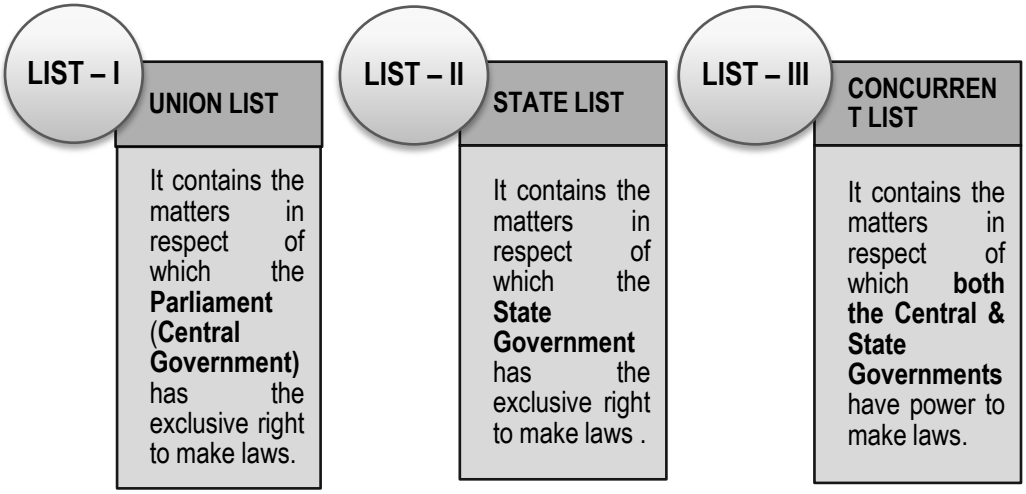
Power to levy and collect taxes whether direct or indirect emerges from the Constitution of India. Without a study of the basic provisions in the Constitution, no study would be complete. Part XI of the Constitution deals with relationship between the Union and States. The power for enacting the laws is conferred on the Parliament and on the Legislature of a State by Article 245 of the Constitution. The said Article states:

(i) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State.

(ii) No law made by the Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246 gives the respective authority to Union and State Governments for levying tax. Whereas Parliament may make laws for the whole of India or any part of the territory of India, the State Legislature may make laws for whole or part of the State.

Seventh Schedule to Article 246: It contains three lists which enumerate the matters under which the Union and the State Governments have the authority to make laws.



Entries 82 to 92C of List I enumerate the subjects where the Central Government has power to levy taxes. Entries 45 to 63 of List II enumerate the subjects where the State Governments have the power to levy taxes. Parliament has a further power to make any law for any part of India not comprised in a state, notwithstanding that such matter is included in the state list.

Part XII of the Constitution of India contains matters related to "Finance, Property, Contracts and Suits" in the Articles 264 to Article 300A. Article 265 states that "no tax shall be levied or collected except by **authority of law**".

It has been held by the Supreme Court in *Kunnathat v. State of Kerala AIR 1961 SC 552* that the term "authority of law" means that tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax.

The law must not be a colourable use of or a fraud upon the legislative power to tax. It must not also violate the fundamental rights such as Article 14, 19 etc.*[Express Newspapers v. U.O.I. 1999 (110) E.L.T. 3 (S.C.)]*

Some of the relevant entries in the Union List I of the Seventh Schedule are:

Entry 82 – Taxes on income other than agriculture income

Entry 83 – Duties of Customs including Export duties

Entry 84 – Duties of excise on tobacco and other goods manufactured or produced in India **except:**

(a) alcoholic liquors for human consumption

(b) opium, Indian hemp and other narcotic drugs and narcotics; but

including

medicinal and toilet preparations containing alchohol, or any substance stated before.

Example: Medical syrups for cold and cough contains a small portion of alcohol. Even though it contains alcohol, it will come under Union List 1.

1.2 Direct and Indirect taxes

Taxes are broadly classified into Direct taxes and Indirect taxes.

Direct Taxes	Indirect taxes
Direct Taxes are taxes which are levied on persons for the income earned or activities conducted, the incidence of which is to be borne by the person himself on whom it is levied.	Indirect taxes are the taxes which are levied on a product or a service the incidence of which is borne by the consumers who ultimately consume the product or the service, while the immediate liability to pay the tax may fall upon another person such as a manufacturer or provider of service or seller of goods. Since the cost of indirect taxes is on the ultimate consumer and therefore even the economically challenged bear the brunt equally.

1.3 What is excise duty?

1.3.1 Meaning of excise duty: Excise is derived from the Latin word **"Excisum / Excidere** which means to cut out".

Excise, according to the Federal Court and Privy Council is a **tax attracted by the event of manufacture** but collected at some convenient stage which may be after the said event, which is only for administrative convenience. *[Province of Madras v. Boddu Paidanna & Sons 1978 (2) E.L.T. J272 (FCI)]*

It is a duty levied upon goods manufactured and not upon sales or the proceeds of sale of goods. *[Council v. Province of Madras, 1978 (2) E.L.T. J280 (PC)]*

Therefore the duty of excise is levied on a manufacturer or producer in respect of the commodities produced or manufactured by him. It is a tax upon manufacture of goods and not upon sales or proceeds of sale of goods.

'Duty of excise' has been renamed as Central Value Added Tax (CENVAT). **CENVAT includes 'duty', 'duties' 'duty of excise' or 'duties of excise'.**

Although excise started as a pure duty on manufacturing activity, over a period of time it has included deemed manufacture and is tending towards a value added tax and the changed nomenclature indicates the same. In future, it would be subsumed into the GST.

1.3.2 (a) Duties under Central Excise Act, 1944 : Excise duties are of following types –

(i) Basic excise duty: This duty is levied under section 3(1)(a) of Central Excise Act. As per section 2A of Central Excise Act, basic excise duty is termed as CENVAT with effect from 12-5-2000. It is levied at the rates specified in First Schedule to Central Excise Tariff Act, read with exemption notification, if any. ***General rate of central excise duty on non-petroleum products is 12.5% [The general rate has been increased from 12% to 12.5% with effect from 01.03.2015].***

The rate of excise duty has been enhanced by the Finance Act, 2015 (enacted on 14.05.2015). However, by virtue of a declaration under the Provisional Collection of Taxes Act, 1930*, the above increase in the rate of excise duty was made effective immediately on the expiry of the day on which the Finance Bill, 2015 was introduced i.e. w.e.f. 01.03.2015.

*The purpose of this act is to amend the law providing for the immediate effect for a limited period, for provisions in bills relating to the imposition or increase of duties in customs or excise laws.

(ii) Special excise duty: This duty is levied under section 3(1)(b) of Central Excise Act. Special duty of excise is leviable on some commodities like pan masala, cars etc. These items are covered in Second Schedule to Central Excise Tariff.

However, with effect from 01.03.2006, all good have been exempted from special excise duty.

(iii) **Additional Duty of Excise (Textile and Textile Articles) [AED(TTA)]:** This duty is leviable under section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978. This Act provides for the levy and collection of additional duties of excise on certain textile and textile articles. However, w.e.f. 09.07.2004, all goods which were liable to AED (TTA) have been exempted from such duty.

(iv) **Additional Duty of Excise (Goods of Special Importance) [AED (GSI)]:** It is levied under Additional Duties of Excise (Goods of Special Importance) Act, 1957 on the specified goods mentioned in its First Schedule. This duty is levied in lieu of sales tax and shared between Central and State Governments. However, w.e.f. 01.03.2006, all goods which were liable to AED (GSI) have been exempted from such duty.

(v) **National Calamity Contingent Duty (NCCD):** It is imposed vide section 136 of the Finance Act, 2001 on pan masala, branded chewing tobacco, cigarettes, domestic crude oil and mobile phones.

(vi) **Additional Duty of Excise:** It is imposed by way of surcharge on pan masala and certain specified tobacco products vide section 85 of the Finance Act, 2005.

(vii) **Education Cess:** It is levied on excisable goods manufactured in India @ 2% of the aggregate duties of excise levied on such goods.

With effect from 01.03.2015, Education Cess levied on all excisable goods as a duty of excise has been fully exempted.

(viii) **Secondary and Higher Education cess:** It is levied on excisable goods manufactured in India @ 1% of the aggregate duties of excise (excluding education cess) leviable on such goods.

With effect from 01.03.2015, Secondary and Higher Education Cess levied on all excisable goods as a duty of excise has been fully exempted.

(ix) **Clean energy cess:** It has been levied on coal (raw coal, lignite and peat) @ ₹ 50 per tonne with effect from 01.07.2010. The procedures relating to exemption, registration, recovery, demand, interest, refund, offences, penalty etc. in respect of such cess are being governed by the provisions as applicable under the Central Excise Act, 1944 in regard to like matters.

1.4 History of Central Excise Law

1.4.1 History: Prior to 1944 there were 16 individual Acts which levied excise duty. Each such act dealt with one or same type of commodities. All these acts were consolidated and a consolidating Act was passed in 1944 called as Central Excises and Salt Act, 1944 which came into effect from 28th February 1944. In I996 the Act was renamed as Central Excise Act, 1944.

The Central Excise Act, 1944 (originally Central Excises and Salt Act, 1944) and Rules framed there under came into force on 28th February, 1944.

1.4.2 Application: The Act applies to the whole of India. It also extends to areas designated in the Continental Shelf and Exclusive Economic Zone of India. The 'exclusive economic

zone' extends upto 200 nautical miles inside the sea from base line. Though originally the Act did not apply to the State of Jammu and Kashmir, its application was extended to that State since the enactment of Taxation Laws (Extension to Jammu & Kashmir) Act, 1954.

1.5 Body of Central Excise Law

Central Excise Law includes

(a) Central Excise Act, 1944

(b) Central Excise Rules, 2002

(c) CENVAT Credit Rules, 2004

(d) Central Excise (Appeal) Rules, 2001

(e) Central Excise (Advance Rulings) Rules, 2002

(f) Central Excise (Settlement of Cases) Rules, 2007

(g) Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001

(h) Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000

(i) Central Excise (Compounding of Offences) Rules, 2005

(j) Central Excise (Determination of Retail Sale price of Excisable Goods) Rules, 2008

(k) Central Excise Tariff Act, 1985

1.5.1 Central Excise Act, 1944: This Act contains the basic provisions relating to the levy of excise duty. There are 10 chapters in the Central Excise Act. These are briefly as follows:

Chapter I	Short title, extent and commencement of the Act including definitions
Chapter II	Levy and collection of duty
Chapter II A	Indicating amount of duty in the price of goods, etc., for purpose of refund and crediting certain amounts to the Consumer Welfare Fund
Chapter III	Powers and Duties of Officers and Land Holders
Chapter III A	Advance Rulings
Chapter V	Settlement of Cases
Chapter VI	Adjudication of Confiscations and Penalties
Chapter VI A	Appeals
Chapter VI B	Presumptions as to Documents
Chapter VII	Supplemental Provisions

1.5.2 Central Excise Rules, 2002 : These Rules contain the procedure for the assessment and collection of duty including other procedures like manner of payment of duty, registration, maintenance of records, invoicing, rebate of duty, export without payment of duty etc.

1.5.3 CENVAT Credit Rules, 2004 : The provisions relating to Cenvat credit which were a

part of Central Excise Rules, 1944 were given a separate identity from 1st July 2001 and were called Cenvat Credit Rules, 2001. These Rules were superseded by the Cenvat Credit Rules, 2002. However, with effect from 10.09.2004 Cenvat Credit Rules, 2002 have been replaced by a new set of rules, viz., Cenvat Credit Rules, 2004 which provide for extending credit across goods and services.

1.5.4 Central Excise (Appeals) Rules, 2001 : The procedure relating to appeals are covered in this rules which was earlier included in Central Excise Rules, 2001.

1.5.5 Central Excise (Settlement of Cases) Rules, 2007 : The procedural aspects relating to settlement commission are contained in these rules.

1.5.6 Central Excise (Advance Rulings) Rules, 2002 : These rules contain the provisions relating to Advance Rulings.

1.5.7 Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 : These rules contain the provisions and procedure relating to the goods removed at concessional rate of duty for manufacture of excisable goods.

1.5.8 Central Excise Tariff Act, 1985 : The Central Excise Tariff which was originally a schedule to the Central Excise Act, 1944 was de-linked from it and the Central Excise Tariff, Act 1985 containing the Tariff schedule was enacted, based on the international product coding system called Harmonised System of Nomenclature(H.S.N.). However, w.e.f. 28.02.2005 the Central Excise Tariff (Amendment) Act, 2005 has been brought into

1.5.9 Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000: These rules have been framed to prescribe valuation methods where transaction value cannot be determined under Section 4.

1.6 Definitions under Excise Law

Section 2 of the Act contains definitions of certain terms which are given below.

1.6.1 "Adjudicating authority": It means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act,1963, Commissioner of Central Excise (Appeals) or Appellate Tribunals [Section 2(a)].

1.6.2 "Appellate Tribunal": It means the Customs, Excise and service tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 [Section 2(aa)].

1.6.3 "Broker" or "commission agent": It means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others [Section 2(aaa)].

1.6.4 "Central Excise Officer": It means the Principal Chief Commissioner of Central Excise, Chief Commissioner of Central Excise, Principal Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the

Central Boards of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this Act [Section 2(b)].

1.6.5 "Curing": It includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture [Section 2(c)].

1.6.6 "Excisable goods": It means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt.

Explanation - For the purposes of this clause, **"goods"** includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable [Section 2(d)].

1.6.7 "Factory": It means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on [Section 2(e)].

1.6.8 "Fund": It means the Consumer Welfare Fund established under section 12C [Section 2(ee)].

1.6.9 "Manufacture": It includes any process,—

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

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

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

and the word **"manufacturer"** shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account [Section 2(f)].

1.6.10 "Prescribed": It means prescribed by rules made under this Act [Section 2(g)].

1.6.11 "Sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration [Section 2(h)].

1.6.12 "Wholesale dealer": It means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale [Section 2(k)].

1.7 Levy and collection of duty

Chapter II of the Central Excise Act, 1944 deals with levy and collection of the duty. This

chapter contains sections 3, 4 & 4A.

Section 3 is the charging section, section 4 provides for the method of valuation of excisable goods and section 4A deals with valuation based on maximum retail price (MRP).

Section 3(1) which is the charging section states:

There shall be levied and collected in such manner as may be prescribed:

(a) a duty of excise on all excisable goods (excluding goods produced or manufactured in special economic zones [SEZ]) which are produced or manufactured in India as, and at the rates set forth in the First Schedule to the Central Excise Tariff Act, 1985;

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

However, the excise duty leviable on any excisable goods manufactured by a hundred percent export oriented undertaking (100% EOU) and brought to any other place in India shall be an amount equal to the aggregate of the customs duties which would be leviable under the Customs Act or any other law for the time being in force on like goods produced or manufactured outside India if imported into India. The value of such goods shall be determined in accordance with the provisions of the Customs Act, 1962 if the duty to be levied is based on the value of such goods *(ad valorem).*

Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then, such duty shall, be deemed to be leviable at the highest of those rates.

Here, 100% EOU means an undertaking which has been approved as a 100% EOU by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 and the rules made under that Act.

SEZ has the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005. A Special Economic Zone (SEZ) is a geographically bound zone where the economic laws relating to export and import are more liberal as compared to other parts of the country. Goods manufactured in Special Economic Zones are not leviable to excise duty. SEZ is considered to be a place outside India for all tax purpose.

Section 3(1A) provides that there is no distinction between excisable goods produced by the Government and those produced by others, with regard to payment of excise duty. Excise duty is payable on goods manufactured by or on behalf of the Government (both Central and State) also.

An analysis of section 3 of the Central Excise Act, 1944 which is the charging section, throws out the following propositions:-

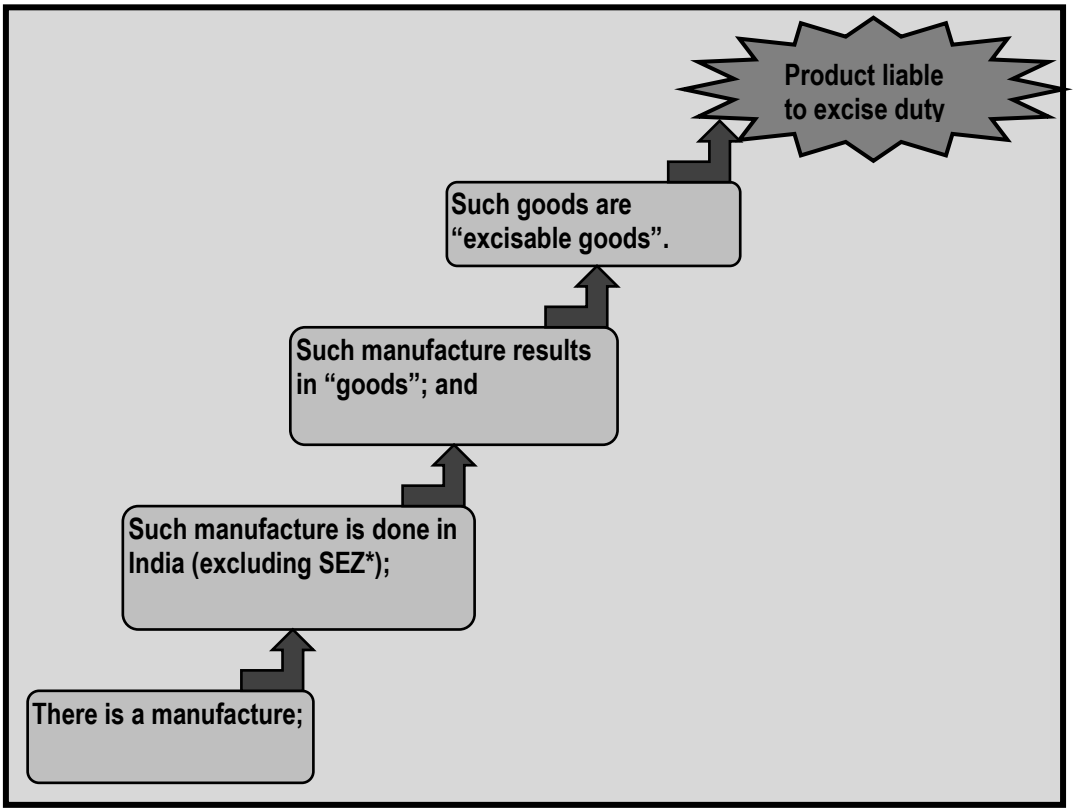
(a) There must be a manufacture

(b) Manufacture must be in India and

(c) The manufacture must result in "goods"

(d) The resultant goods must be "excisable goods"

Excise duty is not concerned with ownership or sale. Liability under excise law is event based and irrespective of whether the goods are sold or captively consumed. *[Moriroku Ut India P Ltd v. State of UP 2008, (224) ELT 365 (SC)]*



**A Special Economic Zone (SEZ) is a geographically bound zone where the economic laws relating to export and import are more liberal as compared to other parts of the country. Goods manufactured in Special Economic Zones are not leviable to excise duty. SEZ is considered to be a place outside India for all tax purpose.*

Each of these propositions are discussed below:

1.8 Goods & Excisable goods

Before we examine the question of what amounts to manufacture, it must be understood that unless the goods that are manufactured are excisable goods, there will be no question of attracting excise duty.

Section 2 (d) of the Act defines excisable goods to be "goods which are specified in the Tariff as being subject to a duty of excise and includes salt".

Explanation to section 2(d) provides that "goods" includes any article, material or substance which is being capable of brought and sold for a consideration and such goods shall be deemed to be marketable.

Therefore, the following **two conditions** have to be satisfied to be excisable goods:

(i) Firstly, the goods must be specified in the First or Second Schedule to the Central Excise Tariff Act, 1985.

(ii) Secondly, the goods so specified must be subject to duty as per the Tariff. The goods which are not covered in the schedules are referred to as non-excisable goods.

The First Schedule to CETA 1985 is the main schedule containing 96 chapters under which the goods are arranged and this arrangement is based on HSN. Chapters are grouped under Sections and are further sub-divided into headings and sub-headings. Each chapter handles a different category of item as compared to the preceding and succeeding chapters. The duty rates for the various items are specified in such chapters and the duty would be charged on the goods at the specified rates.

Hence, excise duty would be levied when the items which are subject to duty are goods, are specified in the Tariff and have come into existence as a result of manufacture.

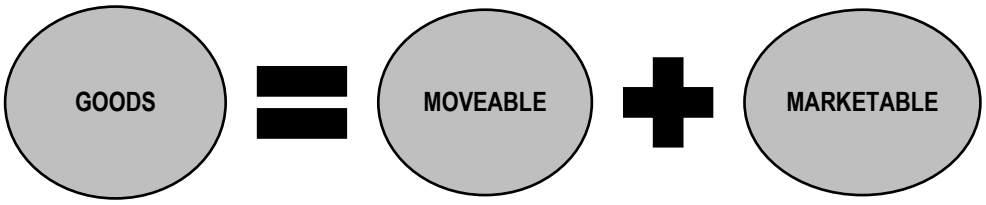
The word "goods" has not been defined in the Central Excise Act. The word "goods" is defined in **Article 366(12) of the Constitution of India** as "goods include all materials, commodities and articles".

Sale of Goods Act, 1930 in section 2(7) defines goods to mean "every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale". To be "goods" the article concerned must be movable. In other words, immovable property cannot be goods. Any movable property whether visible, tangible, corporeal or not will constitute goods.

Black's Law Dictionary define "goods" as a term of variable content and meaning. It may include every species of personal property or it may be given a very restricted meaning.

In ***U.O.I. v. DCM 1997(1) E.L.T. J199,*** the Supreme Court has held that in order to be goods the articles must be capable of coming to the market to be bought and sold. Therefore, to be called goods, the items must be moveable and marketable.

From the above, **two fundamental aspects of the term "goods" arise that they should be 'moveable' and 'marketable'**.



The two fundamental aspects of the term "goods" 'moveable' and `marketable' are discussed in detail.

1.8.1 Concept of 'Moveable': The first aspect of goods is that they should be moveable. In ***Union of India v. Delhi Cloth Mills (1977) ELT J-199*** and in ***South Bihar Sugar Mills v Union of India (1978) ELT J-336***, the Supreme Court enunciated the principal that to be called goods, the articles must be such as are capable of being bought and sold in the market. The articles must be something, which can ordinarily come or can be brought to the market to be bought and sold. As opposed to moveable goods, immoveable goods like property cannot be brought to the market to be sold.

Under section 3(36) of the General Clauses Act of 1897, moveable goods mean property of every description except immoveable property.

Section 3(26) of the General Clauses Act, 1897 defines the term immovable property as:

"immoveable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

Thus, excise duty cannot be levied on immoveable goods and property. There are several case law on this aspect and they are discussed subsequently in the section "Dutiability of Site Activities'.

1.8.2 Concept of 'Marketable': Unless the goods are capable of being marketed, they cannot be charged to duty. Marketability is the capability of a product of being put into the market for sale. In order to become goods, an article must be something, which can ordinarily come to the market to be bought and sold. Marketability is an essential ingredient in order to render goods dutiable under law. Whether a product is marketable or not is to be decided on the facts of each case.

Let us examine **some important cases under marketability**: -

1. The Supreme Court held that to become 'goods', an article must be something which can ordinarily come to the market to be bought and sold. Articles in crude or elementary form are not dutiable as they are merely intermediate products and are not goods. It, therefore, held that aluminium cans or torch bodies produced by extrusion process were neither sold nor marketable and hence were not 'goods' and not liable to excise duty. It is clear from this decision that goods must be marketable and known in the market as such, in order to be exigible to duty.

   ***[Union Carbide India Ltd. v. Union of India (1986) (24) ELT-169*]**

2. The Supreme Court has held that the duty of excise is on the manufacture of goods and for an article to be "goods", it must be known in the market as such or must be capable of being sold in the market as goods. Actual sale is not necessary. Usage in captive consumption is not determinative of whether the article is capable of being sold in the market or is known in the market as goods. Even transient items or articles can be goods, provided that they are known in the market as distinct and separate articles, having separate uses. They would still become goods if they were capable of being marketed during the said short period of their life. Thus, goods with unstable character can be theoretically marketable if there was a market for such transient types of articles, but one has to take a practical view on the basis of available evidence.

   [C.C.EX. v. Ambalal Sarabhai Enterprises (1989) (43) ELT-214]

3. The Supreme Court has held that marketability is essential if an article is to be liable to excise. Merely because an article is specified under the Tariff, it would not be correct to state that it is chargeable to duty, unless it is proved that the goods are marketable. Prior to this decision in Bhor Industries, it was the practice to hold all goods specified in the Tariff as chargeable to duty, regardless of this criterion of marketability. The Court held that it would be necessary to find out whether the goods are known in the market as separate, distinct and identifiable commodities.

   [Bhor Industries Ltd. v. C.C.EX. (1989) (40) ELT-280]

4. Following the decision in Bhor Industries, the Madras High Court, in the instant case, has held that where a product could neither be sold nor consumed in the market, nor was capable of being sold or consumed, it would not be liable to duty.

   [Madura Coats Ltd. v. Asstt. Collector of C.C.EX. (1990) (48) ELT-321]

5. The Supreme Court has held that mere specification of an item in the Central Excise tariff is not sufficient in the absence of the marketability test.

   [Ion Exchange India Ltd. v. C.C.EX 1999 (112) ELT-746[

6. Tribunal has held that an article is not liable to excise merely because it is specified in the Tariff Schedule, unless it is known as goods in the market. Marketability is an essential ingredient for Dutiability. This decision of the Tribunal is important since it first interpreted the Supreme Court's criterion of marketability, as laid down in the Bhor Industries' case, that goods were not excisable even though they were specified in the Excise Tariff, unless the test of marketability was met.

   [CCEX. v. Bakelite Hylam, Ltd. (1990) (46) ELT-552]

7. Karnataka High Court has held that for Dutiability, a product must pass the test of marketability even if it is a transient item, which is captively consumed in, the manufacture of other finished products. It is the onus of the Department to produce evidence of marketability.

   [Cipla Ltd. v. UOI (1990) (46) ELT-240]

8. The Bombay High Court held that if a product is not a marketable commodity, then no excise duty is leviable.

   [UOI v. CEAT Tyres India Ltd. (1989) (43) ELT-26]

9. The Calcutta High Court held that articles are not 'goods' under section 3 of the Act unless they are marketable. The Court has also held that goods which are specified in the excise tariff are presumed to be excisable unless shown to be non marketable and actual sales are not necessary in order to establish marketability.

   [UOI v. Bata India Ltd. (1993) (68) ELT-756]

10. Marketability is a question of fact to be decided in the facts of each case. The fact that goods are not actually marketed is of no relevance nor is it necessary that goods in question should be generally available in the market. Marketability does not depend upon the number of purchasers nor is the market confined to territorial limits of India.

    [*A.P. State Electricity Board v. CCE 1994 (70) ELT (SC)]*

1.8.3 Goods exempt from duty whether excisable: Having held that in order to constitute 'goods' under excise law, articles must be moveable and marketable, let us now turn to the definition of excisable goods under the Act. Section 2(d) defines excisable goods as goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to the duty of excise and includes salt. In other words, all goods specified or covered in the Tariff will be known as excisable goods. This brings us to the important point in law that goods, which are exempt from duty under a notification, are nevertheless excisable goods as long as they are covered by any of the headings of the Central Excise Tariff. This point in law was earlier in doubt. The Allahabad High Court had taken the view in couple of cases that fully exempted goods were meant to be taken out of the Schedule to the Tariff Act and hence cannot be treated as excisable goods at all. However, the Delhi, Andhra Pradesh and Madras High Courts took the view that fully exempted goods continued to be excisable goods.

Finally, the Supreme Court's decision in *Wallace Flour Mills Ltd. Vs. C.C.EX. (1989) (44) ELT-598* has effectively settled the issue. It was held therein that fully exempted goods were also excisable goods and hence were chargeable to duty if the exemption was removed prior to removal of goods but subsequent to manufacture.

Even full exemption from duty under a notification does not make goods as non-excisable. *[UOI v. Nandi Printers P Ltd. 2001 (127) ELT 645 (SC)]*

1.9 Manufacture

1.9.1 Concept of Manufacture: The term "manufacture" **literally** means to make by hand. However, in the context of today's mechanised world, the term includes making articles by machines also.

However, as far as central excise is concerned the term has a specific definition in the Central Excise Act, 1944 which is contained in Section 2(f) of the Act. It defines manufacture in an inclusive manner as follows:

"**Manufacture** includes any process,

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

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

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

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

ANALYSIS: The definition stipulates that manufacture will include any process which is specified in the Section and Chapter Notes of the Central Excise Tariff as amounting to manufacture. In other words, the concept of deemed manufacture is given legal sanction. Thus, excise duty could be leviable on activities which do not result in the production or manufacture of a new commodity. As already indicated, Parliament has power to levy excise

duty on goods manufactured in India. In other words, manufacture or production of goods is a necessary condition for imposition of the levy.

The question therefore arises as to whether Parliament can levy excise duty on activities which do not amount to manufacture or production by means of giving artificial meaning to the terms 'manufacture' and 'production'. This has been held to be valid by the Supreme Court in said that resort could be had to Entry 97 of List I to the Constitution. Reference may be also made of the case of *Collector v. SD Fine Chemicals Pvt. Ltd. 1995 (75) E.L.T. 49 (S.C.)*.

1.9.2 Relevant case laws: Since the definition of manufacture is an inclusive one and does not spell out or enumerate the activities covered therein, it is essential to arrive at an understanding of the term based on legal decisions on the point. Therefore, we go by the judicial decisions handed down to us.

1. The expression 'manufacture' was considered at length by the Supreme Court in its decision in *Union of India v. Delhi Cloth & General Mills Co. Ltd. 1977 (1) ELT J199*. In para 14 of the judgment, the Court held that the word manufacture when used as a verb is generally understood to mean as bringing into existence a new substance and not merely to produce some change in the substance. The Court thereafter emphasized the definition by citing passage from an American judgement which was quoted in the Permanent Edition of Word and Phrases. The passage is as follows:-

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

   This famous paragraph is now the basis for determining whether or not an activity or process amounts to manufacture.

   [Union of India v. Delhi Cloth & General Mills Co. Ltd. 1977 (1) ELT J199]

2. Apex court has held that the word manufacture implied a change, but every change in the raw material does not tantamount to manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character and use.

   [South Bihar Sugar Mills Ltd. v. Union of India (1978)(2)ELT J336]

3. Supreme Court held that to constitute manufacture it is not necessary that one should absolutely make out a new thing because it is well settled that one cannot absolutely make a thing by hand in the sense that nobody can create matter by hand(scientifically). It is transformation of a matter into something else that would amount to manufacture. That something else is a question of degree. Whether that something else is a different commercial commodity having its distinct character, use and name and is commercially known as such, is an important consideration in determining whether there is a manufacture.

   [Empire Industries Ltd. v. Union of India 1985(20) ELT 1]

4. Whether or not something results in manufacture would depend on the facts of the case but any number of processes undertaken which do not result in a commercially different commodity cannot result in manufacture.

   [U.O.I. v. Parle Products 1994 (74) E.L.T. 492 (S.C.)]

5. The Supreme Court held that prevalent and generally accepted test to ascertain whether there was manufacture was whether the change or the series of changes brought about by application of processes take the commodity to the point where, commodity can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged because of the result of the processes. There might be border line cases where either conclusion can be reached with equal justification. Insistence on any sharp or intrinsic distinction between processing and manufacture results in an over simplification of both and tends to blur their interdependence in cases.

   [Ujagar Prints v. U.O.I 1988 (38) ELT 535]

6. The Tribunal has held that levy of excise duty is on manufacture and not on sale and hence the fact that invoices have been raised by the manufacturer in favour of a leasing company in respect of captively consumed excisable goods would not have any bearing on excise duty liability.

   [B.P.L. Electronics Ltd. v. CCE 1994 (71) ELT 801]

7. The Bombay High Court has held that excise duty is a tax on manufacture and the liability to pay the duty does not depend on the end use of the product.

   The production or manufacture of goods is sufficient to attract duty, whether the goods are consumed, sold or not used thereafter is wholly irrelevant. The mere fact that the product is not actually sold would not make any difference in determining the excisability of that product.

   It is the effect of the operation carried out on a commodity that is material for the purpose of determining whether the operation constitutes 'manufacture' under excise law. Any process or processes creating something else having distinctive name, character and use would amount to manufacture. The moment there is a transformation of an input into a new commodity which is commercially known as a distinct and separate commodity, having its own character, use and name, whether it is the result of a process or several processes, manufacture takes place and the liability to duty is attracted.

   [Critic India Ltd. v. U.O.I 1993 (66) ELT 566]

1.9.3 Manufacture and processing: It is necessary to differentiate between manufacture and processing. Manufacture involves a series of processes, whereas a process is one of the activities undertaken for manufacture of a product from input materials. Manufacture is the cumulative effect of various processes to which raw materials are subjected and each such step towards the finished product would constitute processing in relation to the manufacture.

The definition of manufacture under section 2(f) states that it includes any process incidental or ancillary to the completion of the manufactured product. The definition clarifies that a process, which is incidental to the manufacture of the product, is also manufacture under law. Consequently, it would be incorrect to state that the manufacture of a product was complete merely by means of carrying out one or more processes on raw materials. It is only when a process or a series of processes has taken the input material to a point where it is recognised as a new and distinct article commercially, that manufacture of goods is said to have taken

place. The inclusive nature of the definition would thus cover all intermediate processes, packing of final products etc.

If there is no essential difference in identity between the original article and the processed article, then no manufacture under excise law has taken place. Although the input material has undergone a degree of processing, it must be regarded as still retaining its original identity. Where the article retains its substantial identity through the stage of processing, it could be said to have been merely processed and not manufactured. If there are separate and distinct processes of manufacture and each such process results in such a transformation that a new and distinct article known in the market comes into being, then each process would be subject to duty. The question whether a process amounts to manufacture under excise law would hence depend on the facts of each case.

The distinction between the manufacture and process has been dealt by the Supreme Court in the case of ***Union of India vs J.G. Glass Industries Ltd. 1998 (097) ELT 0005 (S.C)*** wherein the apex court observed that the answer to the question whether the process is that of "manufacture" would be based on two-fold test - First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist - Secondly, whether the commodity which was already in existence will serve no purpose or will be of no commercial use but for the said process. In the above case with reference to the process of 'Printing', whether a process amounting to "manufacture" - Test is whether the product would serve any purpose but for the printing - If the product could serve a purpose even without printing and there is no change in the commercial product after the printing is carried out, the process cannot be said to be one of "manufacture".

The meaning of incidental or ancillary processes needs to be understood. Before a process can be regarded as "incidental or ancillary to the completion of manufactured product, it must have some relation to the manufacture of finished product. However inessential the process may be, if it is found incidental or ancillary to the completion of the manufactured product, then that process falls within the compass of the expression manufacture. If the process is not integral to or connected with manufacture, it will not be incidental. Here again, the finding is one of fact as prevalent in each case.

In sum, the question whether a particular process is a process of manufacture or not, has to be determined having regard to the facts and circumstances of each case and having regard to the well known tests laid down by the Courts in the aforementioned decisions. The following are some representative cases, where the Courts have decided on what constitutes manufacture under law:-

1.9.4 Instances of Goods/Processes not amounting to Manufacture:

Final Product	Product/process/activity	Citation
Aluminium	Cutting, drilling and punching of aluminium section	*CCE* v. *Ajit India Pvt. Ltd.* 2000 (119) E.L.T. 274 (S.C.)
Aluminium cans (torch bodies)	Aluminium slugs converted to intermediate product	*Union Carbide India Ltd.* v. *CCE* 1986 (24) E.L.T. 169 (S.C.); *Geep*

		Industrial Syndicate Ltd. v. *CG* 1987 (31) E.L.T. 865 (S.C.)
Butter	Stirring of cream	*State of Tamil Nadu* v. *Bharat Dairy Farm* 1992 (61) E.L.T. 25 (Mad.)
BOPP films	Winding, slitting and packing	*CC & CE V. Crown Tapes Pvt. Ltd. 2009 (233) E.L.T.357 (Tri.Ahmd)*
Cable joining kits	Putting together different duty paid items not manufacture	*XI Telecom Ltd.* v. *CCE* 1999 (105) E.L.T. 263 (A.P.)
Chilled water	Chilling of water	*Farm & Co.* v. *CCE* 1987 (30) E.L.T. 541 (T)
Chilly powder	Pulverising of chilly	*Namputhiris Pickle Industries* v. *State of Kerala* 194 (92) STC 1 (S.C.)
Cinder	Burning in boiler of coal	*CCE V. Papyrus Papers, 1983 (33) E.L.T.97 (T), Union of India V. Ahmedabad Electricity Co. 2003 (158) E.L.T. 3 (SC)*
Coffee	Reprocessing of coffee	*CCE* v. *Brooke Bond India Ltd.* 1998 (101) E.L.T. 2965 (T-SZB)
Coloured/ printed paper	Colouring/printing of white paper	*Swastic Products* v. *SCE* 1980 E.L.T. 164 (Guj.)
Coloured plastic granules	Conversion of plastic granules	Vadodara CTN No. 61/92, dated 22-7-1992, 1992 (60) E.L.T. T43
Computer under Heading No. 84.71	Upgradation does not amount to manufacture Installation at customers site not manufacture	CBEC Circular No. 454/ 20/99-CX, dated 12-4-1999 *Universal Micro Systems* v. *CCE* 1999 (107) E.L.T. 505 (T)
Curry powder rasam powder, masala powder	Mixing of chilly powder coriander powder	*State of Tamil Nadu* v. *SVS Natarajan & Sons* 1992 84STC (Mad.)
Cycle	Assembling of cycle parts	*T.I. Cycles of India* v. *U.O.I.* 1983 E.L.T. 681 (Mad.)
Feeding bottle	Putting together bought out parts like bottles, nipples, lids etc. is not manufacture	*Dalmia Industries Ltd.* v. *CCE* 1999 (112) E.L.T. 305 (T)
Filler wire	Straightening and cutting into required sizes of wires (stainless steel)	*D & H Sechron Electrodes Pvt. Ltd.* v. CCE 1990 (40) E.L.T. 401 (T)
Furniture (for resale)	Polishing/colouring of old furniture	*CST* v. *Musarafalli Kutbuddin* 35 STC 503 (Bom.) *CST* v. *Habib Kasambai* 35 STC 560 (Bom.)
Garland/	Preparation of flowers	*Sudhir Ch. Mukherjee* v. *Addl.*

bouquets		*Commissioner of CT* 1976 (37) STC 554 (Cal.)
Ingots/billets	Recycling of aluminium waste	*Salco Extrusions P. Ltd.* v. *CCE* 1984 (16) E.L.T. 356 (T)
Jelly (stone) (See contra decision under Table below)	Breaking of boulders	*Reliable Rock Builders* v. *State of Karnataka*, 49 STC 110 (Kant); *Kher Stone Crushers* v. *G.M. District Industries Centre*, 1992 (62) E.L.T. 586 (M.P.)
MS Scrap, borings, turnings, etc.	Generated during maintenance and repair work	*Prism Cement Ltd. V. CCE 2008 (232) E.L.T 564 (T)*
Pan-masala	Mixing of supari, variyali, dhana dal, etc	*State of Gujarat* v. *Sukhram Jagannath* 50 STC 76 (Guj.)
Paper	Polishing/ printing of paper	*Modern Paper Industries* v. *Union of India* 1983 ECR 636 D (Bom.)
Pillows	Covering an uncovered pillow	*DP Foam Pvt. Ltd.* v. *CCE* 1999 (106) E.L.T. 544 (T)
Pine apple	Slicing of pineapple	*Dy. CST* v. *PIO Food packers*, 1980 (6) E.L.T. 343 (S.C.)
Planks/rafters	Sawing of timber logs	*Y. Mohiden Kunhi and Others* v. CCE 1986 (23) E.L.T. 293 (Kar.) See also *Sanghvi Enterprises* v. *CCE* 1984 (16) E.L.T. 317 (T) *CCE* v. *Kutty Flush Doors & Furniture P.d.* 1988 (35) E.L.T. 6 (S.C.). Departmental appeal dismissed 1997 (89) E.L.T. A105.
Powdered pepper/ Turmeric	Powdering of pepper/turmeric	*Mahabirprasad Bishiwala* v. *State of W.B*. 31 STC 628 (Cal.) *Krishna Chander Dutta (Spice) Pvt. Ltd.* v. *CTO* (1994) 93 STC 180 (S.C.) 1994 (70) E.L.T. 501 (S.C.)
Reels of lesser width and dia-meter	Slitting and rewinding of paper (jumbo reels)	*CCE* v. *Reelco Paper Products (P) Ltd.* 1989 (40) E.L.T. 435 (T)
Turmeric powder	Pulverising of turmeric	*Krishna Chander Dutta (Spice) P. Ltd.* v. *CTO* 1994 (70) E.L.T. 501 (S.C.)
Water	Process of removing chemicals to make it soft without purifying	*McDowel Co. Ltd.* v. *CCE* 1999 (105) E.L.T. 577 (T)

Pickling and oiling is not manufacture: "Pickling is removing surface oxides from metals by chemical or electro chemical reaction" and pickle means "the chemical removal of surface oxides (scale) and other contaminants such as dirt from metal by immersion in an aqueous acid solution." Therefore it can be said that the process of pickling is only a chemical cleaning process to remove scales and dirt from the metal by immersion in chemical solution and does not result in emergence of any new commercially different commodity.

Therefore it has been clarified that mere undertaking the process of oiling and pickling as preparatory steps do not amount to manufacture *[Circular No. 927/17/2010-CX dated 24.06.2010].*

1.9.5 Instances of Goods/Processes amounting to Manufacture

Final Product	Product/process/activity	Citation
Audio cassettes	Recording of audio cassettes amounts to manufacture as pre-recorded cassette is distinct	*Gramophone Co. Ltd.* v. *CC* 1999 (114) E.L.T. 770 (SC)
Bagasse	Crushing of sugarcane	*Deccan Sugar and Abkhari Company* v. *Union of India*, 1986 (26) E.L.T. 209 (Mad.)
Bed sheets, bed spreads and table cloths	Cutting, hemming and stitching of running cloth	*Kapri International* v. *CCE* 1986 (23) E.L.T. 538 (T)
Biris	Rolling of tobacco	*Y. Tirupathy Rao* v. *CCE* 1983 E.L.T. 2346 (AP)
Brass	Mixing of copper & zinc	*Khandelwal Metal & Engg.* v. *Union of India,* 1983 E.L.T. 292 (Del.) (affirmed in 1985 (20) E.L.T. 222 (SC)
Brass tubes new	Melting and remaking of tubes of brass out of old brass tubes	*Multi. Metals Ltd.* v. *CCE* 1995 (75) E.L.T. 938 (T) affirmed by the Supreme Court in 1995 (78) E.L.T. A31
Bright bars	Drawing of round bars	*Veekayan Industries* v. *CCE* 1985 (21) E.L.T. 596 (T)
Camphor cubes	Conversion of camphor granules	*Om Prakash Gupta* v. *CTO* 38 STC 73 (Cal.)
Canned foods	Canning of vegetable products	*Ramnagar Cane & Sugar Co.* v. *Union of India*, 1983 E.L.T. 6 (Raj.)
Chappals	Assembly of rubber sole & rubber strap mouldings	*Achamma Sebastian* v. *State of Kerala,* 1967 (20) STC 483 (Ker.)
Cinema wall paper	Printing of paper	*CCE* v. *Sudhakar Litho Printers*, 1988 (36) E.L.T. 346 (T)

Circles	Rolling & billets of copper	*Union of India* v. *Ramlal*, 1978 E.L.T. (J389) (SC)
Coconut fibre	Conversion of coconut husk	*DCST v. Coco fibers, 1991 53 E.L.T 515 (SC)*
Computers	Assembly of computer from duty paid parts amounts to manufacture	*Sheth Computers Pvt. Ltd.* v. *CCE* 2000 (121) E.L.T. 738 (T)
Dyed & printed cloth	Dyeing & printing of grey cloth	*Lal Woolen and Silk Mills P. Ltd.* v. *CCE* 1999 (108) E.L.T. 7 (S.C.)
Evacuated Bottles	Empty bottles cleaned, siliconized, evacuated sealed and sterlised to make a new product	*Shri Krishna Keshav Laboratories Ltd.* v. *CCE* 1999 (105) E.L.T. 117 (T)
Fruit Drink	Conversion of fruit pulp to ready made drink	*Godrej Foods Ltd.* v. *CCE* 2000 (122) E.L.T. 231 (T)
Ghee	Boiling of butter	*Motilal Ramchandra Oswal* v. *State of Bombay* 3STC 140 (Bom.)
Glass Moulds	Grinding polishing of glass blanks-opthalmic	*Forbes Gokak Ltd. V. Collector of C.Ex., 2003(153) E.L.T.24 (SC)*
Gittis, ballast	Crushing of stone boulders	*Kher Stone Crusher* v. *G.M. Dist. Industries Centre* 1992 (61) E.L.T. 587 (MP-FB); *Contra Reliable Rock Builders* v. *State of Karnataka,* 1982 49 STC 110 (Kar.)
Ground black pepper	Grinding of black pepper	*CCE* v. *Herbal Isolates (P) Ltd.* 1994 (74) E.L.T. 929 (T)
Hair Oil	Addition of perfume to hair oil	*CCE v. Zandu Pharmaceuticals Works ltd, 2006 (204) E.L.T. 18 (SC)*
Ingots	Melting of scrap iron	*Rangoon Metal & Refining Com* v. *State of Tamil Nadu* 47 STC 60 (Mad.)
Jewellery	Conversion of crude diamonds	*Bapalal & Co.* v. *Govt of India*, 1981 E.L.T. 587 (Mad.)
Masala Powder	Prepared by grinding and mixing of various spices and condiments in certain proportion – After grinding and mixing, ingredients	*AP Products v. State of Andhrapradesh, 2007 (214) E.L.T.485 (SC)*
New jewellery	Melting/conversion of jewellery (Old)	*Chenna Kesavalu v. Board of Revenue, 1981 (47) STC 403 (Mad.)*

Photographic films	Cutting slitting of jumbo rolls of photographic films	CBEC Circular No. 13/ 92-CX3, dated 28-12-1992, 1993 (63) E.L.T. T31
Polythene kraft	Lamination of paper (kraft)	*Laminated Packing (P) Ltd. V. CCE 1990 (49) E.L.T. 326 (SC)*
Recorded video cassette	Recording and re-recording of blank video cassette	*Garware Plastics & Polyesters Ltd.*v. *CCE* 1993 (67) E.L.T. 670, 673 (T).
Rice	Dehusking of paddy	*State of Karnataka* v. *B. Raghuram Sethy*, 47 STC 282 (S.C.)
Rice	Milling of paddy	*M. Narayanan Nambiar* v. *State of Karnataka* 44 (STC) 191 (Ker.)
Water filter	Putting together parts alongwith bought out filter cum purifier	*Eureka Forbes Ltd.* v. *CCE* 2000 (122) E.L.T. 550 (T)

It should be noted that the above decisions may not be the final word since we normally see conflicting decisions being rendered by various courts on the same set of facts.

1.10 Dutiability of intermediate products and captive consumption

Captive consumption in the context of excise law means utilisation of goods produced or manufactured within the factory of production. This is normally prevalent in large factories with several departments in diverse manufacturing processes with their departmental and intra-departmental stock transfers. The goods internally consumed to manufacture the final product are termed as intermediate goods. In terms of the definition of manufacture under section 2(f) of the Act, manufacture takes place even at an intermediate stage of the manufacturing process, if the intermediate product is known commercially as a distinct and identifiable product.

The Supreme Court in its decisions in *Union Carbide India Ltd. Vs. Union of India (1986) (24) ELT-169* and in *Bhor Industries Ltd. Vs. C.C.EX. (1989) (40) ELT-280* has held that an intermediate product would be excisable only if it is a complete product in the sense that it is capable of being sold to a consumer. Thus marketability is essential for charging an article to duty. Therefore where the intermediate product is not capable of being sold, it is not dutiable even if it is included in the Tariff Entry. In other words intermediate goods will be chargeable to duty under law only if the test of marketability is met.

Intermediate goods which are bought into being *insitu* in the process will not be chargeable to duty since they are not marketable. Moreover, transient and unstable intermediate goods would also not be chargeable to duty on the same basis. However, other kind of intermediate products, which are capable of being marketed as goods in their own right, will be chargeable to duty, notwithstanding that they are not packed or stored separately but are used as part of a continuous process.

Thus to conclude, intermediate goods will be chargeable to duty if they arise in the course of manufacture/production, are moveable and marketable in such intermediate stage, listed in

the Tariff, and are subject to duty of excise in the Tariff.

Exemption for Captive Consumption: Although excise duty is chargeable on manufactured goods under section 3 of the Act, the collection of the levy is postponed under rule 4 of Central Excise Rules, 2002 to the time of removal of goods from the factory. In case of *Collector* v. *Vazir Sultan Tobacco Co. Ltd. 1996 (83) E.L.T. 3,* the Supreme Court has held that the words used in section 3(1) "in such manner" applies to "collection". Hence, the section creates the "levy" itself and collection is left to be regulated by the Rules.

Therefore, removal of goods emerged in one process for being used in another process (captive consumption) would be a 'clearance' in terms of rule 4 of Central Excise Rules, 2002, which requires payment of duty. However, since paying duty on all captive consumption will cause inconvenience to manufacturers, exemptions have been given in many cases. *Notification No. 67/95 CE 16.03.95* grants exemption from excise duty payable on capital goods and inputs (except light diesel oil, high diesel oil and petrol) manufactured in a factory and used within the factory of production in or in relation to manufacture of final products, if duty is payable on such final products.

1.11 Dutiability of site related activities and immovable property

We have already seen that excise duty is a levy on moveable goods and not on immoveable goods or property. The aforesaid principle is of paramount relevance for determining the excisability of activities undertaken at project sites. The aspect of excisability of site related activities is source of perennial litigation between department and assesses. Reference may be made to the definition of immovable property which has been set out earlier.

Excise duty is chargeable when, at site, there emerges moveable goods during the course of fabrication or bringing into being of immovable property in the form of buildings, plant etc. In other words, if movable goods such as fabricated parts, structures, equipment are brought into being and they are thereafter mounted or fixed on civil foundations so as to complete the construction, excise duty will be chargeable on such movable goods, notwithstanding that the final products are items of immovable property. On the other hand, if the site work is carried out on top of civil foundation and such parts, structures etc are erected piece by piece on such foundation, no movable goods are brought into being and hence no duty is chargeable of such activities.

In this connection, the Central Board of Excise and Customs has issued *Circular No. 25/89 CX dated 21.4.89.* The principles laid down therein are as follows:-

(i) Duty would be chargeable on the parts and components of such goods leaving the factory in the condition in which they are removed. Thus if together, the goods can be regarded as a chimney or a tank or a scrubber or tower or a hopper in completely knocked down condition, or having the essential character of the aforementioned goods, the goods would be chargeable to duty under the headings/sub-headings appropriate to such goods in their complete form; otherwise such parts and components should be charged to duty under the headings/sub-headings appropriate to such parts and components.

(ii) At site, duty would be chargeable only if the assembly of parts/components results in a different recognizable marketable product before installation in an immovable manner. Mere bringing together of parts and components would not be excisable.

(iii) However, at site, if the piece by piece erection or installation of parts or components result in an immovable property, then no duty would be required to be levied on such property. The Board has thus reiterated the well-known principles for deciding on whether or not specific site related activities would attract excise duty liability.

The tests laid down by the Supreme Court as found in the celebrated case of *Municipal Corporation of Greater Bombay vs Indian Oil Co.Ltd 1991 Suppl(2) SCC 18* can be summarized as under:

"The test was one of permanency; if the chattel was movable to another place of use in the same position or liable to be dismantled and re-erected at the later place, if the answer to the former is positive it must be movable property but if the answer to the latter part is in the positive, then it would be treated as permanently attached to the earth."

Immovable property or articles embedded to earth, structures, erections and installations are also not "goods" because they cannot ordinarily come to the market to be bought and sold - *Quality Steel Tubes (P) Ltd. v. Collector 1995 (75) E.L.T. 17 (S.C.) & Mittal Engg. Works (P) Ltd. v. Collector 1996 (88) E.L.T. 622 (S.C.).* Reference can also be made to the following:

Otis Elevator Company's Case 1981 (8) E.L.T. 720 (G.O.I.)

Hyderabad Race Club's case 1996 (88) E.L.T. 633 (S.C.)

However, the Supreme Court in *Sirpur Paper Mills Ltd. v. CCE 1998 (97) E.L.T. 3* held that assembly of a paper making machine and its erection at site mainly from bought out components and by fabricating the rest of the parts at site, amounts to manufacture. This decision has caused considerable amount of re-thinking as to what constitutes immovable property and also has left the field open for further disputes.

The Supreme Court in a landmark judgement in *Triveni Engineering & Industries Ltd.* v. *CCE 2000 (120) E.L.T. 273* held that while fixing of steam turbine, alternator and coupling them to form a turbo alternator amounts to a manufacturing process, the resultant property being immovable the same cannot be brought to excise. This decision has once again set the ball rolling in favour of the assessee as regards immovable property and excise.

In *CCE v. Man Structurals Ltd. 2001 (130) ELT 401 (S.C.)* the Supreme Court held that the Tribunal has failed to consider the facts and proceeded simply upon the basis that structurals are not exigible to excise duty. It has failed to appreciate that there is a tariff entry which makes structurals exigible to excise duty and that they are so exigible, provided that they are new identifiable goods that are the result of manufacture or processes and they are marketable.

Considering the above conflicting judgments, CBEC issued *Circular No. 58/1/2002-CX, dated 15-1-2002* to clarify its position on the excisability of immovable property which is as under:

(i) For goods manufactured at site to be dutiable they should have a new identity, character and use, distinct from the inputs/ components that have gone into its production. Further, such resultant goods should be specified in the Central Excise Tariff as excisable goods besides being marketable i.e. they can be taken to the market and sold (even if they are not actually sold). The goods should not be immovable.

(ii) Where processing of inputs results in a new product with a distinct commercial name, identity and use (prior to such product being assimilated in a structure which would render them as a part of immovable property), excise duty would be chargeable on such goods immediately upon their change of identity and prior to their assimilation in the structure or other immovable property.

(iii) Where change of identity takes place in the course of construction or erection of a structure which is an immovable property, then there would be no manufacture of "goods" involved and no levy of excise duty.

(iv) Integrated plants/machines, as a whole, may or may not be 'goods'. For example, plants for transportation of material (such as handling plants) are actually a system or a net-work of machines. The system comes into being upon assembly of its component. In such a situation there is no manufacture of "goods" as it is only a case of assembly of manufactured goods into a system. This cannot be compared to a fabrication where a group of machines themselves may be combined to constitute a new machine which has its own identity/marketability and is dutiable (e.g. a paper making machine assembled at site and fixed to the earth only for the purpose of ensuring vibration free movement)

(v) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods.

(vi) If any goods installed at site (example paper making machine) are capable of being sold or shifted as such after removal from the base and without dismantling into its components/parts, the goods would be considered to be moveable and thus excisable. The mere fact that the goods, though being capable of being sold or shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported in dismantled condition. Rule 2(a) of the Rules for the Interpretation of Central Excise Tariff will be attracted as the guiding factor is capability of being marketed in the original form and not whether it is actually dismantled or not, into its components. Each case will therefore have to be decided keeping in view the facts and circumstances, particularly whether it is practically possible (considering the size and nature of the goods, the existence of appropriate transport by air, water, land for such size, capability of goods to move on self propulsion -ships- etc.) to remove and sell the goods as they are, without dismantling into their components. If the goods are incapable of being sold, shifted and marketed without first being dismantled into component parts, the goods would be considered as immovable and therefore not excisable to duty.

(vii) When the final product is considered as immovable and hence not excisable goods, the same product in CKD or unassembled form will also not be dutiable as a whole by applying Rule 2(a) of the Rules of Interpretation of the Central Excise Tariff. However, components, inputs and parts which are specified excisable products will remain dutiable as such identifiable goods at the time of their clearance from the factory or warehouse.

(viii) The intention of the party is also a factor to be taken into consideration to ascertain whether

the embedment of a machinery in the earth was to be temporary or permanent. This, in case of doubt, may help determine whether the goods are moveable or immovable.

Keeping the above factors in mind the position is clarified further in respect of specific instances which have been brought to the notice of the Board.

(i) **Turn key projects** like Steel plants, Cement plants, Power plants etc. involving supply of large number of components, machinery, equipments, pipes and tubes etc. for their assembly/installation/erection/integration/inter-connectivity on foundation/civil structure etc. at site, will not be considered as excisable goods for imposition of central excise duty - the components, however, would be dutiable in the normal course.

(ii) **Huge tanks made of metal for storage of petroleum products in oil refineries or installations**. These tanks, though not embedded in the earth, are erected at site, stage by stage, and after completion they cannot be physically moved. On sale/disposal they have necessarily to be dismantled and sold as metal sheets/scrap. It is not possible to assemble the tank all over again. Such tanks are, therefore, not moveable and cannot be considered as excisable goods [Reference para 15 of Triveni judgement supra and the case of *CCE Chandigarh v. Bhagwanpura Sugar Mills reported in 2001 (134) E.L.T. 673 (Tri.-Del.) = 2001 (47) RLT 409 (CEGAT-Del)]*

(iii) **Refrigeration/Air conditioning plants.** These are basically systems comprising of compressors, ducting, pipings, insulators and sometimes cooling towers etc. They are in the nature of systems and are not machines as a whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods. Air conditioning units, however, would continue to remain dutiable as per the Central Excise Tariff.

(iv) **Lifts and escalators.** (a) Though lifts and escalators are specifically mentioned in the tariff, those which are installed in buildings and permanently fitted into the civil structure, cannot be considered to be excisable goods. Such lifts and escalators have also been held to be non-excisable by the Government of India in the case of ***Otis Elevators India Co. Ltd. reported in 1981 (8) E.L.T. 720 (GOI)***. (b) There may, however, be instances of fabrication of complete lifts and escalators which are movable in nature as a whole and can be temporarily installed at construction sites or exhibitions for carrying men or material. Such cases alone would be liable to duty under sub-heading 8428.10 of the Central Excise Tariff.

In ***Unicorn Industries v. CCE 1990 (50) ELT 279***, the Tribunal has held that the operation of supply of manufactured and bought out equipment and components by the assessee and erection and commissioning of the plant which comprised of the equipment and components amounts to manufacture. It was held that manufacture and clearance of various manufactured and bought out equipments taken from their factory and erected at site led to the emergence of a new commodity liability to duty.

The Tribunal followed the Supreme Court's decision in ***Narne Tulaman Manufacturers Pvt. Ltd. Vs. CCE 1988 (38) ELT 566***, wherein it was held that assembly of an excisable product

out of duty paid components would amount to manufacture and the assembly of both own manufactured parts together with bought out parts/components would amount to manufacture and accordingly the person carrying on such activity was a manufacturer and liable to duty. However, the aspect on non excisability of immovable property was not argued in *Narne Tulaman's* case. If the emergent final product is immovable property then no liability to excise duty accrues.

In ***Larsen & Toubro Limited Vs. Union of India 2009 (243) E.L.T. 662 (Bom.)***, the court has held that the water treatment plant erected by embedding in civil work becomes immovable property and does not attract excise duty. It was held that collection of various parts at site not amounts to manufacture unless excisable movable product comes into existence by assembly of such parts.

Instances where site related activities result in immovable property

Particulars	Citation
Plant and machinery embedded in earth, structures, erections and installations are not goods	*Quality Steel Tubes Vs. CCE 1995 (75) ELT 17 (SC)*
Boiler erected at site with duty paid components which were cleared in CKD/SKD condition was held to be not excisable since the boiler became an immovable property on assembly and erection at site as it was removable only on dismantling	*Chethar Vessels Ltd Vs. CCE 2009 (241) ELT 580 (T)*
MS tanks of various capacities manufactured at site and attached to earth can neither be removed without dismantling nor separable without destroying. Not liable to duty as these are immovable property	*Prodip Engineering works* v. *CCEx., Kolkata,* 2007 (216) E.L.T. 534 (Tri-Kolkata)
Installing the storage systems rails flush with floor level by digging of trench and refilling it with concrete etc at site is a permanent fixture fixed to the ground which cannot be removed from the place of installation.	*Collector of CE* v. *Nikhil Equipments Pvt. Ltd.*, 2004 (165) E.L.T. 487 (S.C.).

Instances where site related activities result in excisable goods and not immovable property

Particulars	Citation
UPS is goods and not an immovable property	*National Radio & Electronics Co. Ltd.* v. *CCE,* 1995 (76) E.L.T. 436 (T)
RCC Poles erected for electricity purposes are goods	*APSEB* v. *CCE,* 1994 (70) E.L.T. 3 (S.C.)
Machines first assembled and then affixed to ground are goods.	*Wandleside National Conductors Ltd.* v. *CCE,* 1996 (84) E.L.T. 419 (T)
D.G. set assembled at site is goods and	*Cheran Spinners Ltd. V.CC Ex.,*

marketable as such, hence the same is excisable. The D.G. set is assembled and bolted to the concrete platform so that its operation is vibration free. The D.G. set could be easily unbolted and bought and sold. Therefore, D.G. set assembled at site cannot be held to be immovable property. They are goods and are marketable.	*Coimbatore, 2008 (231) E.L.T. 315 (Tri. – Chennai)*

1.12 Whether assembly amounts to manufacture?

Assembly is a process of putting together a number of items or parts of an item to make a product or item. From a general point of view not all cases of assembly would amount to manufacture in as much as an already manufactured item may be put in a readily usable form. The assembly may take place before the sale or after the sale of manufactured goods and again at the factory gate of the manufacturer or the customer's site. It may be done by the manufacturer/buyer/intermediary/technician. In all such cases, the questions that arise are :-

(a) Whether such assembly is manufacture?

(b) Do new goods emerge as a result of assembly?

The leading judgment in this context is ***Narne Tulaman Manufacturers Pvt. Ltd.* v. *CCE 1988 (38) E.L.T. 566 (S.C.)***. Their Lordships held that as the Tribunal had found that the Appellant had fitted a platform, load cells and indicator system which in the assembled form became a weigh bridge, there was a commercial commodity, having a distinct name, character and use resulting in manufacture. The aspect whether the resultant product would become an immovable property was not argued or considered. Therefore, the general proposition would be that if the assembly results in new commercial commodity with a distinct name, character and use, then it would amount to manufacture.

In ***BPL India Ltd. Vs CCE 2002 (143) ELT 3***, the Supreme Court held that assembly of imported kits of VTR with colour monitors imported in disassembled condition amounted to manufacture since the end product had a distinct character and use and the process of assembly was done by technical experts or skilled persons.

In a Supreme Court judgment in ***Mallur Siddeswara Spinning Mills (P) Ltd. v. CCE, Coimbatore, 2004 (166) E.L.T. 154***, it was held that generating sets assembled and installed in the factory from bought out duty paid components would be dutiable.

1.13 Dutiability of waste and scrap

The long legal battle on the dutiability of waste and scrap was settled by the Supreme Court by its decision in ***Khandelwal Metal & Engineering Works Vs. U.O.I 1985(20) ELT 222*** by holding that notwithstanding that process waste and scrap arose as intermediate products or by-products out of final products, nevertheless such process waste and scrap, if marketable, would be chargeable to duty in view of the incorporation of the specific sub-headings in various Chapters of the revised Tariff. The Apex Court held that process waste and scrap was

a commercially distinct and identifiable product and has commercial value. Hence, such waste and scrap were chargeable to duty, if covered in the Tariff.

It is important to note here is that as the excise duty is on manufacture, the waste and scrap actually generated in the course of manufacture alone is chargeable to duty.

1.14 Packing, labelling and branding activities

Packing of dutiable goods is a process of manufacture. The definition of manufacture as contained in section 2(f) of the Act, covering incidental and ancillary activities there under, would incorporate within its ambit the activity of packing, which is a necessary adjunct to manufacture. Further, goods are normally treated as fully manufactured for the purpose of accounting in the statutory excise records at the stage where they are packed in their normal packing, without which they cannot be delivered in wholesale at the factory gate. In other words the activity of packing of otherwise fully manufactured goods is the process which renders such goods marketable and consequently the activity of packing is part and parcel of manufacture.

Reference is also made in this connection to section 4 of the Central Excise Act governing the determination of value of excisable goods. The aforesaid provisions of section 4 would also indicate that packing is always contemplated under excise law as a part of the entire process of manufacture by which input materials are transformed into commercially distinct, identifiable and marketable finished products.

It is to be noted that for the goods specified in Third Schedule of Central Excise Act, 1944, the process of packing or repacking of such goods in a unit container or labelling or re-labelling of containers amounts to manufacture. Further, the declaration or alteration of retail sale price or adoption of any other treatment on the goods to render the product marketable to the consumer also results in manufacture. The goods specified in Third Schedule of the Central Excise Act, 1944 are valued on MRP basis as per the provisions of section 4A.

Further, several Chapters of the Central Excise Tariff also incorporate the duty rates on excisable goods packed in packages. In other words, the Tariff itself determines the duty rates of excisable goods in a fully packed and saleable condition. For example, milk powder is chargeable to duty only if it is put up in unit containers. In case it is produced and consumed within the factory of production without packing in such unit containers, there is no liability to duty. Unit containers are also defined in the Tariff as containers, large or small, designed to hold a predetermined quantity or number. Several examples of unit containers are also described therein.

The position in law however changes when excisable goods which are packed in bulk are charged to duty and are thereafter dispatched to outside godowns wherein they are repacked into small containers. In such a situation, the principle in law is that since the bulk product has already been fully manufactured and has been marketed or dispatched in the factory, the repacking activity would not constitute manufacture in law. There are numerous decisions to this effect both of the Tribunal and of the High Courts.

Another aspect of the issue is that of packing together of a manufactured item together with a

bought out or purchased item. It was held by the tribunal that packing together of a fully manufactured product and the bought out item would not bring into existence any new commodity. Consequently, the duty liability would be restricted to the manufactured product only. The mere activity of packing together of two distinct goods in a single container would not bring into existence any new commodity; here it is important to distinguish the activity of packing together of two different products from that of assembly of the products together to form a distinct third product. In other words, while such packing would not constitute manufacture, assembly would certainly constitute manufacture. Reference is made in this connection to the Supreme Court's decision in the *Narne Tulaman* case.

Coming now to the aspect of whether labelling and branding activities constitute manufacture or not, the settled position in law is that an unlabelled and a labelled product is normally treated in commercial parlance as the same and consequently the mere labelling of fully manufactured products would not constitute manufacture in law. The Bombay High Court, in ***Pioneer Tools and Appliances (P) Ltd. Vs. Union of India (1989) (42) ELT-384*** has held that mere affixation of labels would not render the person who undertakes the said activity as a manufacturer since the activity would not constitute manufacture in law.

As far as question of branding of goods is concerned there are numerous decisions, which hold that such branding would not amount to manufacture. In most of these cases, the manufacturer was affixing the brand name of the customers on the specified goods and the Department sought to establish that the brand name owner was the manufacturer in law. This was negated by the Supreme Court in a series of three decisions in ***Union of India Vs. Cibatul Ltd. (1985) (22) ELT- 302***, ***Joint Secretary to Govt. of India Vs. Food Specialties Ltd. (1985) (22) ELT-324***, and in ***Sidhosons Vs. UOI (1986) (26) ELT-881***. The question whether branding of already manufactured goods was a process of manufacture was not *per se* considered in these decisions and Court rendered its decision only on whether or not the brand name owner was the manufacturer under excise law.

However, in ***Banner & Co. Vs Union of India (1994) (70) ELT-181***, the Calcutta High Court held that affixation of a brand name on specified goods did not amount to manufacture. Similarly, in the Pioneer Tools case (supra), the Bombay High Court impliedly held that the activity of branding carried out by a wholesale buyer on fully manufactured goods could not constitute manufacture under excise law so as to require excise duty liability discharged on such an activity. The Apex Court agreed in this regard in *Metal Box (I) Ltd.(1996)*.

In view of the aforesaid position of law, wherever there are serious revenue implications, the Legislature has introduced the concept of artificial definition of manufacture to include the activity of repacking, relabelling or branding as amounting to manufacture. For example, you would find these activities as amounting to manufacture under Chapter 21 or Chapter 30 of the Tariff. Therefore, wherever the Tariff would state so, such activities would amount to manufacture.

Activity of transferring the goods from tankers into smaller drums is not manufacture: As per note 10 to Chapter 29, the activity of repacking products mentioned in the said Chapter from bulk packs to retail packs shall amount to manufacture under section 2(f)(iii) of the Central Excise Act, 1944.

In this regard, it has been clarified that the activity of transferring the goods from tankers into

smaller drums cannot be said to be covered by the said chapter note 10 because the tankers cannot be termed as bulk packs *[Circular No. 910/30/2009-CX dated 16-12-2009].*

1.15 Can the test of change in tariff heading/sub-headings be adopted for identifying whether a process amounts to manufacture?

The manufacture and production of goods is the event for attracting the levy of duty. However, unless such goods are covered under the individual headings/sub-headings of the Chapters of the Central Excise Tariff, no duty liability would arise. There is thus an intricate link between manufacture of goods and the liability that would arise. The aforesaid aspect brings into focus the question whether there has to necessarily be a change from one Tariff Heading/sub-heading to another in order to bring the said activity within the ambit of the definition of manufacture under excise law. In other words, the question to be answered is whether a change in Tariff heading or sub heading between input material and the resultant finished product is required so as to render such finished products liable to duty.

This question was considered by the larger Bench of the Appellate Tribunal in ***Guardian Plasticote Vs. C.C.EX. (1986) (24) T-542*** wherein the Tribunal held that in such an eventuality, the definition of manufacture would be attracted. The reasoning was that there was a transformation from one identifiable and distinct article to another identifiable and distinct article, known differently in the trade parlance. It was held that since the market understood the two goods differently, the fact that the tariff headings or sub headings did not change as a result of the process was of no relevance for determining the chargeability.

The decision was upheld by the Hon'ble Supreme Court in landmark decisions in ***Laminated Packings (P) Ltd. Vs. C.C.EX. (1990) (49) ELT-326*** and in ***Union of India Vs. Babubhai Nychand Mehta (1991) (51) ELT-182***. The Supreme Court held that a process would amount to manufacture when input and output material were differentiated in the commercial or trade parlance and that the fact that the same chapter heading or sub heading would govern both the input and output material was not germane to the issue. The Supreme court in case of *Laminated Packings* case held that duty paid kraft paper and the resultant polyethylene laminated kraft paper falling under same tariff entry is not relevant for determining dutiability of the goods as both the goods are differently identifiable goods in the market The Apex Court held that the commercial or trade parlance test was a safe and reliable test which must necessarily be adopted in such a situation so as to determine whether or not the process amounted to manufacture or not.

Therefore, the test would be of commercial differentiation and not whether the Tariff heading changes or not.

1.16 Determination of taxable event for charge of duty

Before getting into the discussion it will be relevant to note the differences between the exempted goods and the goods which are out side the purview of the Central Excise. Exempted goods are basically chargeable to duty but with an intention of giving relaxation, they are exempted from payment of duty. On the other hand the goods out side the purview of levy are either goods which are not included in the tariff at all.

The taxable event for the charge of excise duty is the manufacture of goods, as per section 3 of the Central Excise Act. However, the collection of duty is postponed to the stage of removal of goods as per Rules 4 of the Central Excise Rules 2002. The question which arises for consideration is whether goods which are manufactured at the period in time when they were either not chargeable to duty or were exempted from duty could be charged to duty if, subsequent to manufacture but before removal such goods become chargeable to duty, either due to their inclusion in the Tariff or due to withdrawal of the exemption from duty.

In its decision in ***Wallace Flour Mills Vs. C.C.EX. (1989) (44) ELT-598***, the Supreme Court held that the taxable event for the liability to duty was manufacture of goods but the duty could be levied and collected at any later stage for administrative convenience. Merely because the payment of duty under Rules is postponed to the stage of removal it could not be contended that the removal of goods has become the taxable event for the levy of duty. The Supreme Court considered the several earlier High Court judgements on the point, especially, the Madhya Pradesh High Court's decision in ***Union of India Vs. Kirloskar Brothers (1978) (2) ELT-690***, the Bombay High Court's decision in ***Synthetics & Chemicals Ltd. Vs. S.C. Coutinho (1981) (8) ELT-414*** and the Madras High Court's decision in ***Sundaram, Textiles Ltd. Vs. Asstt. Collector C.EX. (1983) (13) ELT-909***.

Consequently, the excisable goods which were chargeable to duty under the Tariff at the time of manufacture but were exempted under an exemption notification will be liable to payment of duty if, post manufacture and prior to removal, such exemption from duty is withdrawn. However, in cases where the goods were outside the purview of the Tariff at the time of manufacture such goods would not be chargeable to duty even though, subsequent to manufacture but prior to removal, such goods were brought within the purview of the Tariff or were charged to a duty of excise by means of an amendment to the Tariff. In other words, since the goods were not excisable goods as per the provisions of section 2(d) at the time of manufacture, they would not be liable to duty even though they were brought within the purview of the aforesaid section prior to removal from the factory.

This was the implication of the decision of the Supreme Court in ***Vazir Sultan Tobacco Co.Ltd vs CCE 1996 (83) ELT 3***. In this case a special excise duty of 5% of the amount of excise duty was introduced on manufacture of cigarettes. The assessee contended that the special duty is not payable as the goods were manufactured prior to introduction of new levy. The Supreme Court also held that the levy can be imposed only on goods manufactured after the date of levy.

To summarise, the current position in law is that exempted goods will be chargeable to duty at the time of removal if, subsequent to manufacture but before removal, the exemption from duty is withdrawn. However, goods that are not covered within the ambit of the Central Excise Tariff will not be chargeable to duty even though subsequent to manufacture but before removal such goods are bought within the purview of the tariff or are made chargeable to a specified rate of duty under the Tariff.

2

Classification of Excisable Goods

2.1 Introduction

The classification of goods consists of determining the headings or sub-headings of the Central Excise Tariff under which the said goods would be covered.

Need for classification

(i) The actual amount of excise duty payable on excisable goods is, *inter alia,* dependent upon the rate of duty. The rate of duty is determinable on the basis of classification of goods.

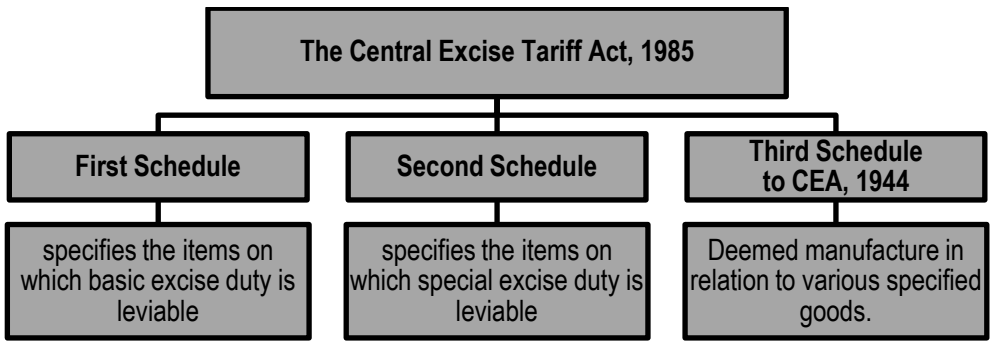
(ii) The classification of goods is also required to be decided for the purposes of determining eligibility to exemptions, most of which are with reference to the Tariff headings or sub headings.

2.2 Central Excise Tariff

2.2.1 Harmonised System of Nomenclature : Central Excise Tariff Act, 1985 is based on the Harmonised System of Nomenclature (popularly known as HSN).

HSN is an internationally accepted product coding system formulated under the auspices of the General Agreement on Tariffs & Trade (GATT). Excise Tariff Act is modelled along with international practices. The international practice of adopting a uniform classification was done to facilitate a common understanding of products across countries. In other words, the classification of a product under this code would be the same across the countries.

2.2.2 Schedules to tariff



(a) First Schedule: It consists of 96 chapters and twenty sections. This Schedule provides the rates of basic excise duty (CENVAT) leviable on various products.

(i) Sections: A group of Chapters representing a broad class of goods.

For example, Section I relates to Live animals and Animal products while Section V relates to Mineral products.

(ii) Chapters: Each section is divided into various chapters and sub-chapters.

- Each chapter contains goods of a particular class.
- The chapters are arranged classifying all goods of a kind beginning with the raw material and ending with the finished products, within the same Chapter.
- It is also designed to group all goods relating to the same industry and all goods obtained from the same raw material under one Chapter, in progressive manner.

(iii) Chapter notes: They are mentioned at the beginning of each chapter. These notes have been given statutory backing and have been incorporated at the top of each Chapter.

(iv) Heading: Each chapter and sub-chapter is further divided into various heading depending upon the different types of goods belonging to the same class of products.

(v) Sub-heading: Each heading is further divided into various sub-heading.

(vi) Rules of Interpretation and General explanatory notes

Along the lines of HSN, the Excise tariff has a set of Rules of Interpretation for the interpretation of First schedule and General Explanatory notes.

(i) Rules of interpretation:- Six

(ii) General explanatory notes: Two

(b) Second Schedule: Second Schedule specifies the items on which special excise duty is leviable.

However, **with effect from 01.03.2006, all goods have been exempted from special excise duty**.

(c) Third Schedule: This schedule specifies goods in relation to which packing, repacking, labeling, re-labelling, MRP declaration/alteration or treatment of goods to render them marketable shall amount to manufacture under section 2(f)(iii) of the Central Excise Act, 1944.

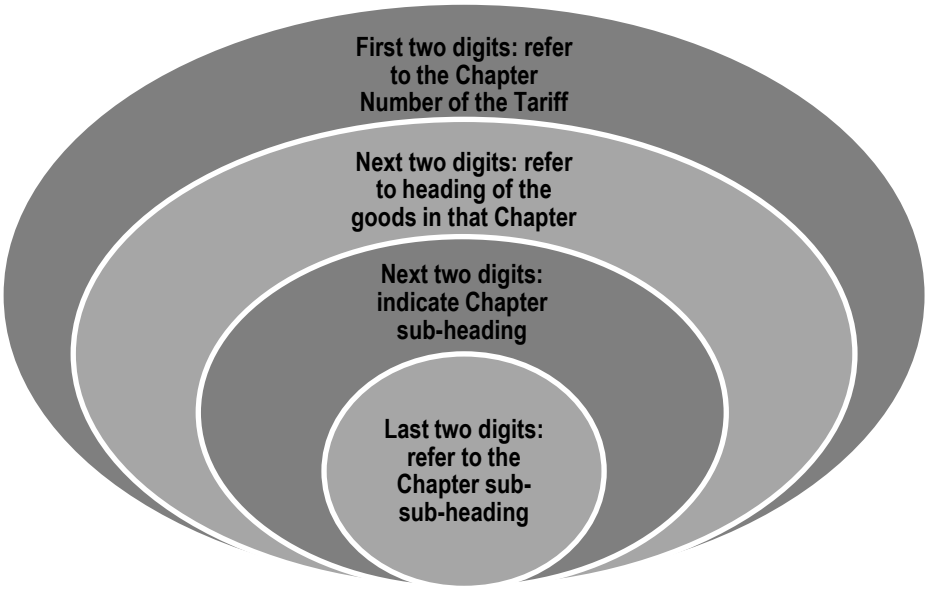
2.2.3 Eight digit classification system: With effect from 28.02.2005, the excisable goods are classified by using 8-digit system. Description with eight digits is termed as **'tariff item'**. A tariff item under eight digit system would be interpreted as follows:-

First two digits: refer to the Chapter Number of the Tariff

Next two digits: refer to heading of the goods in that Chapter

Next two digits: indicate Chapter sub-heading

Last two digits: refer to the Chapter sub-sub-heading



2.3 Explanatory Notes to the HSN

(i) Official notes issued by the Customs Co-operation Council: The Explanatory Notes to the HSN are the official notes issued by the Customs Co-operation Council, Brussels.

(ii) Explain and clarify the scope of headings of HSN: They explain and clarify the scope and extent of each and every heading of the HSN, on the basis of which the present Central Excise Tariff has been patterned.

(iii) Do not have a legal backing-are only of persuasive value: It is to be remembered that the Explanatory Notes do not have legal backing, unlike the Chapter Notes and Section Notes contained in the Tariff. Consequently, these Explanatory Notes are only of persuasive value and can be used as an aid to classification of goods when there is ambiguity as to the scope of the entry.

(iv) Can be resorted to only in case of ambiguity in tariff items in Central Excise Tariff

- HSN explanatory notes can be resorted to in case of ambiguity in classifying goods.
- When there is no ambiguity about the scope of the entry, the classification has to be done as per the tariff entry itself.

Relevant case law

The Larger Bench of Tribunal held that HSN notes can be brought into picture only when there is doubt or ambiguity about scope of any tariff entry and if tariff entry itself is clear, no external aid is necessary or permissible for determining its scope. Explanatory Notes in HSN are to be invoked only if there is ambiguity in tariff items in Central Excise Tariff.

[G.M. Pens International Ltd. v. CC (Sea Port), Chennai, 2005 (187) E.L.T. 180 (Tri. - LB)]

Illustration

Product: Hot air generators

First Heading: 7322

"Radiators for central heating, not electrically, heated, and parts thereof, or iron or steel; air heaters and hot air distributors which can also distribute fresh or conditioned air, not electrically heated, incorporating a motor-driven fan or blower, and parts thereof, of iron or steel."

Second Heading: 8419

"Machinery, plant or laboratory equipment whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes, instantaneous or storage water heaters, non-electric."

Classification of hot air generators: Heading no. 7322 expressly covers air heaters. Since the said tariff entry is clear about the scope, the hot air generators are classifiable under the heading 7322 and there is no need to refer to Explanatory notes to HSN.

2.4 Interpretative Rules to First Schedule of the Central Excise Tariff

The First Schedule to the Central Excise Tariff Act, 1985, contains a set of six general rules for the interpretation of the Tariff items. By and large, these rules for interpretation are identical to those contained in the HSN.

Before resorting to interpretative rules, nature, description, purpose and usage of the goods must be considered: It was held that classification of goods under particular heading depends upon description, purpose and use of the goods. Therefore, before resorting to interpretative rules, one has to look at the nature, description, purpose and usage of the goods.

[CCE v. K.W.H. Heliplastics Ltd. 1998 (97) ELT 385 (S.C.)]

2.4.1 RULE 1: GENERAL RULE OF CLASSIFICATION: The titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the

subsequent rules [i.e. rule 2 to 6].

Example

Heading of Chapter 84 refers to nuclear reactors, machinery etc. but even a hand pump falls under chapter 84.

ANALYSIS: The above rule lays down the following propositions:-

(a) The titles of sections, chapters and sub-chapters do not have any legal force.

(b) Terms of headings read with relative section and chapter notes are legally relevant for the purpose of classification.

(c) The rules of interpretation need not be resorted to when classification is possible on the basis of description in heading, sub-heading, chapter notes and section notes.

(d) Notes of one chapter or section cannot be applied for interpreting entries in other chapters or sections.

Classification has to be determined according to the terms of the headings read with the relevant Chapter Notes and Rules of Interpretation ***[Subhash Photographics v. U.O.I. 1992 (62) ELT 270 (Bom.)]***.

2.4.2 RULE 2(a): CLASSIFICATION OF INCOMPLETE/UNFINISHED ARTICLES

(i) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented; the incomplete or unfinished article has the essential character of the complete or finished article.

(ii) It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or dis-assembled.

ANALYSIS

(i) If any particular heading refers to a finished/complete article, the incomplete/unfinished form of that article shall also be classified under the same heading provided the incomplete/unfinished goods have the essential characteristics of the finished goods.

(ii) If any particular heading refers to a finished/complete article, the unassembled/dis-assembled form of that article shall also be classified under the same heading provided the unassembled/dis-assembled goods have the essential characteristics of the finished goods.

Examples:-

(a) Railway coaches removed without seats would still be railway coaches.

(b) A car without seats would still be classified as car.

Only goods requiring minor adjustments can be construed as having the essential character: It was held that only goods requiring minor adjustments would be construed as having the essential character. Those requiring major processes like turning, grinding, broaching, groove cutting, heat treatment, surface treatment etc., cannot be construed as having the essential character of complete and finished articles and cannot fall within the scope of rule 2(a) of the General Interpretative Rules.

[Motor Industries Co. Ltd. v. Assistant Collector of Customs 1992 (62) E.L.T. 13 (Mad.)]

Rule 2(b): Classification of mixtures/combinations of a material/ substance with other materials/substances

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

(ii) Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance.

(iii) The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

ANALYSIS: The following propositions are laid out by the above rule:-

(a) Any reference to a material or substance would refer to mixture or combination of that material or substance.

(b) Any reference to goods containing a particular material or substance would include a reference to goods consisting wholly or partly of such specified material or substance.

Examples

(a) The term coffee will include coffee mixed with chicory.

(b) Natural rubber will cover a mixture of natural and synthetic rubber.

2.4.3 Rule 3: Classification in Case Goods are Classifiable under two or More Headings: The application of this rule arises when the goods consists of more than one material or substance.

When by application of rule 2(b) or for any other reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:

Rule 3(a) Specific over general

(i) The heading which provides the most specific description shall be preferred to headings providing a more general description.

(ii) However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Analysis: The heading that provides a more specific description should be preferred over the heading that provides a general description.

Relevant case laws:-

(a) ***Speedway Rubber Co. v. CCE 2002 (143) E.L.T. 8 (S.C.)***

Supreme Court held that heading which provides the most specific description shall be preferred to headings providing a more general description.

(b) ***A. Nagaraju Bros v. State of Andhra Pradesh 1994 (72) E.L.T. 801 (S.C.)***

Electric shaving machine was classifiable under following two headings:-

Heading No. 85.10: Shavers and hair clippers with self contained electric motors

Heading No. 85.09: Electro-mechanical domestic appliances with self-contained electric motor

It was held that the said product was classifiable under heading No. 85.10 as heading No. 85.10 is more specific as compared to heading No. 85.09.

(c) ***Plasmac Machinery Mfg Co. Ltd. v. CCE 1991 (51) E.L.T. 161 (S.C.)***

Specific heading should be preferred to general.

Rule 3(b) Essential character principle: Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified with reference to (a), shall be classified as if they consisted of material which gives them their essential character, in so far as this criterion is applicable.

ANALYSIS: Sub-rule (b) would apply only if the goods cannot be classified under sub-rule (a). This sub-rule provides that composite goods should be classified on the basis of that material or substance that gives it its essential character.

Example

Product: Lead pencil with an eraser at the back.

Classification: Though the above product is composite goods, the essential character is that it is a pencil and the attachment of eraser at the stub is only for the purpose of adding convenience to the user. Therefore, it shall be classified as a pencil and not as an eraser.

Rule 3(c) Latter the better: When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

ANALYSIS: If both sub-rules (a) and (b) fail to classify the goods in question, then resort may be had to sub-rule (c), which provides that composite goods shall be classified on the basis of the heading that occurs last in numerical order.

2.4.4 RULE 4: AKIN RULE: Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

ANALYSIS: This rule is popularly referred to as **Akin rule**. This rule specifies that where goods cannot be classified according to any of the above principles, then the goods shall be classified under the heading under which other goods, which are mostly similar to the goods in question (akin goods), are classified.

Example

Product: Plastic films used to filter or remove the glare of the sun light, pasted on car glass windows, window panes etc.

Classification: These goods do not find a specific entry in the tariff schedule. However, heading 3925 30 00 covers Builder's wares of plastic not elsewhere specified – shutters, blinds (including Venetian blinds). Even though the product in question is not a builder's ware, they are most akin to plastic blinds and hence it can be classified under 3925 30 00 heading.

2.4.5 Rule 5: In addition to the foregoing provisions, the following rules shall apply in respect of goods referred to therein:

(a) Classification of cases/containers used for packaging of goods

Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers shall be classified with a specific article or a set of articles when of a kind normally sold therewith.

Conditions to be fulfilled:-

(i) These cases/containers are specially shaped or fitted to contain a specific article or a set of articles.

(ii) These cases/containers are suitable for long term use and presented with the articles for which they are intended.

This rule does not, however, apply to containers which give the whole of its essential character.

(b) Classification of packing materials and packing containers

Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods, if they are of a kind normally used for packing such goods.

However **this provision does not apply** when such packing material or packing containers are clearly suitable of repetitive use.

ANALYSIS: This rule lays down that:-

(i) Cases which are specially designed or fitted to contain a specific article and given with the articles for which they are intended shall follow the classification of the items which are packed.

(ii) The packing materials and containers cleared along with the goods are classifiable with the goods.

Example: Leather cases, which are normally supplied along with the goods, however costly they may be, need not be treated separately for the purpose of classification.

Exceptions to rule 5

(a) Durable containers capable of repetitive use should be classified separately.

Example: Gas cylinders are meant for repetitive use and therefore cannot be classifiable along with gas.

(b) When packing material itself gives the essential character as a whole.

2.4.6 Rule 6: Only sub-headings at the same level are comparable

(i) For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading notes and, *mutatis mutandis*, to the above rules, on the understanding that only sub-headings at the same level are comparable.

(ii) For the purposes of this rule, the relative section and chapter notes also apply unless the context otherwise requires.

The main proposition laid down by this rule is that sub-heading at the same level are comparable. This implies that a sub-heading can be compared only with another sub-heading within the same heading.

2.5 General Explanatory Notes

There are **two general explanatory notes** included in the **First Schedule**. They are-

(a) Relevance of one dash ["-"], two dash ["--"] and three dash ["---"].

- Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by **"-"**, the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading.
- Where, however, the description of an article/group of articles is preceded by **"- -"**, the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has **"-"**.
- Where the description of an article or group of articles is preceded by **"- -"** or **"- - -"**, the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article/group of articles which has **"-"** or **"- -"**.

(b) Meaning of abbreviation "%" in relation to the rate of duty

The **abbreviation "%"** in column (4) of this Schedule in relation to the rate of duty indicates that duty on the goods shall be charged on the value of the goods* on the basis of the percentage specified.

*The value of goods (referred to above) is the value fixed, defined or deemed to be, as the case may be, under or in:-

(i) Sub-section (2) read with section 3(3) -**Tariff value**

(ii) Section 4-**Transaction value**

(iii) Section 4A of the Central Excise Act, 1944-**Maximum Retail Price**

2.6 Additional Notes

In **First Schedule**,--

1. **(a) "Heading":** in respect of goods, means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items the first four-digits of which correspond to that number.

   (b) "Sub-heading":- in respect of goods, means a description in the list of tariff provisions accompanied by a six-digit number and includes all tariff items the first six-digits of which correspond to that number.

   (c) "Tariff item":-means a description of goods in the list of tariff provisions accompanying either eight-digit number and the rate of the duty of excise or eight-digit number with blank in the column of the rate of duty.

2. The list of tariff provisions is divided into Sections, Chapters and Sub-Chapters

3. In column (3), the standard unit of quantity is specified for each tariff item to facilitate the collection, comparison and analysis of trade statistics.

2.7 Rules for Interpretation – Non-Statutory Principles

Apart from the above statutory principles of classification, the Courts have evolved certain non-statutory principles. However, it must be understood that statutory principles will have precedence over non-statutory principles.

2.7.1 Trade parlance test: According to the Trade Parlance test, if a product is not defined in the Schedules and Section Notes and Chapter Notes of the Central Excise Tariff Act, 1985, then it should be classified according to its popular meaning or meaning attached to it by those dealing with it i.e., in its commercial sense.

However, where the Tariff headings itself uses highly scientific or technical terms, goods should be classified in scientific or technical sense.

Relevant case laws

1. ***Akbar Badruddin Jiwani v. CC [1990] 47 ELT 161 (SC)***

   The express wordings of the Tariff Headings and relevant Section and Chapter Notes would take precedence over the commercial or trade parlance test for classifying excisable goods. However, if the specific headings and notes do not cover the excisable goods, then resort must be had to the commercial or trade understanding of the goods.

2. ***Bakelite Hylam Ltd. v. CCE 1998 (101) ELT 561 (SC)***

When legislature has adopted technical term in a particular entry, classification will have to be done in the technical sense and resort to common parlance cannot be done.

3. ***Chemical and Fibres of India Ltd. v. U.O.I. 1997 (89) E.L.T. 633 (SC)***

Tariff Entry using commercial words to be interpreted as understood in the trade. A different approach may be required where strictly technical or scientific words are used.

4. ***CCE v. Fenoplast P. Ltd. 1994 (72) E.L.T. 513 (SC)***

Trade understanding to be resorted to if words not defined in the Act.

5. ***Shree Baidyanath Ayurved Bhavan Ltd v. CCE 1996 (83) E.L.T. 492 (SC)***

Scientific and technical meaning of the terms and expressions used in the tax laws like Excise Act should not be resorted to. Goods should be classified according to the popular meaning attached to them by those using the product.

6. ***CCE v. Fusebase Eltoro Ltd 1993 (67) ELT 30 (SC)***

In the absence of statutory definition of the goods, the classification to be done based on the common parlance, primary function and the utility.

2.7.2 Burden to prove classification is on Department

(i) Under normal circumstances, it is the responsibility of the Department to establish the correct Tariff Heading under which the product falls. The onus is on the Department to establish the alternate classification, when the Department turns down the one claimed by the assessee.

(ii) When certain goods are prima facie covered by the generic description, the burden to prove that they are not so covered would be on the person claiming so.

(iii) To sum up, the burden to prove a particular classification is initially on the Department and once it is discharged, the onus shifts to the assessee, because it is he who has exclusive and special knowledge about the product produced by him.

Relevant case laws

1. ***Kirloskar Oil Engines Ltd. v. Union of India (1991) (51) ELT 334***

It is well settled that the burden to establish that certain goods can be classified and excise duty can be levied under a particular tariff item is entirely on the Department.

2. ***Union of India v. Sahney Steel And Press Works Ltd. (1992) (58) ELT 38***

It was held by the Tribunal that the burden was on the authorities to establish that particular goods fell within a particular item of the Tariff.

3. ***H.P.L. Chemicals v. CCE, Chandigarh, 2006 (197) ELT 324 (SC)***

If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by assessee, the Department has to adduce proper evidence and discharge burden of proof.

4. ***Hindustan Ferodo Ltd. v. CCE 1997 (89) E.L.T. 16 (SC)***

   The burden of proving that a particular goods fall in a particular entry will be on the Department.

2.7.3 Treatment of goods for the purpose of classification and exemption

The **meaning of "for the purpose of classification"** as well as **"for exemption"** should be the same in view of the provisions of section 20 of the General Clauses Act.

The onus of proving dutiability is on the Department. However, in the case of exemption, the burden is on the tax payer claiming the exemption.

Relevant case laws

1. ***Eskayef Ltd. v. CCE 1990 (49) ELT 649 (SC)***

   The Supreme Court held that the exemption from payment of a excise duty which has been granted under a Notification is confined to goods falling under a particular Tariff Heading. Merely because a product can be used for the purposes as specified in the exemption notification does not qualify it for exemption, unless it also falls under the Tariff Heading specified in the Notification because the exemption cannot transfer product from one Tariff entry to another.

2. ***Naffar Chandra Jute Mills Ltd. v. Asst. CCE 1993 (66) E.L.T. 574 (Cal.)***

   The Calcutta High Court has held that the Rules for Interpretation of the Central Excise Tariff are applicable for interpreting exemption notifications as well.

3. ***Maestro Motors Ltd. 2004 (174) E.L.T. 289 (SC)***

   If a tariff heading is specifically mentioned in exemption notification, the Rules for Interpretation will apply to such exemption notification. However, if an item is specifically mentioned without any tariff heading, then exemption would be available even though for purpose of classification, it may be something else.

2.7.4 Other principles

1. **Rule of interpretation to be preferred over common parlance test**

   The Supreme Court held that Rules of interpretation will be preferred to the common parlance test.

   [CCE v. Wood Polymers Ltd. 1998 (97) E.L.T. 193 (SC)]

2. **Composition important in classification**

   Generally in classification matters, composition is important. The End User test would be applicable only if the relevant entry says so.

   [CCE v. Mannampalakkal Rubber Latex Works, 2007 (217) ELT 161 (SC)]

3. **Classification of waste of any article**

   Waste of any particular article will be classified as waste of that article only if the article retains its original character after the process yielding the waste is being carried on it.

   [CCEx., Cochin v Apollo Tyres Ltd. 2005 (184) ELT 115 (SC)]

4. Applicability of Composition and end-user test

In matters of classification, "composition test" was an important test and "end-user test" applied only if the entry said so.

[CCEx. v. Mannampalakkal Rubber Latex Works 2007 (217) ELT 161 (SC)]

5. Reliability on Wikipedia for the purposes of classification

Wikipedia, like all other external aids to construction, like dictionaries etc., was not an authentic source, although the same might be looked at for the purpose of gathering information. Where an express statutory definition of a word existed, a Wiki definition could not be preferred. It could not normally be used for the purpose of interpreting a taxing statute or classification of a product vis-à-vis an entry in statute.

[Ponds India Ltd. v. Comr. of Trade Tax, Lucknow 2008 (227) ELT 497 (S.C.)]

6. Non-alignment of entries in the Harmonised System of Nomenclature (HSN) and the Excise Tariff

When the entries in the Harmonised System of Nomenclature (HSN) and the Excise Tariff are not aligned, reliance cannot be placed upon HSN for the purpose of classification of goods under the said Tariff.

[Camlin Ltd. v. CCEx., Mumbai 2008 (230) E.L.T. 193 (SC)]

2.8 Power of Central Government to amend First and Second Schedules to the Tariff

The Central Government has the power to amend the Schedules by notification under section 5 of the Central Excise Tariff Act. This is subject to the condition that such amendment shall not alter or affect in any manner, the rates of duty. The provisions of this section are:

(1) Where the Central Government is satisfied that it is necessary so to do in the public interest, it may, by notification in the Official Gazette, amend the First Schedule and the Second Schedule. However, such amendment shall not alter or affect in any manner the rates specified in the First Schedule and the Second Schedule in respect of goods at which duties of excise shall be leviable on the goods under the Central Excise Act, 1944.

(2) Such notifications shall be laid before each House of Parliament, while it is in session, for a total period of thirty days as soon as it is issued. These thirty days may be comprised in one session or in two or more successive sessions. If before the expiry of the session, immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be issued, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

2.9 Clarifications

1. Classification of textile quilted products like quilts, quilted bed spreads, etc. - *Circular No. 903/23/2009-CX dated 20.10.2009*

Issue	Clarification
Under which of the following two headings the textile quilted products like quilts, quilted bed spreads, etc. would be classified:- (i) Heading 9404 (ii) Heading 5811	It is clarified that these products will be classified under heading 9404.

Reasons for such classification:-

1. Heading 5811 covers quilted textile products which are further used in the manufacture of quilts, quilted bedspreads, etc. The term **'used in the manufacture'** in heading 5811 implies that heading 5811 covers only materials which are further used in making of quilted final products like bedding or bedspreads.

   While it is heading 9404 which covers the final finished products like quilts and other articles of bedding and furnishing.

2. Explanatory Notes to Harmonized System of Nomenclature to Chapter Heading 5811 also states that the heading does not cover made up goods of this Section (Section Note 7) and articles of bedding or similar furnishing of Chapter 94 which are padded or internally fitted. Thus, the articles of bedding and furnishing fall in Chapter 94.

Note:

(i) The **Explanatory Notes to Harmonized System of Nomenclature to Chapter Heading 5811** reads as follows:

'These materials are commonly **used in the manufacture** of quilted garments, bedding or bedspreads, mattress pads , clothing, curtains, place-mats, underpads (silencers) for table linen etc.

The heading does not cover:

a. Plastic sheets quilted, whether by stitching or heat sealing to a padded core (generally Chapter 39);

b. Stitches or quilted textile products in which the stitches constitute designs giving them the character of embroidering;

c. Made up goods of this Section;

d. Articles of bedding or similar furnishing of Chapter 94 padded or internally fitted.'(emphasis supplied).

The made up goods are defined by Section Note 7 of Section XI.

(ii) The **Explanatory Notes to Harmonized System of Nomenclature to Chapter 9404** clarify that the heading covers:

'A. Mattresses supports,

B. Articles of bedding and similar furnishing which are sprung or stuffed or internally fitted with any material (cotton, wool, horsehair, down, synthetic fibers etc or are of cellular rubber or plastics (whether or not covered with woven fabrics, plastics. etc). For example:

1. Mattresses, including mattresses with a metal frame:
2. Quilts and bedspread (including counterpanes and also quilts for baby - carriages) eiderdowns and duvets (whether of down or any other filling/mattress protectors, bolsters, Pillows/cushions, pouffes, etc.'

Quilts, quilted bedspread etc. are articles of bedding and are covered under the Explanation (B)(2) as mentioned above.

2. Classification of Polyester Staple Fibre manufactured out of PET scrap and waste bottles - *Circular No. 929/19/2010-CX dated 29.06.2010*

It has been clarified that polyester staple fibre manufactured out of PET scrap and waste bottles is nothing but a textile material and hence will be classified as textile material under heading 55032000 under Section XI and not as article of plastic in Chapter 39.

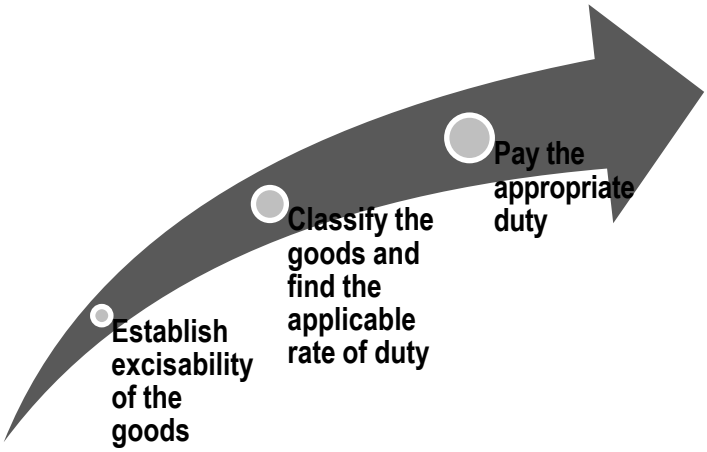
Note - The headings cited in some of the case laws mentioned in this chapter may not co-relate with the headings of the present Excise Tariff as these cases relate to an earlier point of time.

3

Valuation of Excisable Goods

3.1 Basis of computing duty payable

Significance of valuation: Valuation is important to understand as duty under central excise is payable based on different criterion. As a first step, an assessee has to establish whether the goods manufactured by him are excisable. After the excisability is decided, the goods have to be correctly classified. The next step is to value the goods so as to compute the duty payable on the excisable goods.



Basis of computing duty payable: The duty is payable on the basis of any of the following:

(a) Specific duty

(b) Duty based on value

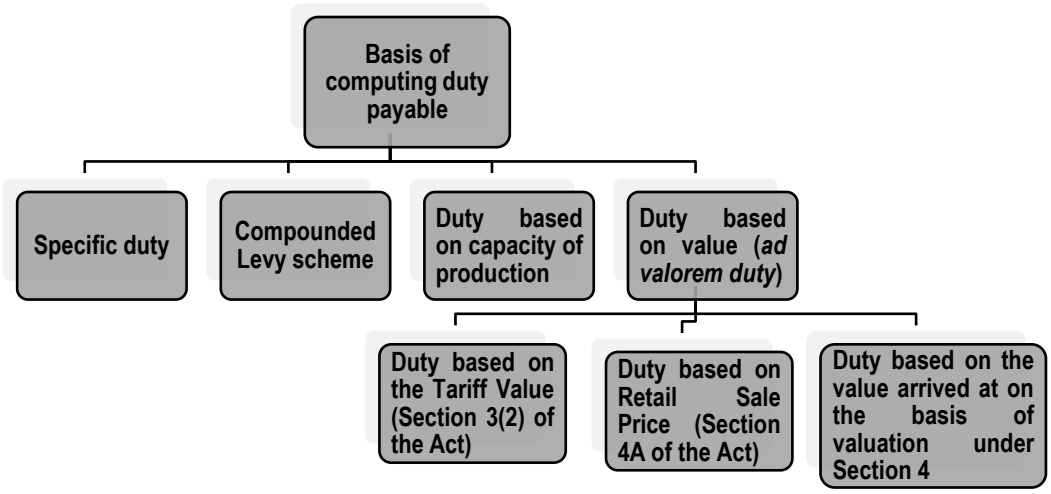
  (i) Duty based on the Tariff Value (Section 3(2) of the Central Excise Act, 1944)

  (ii) Duty based on the value arrived at on the basis of valuation under Section 4

  (iii) Duty based on Maximum Retail Price [MRP] (Section 4A of the Central Excise Act, 1944)

(c) Compounded Levy scheme (Rule 15 of the Central Excise Rules, 2002).

(d) Duty based on capacity of production (Section 3A of the Central Excise Act, 1944)



3.1.1 Specific duty: In the case of some goods, duty is payable on the basis of certain unit, length, weight, volume, etc. For instance, duty payable on cigarettes is on the basis of length. However, this method of levying duty demands frequent revisions in order to increase revenue since while the prices may be increasing, the duty would remain the same quantum when based on length. Since specific duties do not keep pace with inflation, more and more tariff entries are designed based on advalorem duty structure.

3.1.2 Duty based on value (Ad valorem duty): In the case of duties charged on the basis of value, such value may be charged on either of the following basis:

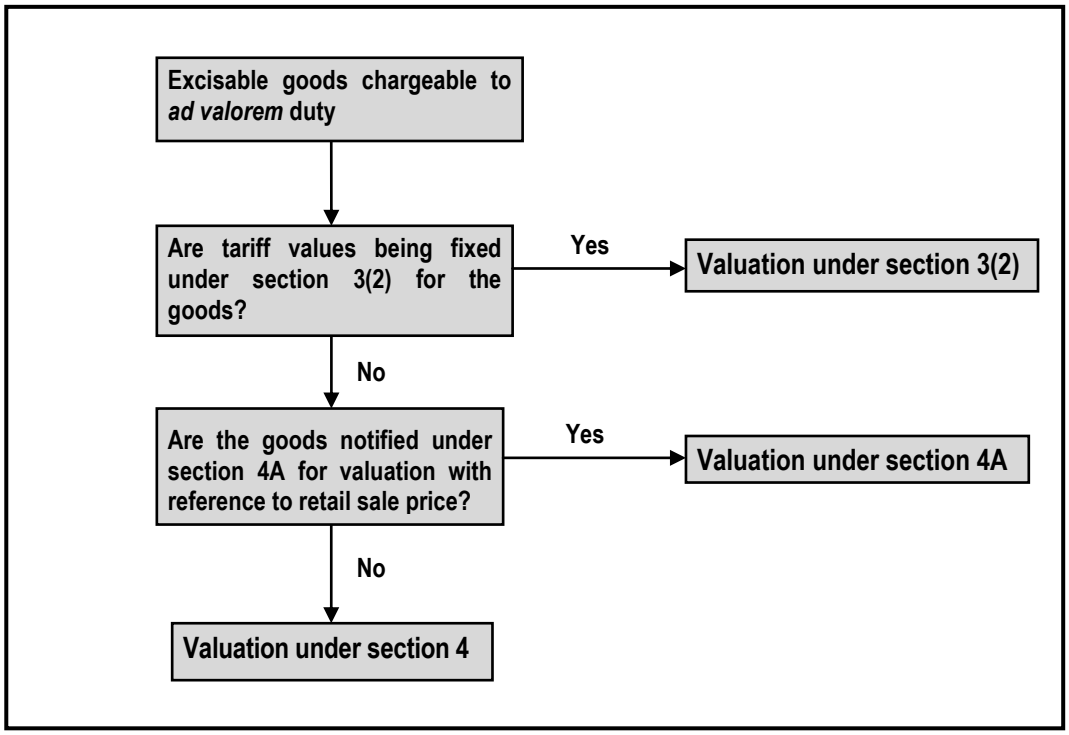
(a) Duty as a percentage of Tariff value fixed by the Central Government u/s 3(2) of the Central Excise Act, 1944: The Central Government is empowered to notify the values of goods which will be chargeable to *ad valorem* duty as per Central Excise Tariff Act, 1975. In such a case, the task is easy since the value is already fixed. For example, Central Government has fixed tariff value for jewellery (other than sliver jewellery) under heading 7113 and branded readymade garments under Chapter 61 and 62. The Central Government has also got the power to alter the tariff value once fixed.

The Central Government may fix different tariff values for different classes or descriptions of the same excisable goods. The Central Government can also fix different tariff values for same class or description of the goods but produced or manufactured by different classes of producers or manufacturers or sold to different classes of buyers. Such tariff values may be fixed on the basis of wholesale price or average price of various manufacturers as the Government may consider appropriate.

(b) Duty as a percentage of Assessable Value determined in accordance with section 4 of the Central Excise Act, 1944 (Ad valorem duty): Section 4 deals with the valuation of goods which are chargeable to duty on the basis of ad valorem. Prior to 1st July 2000 the valuation under this section was based on the principle of 'normal price' which was based on the prices at which manufacturer sold the goods. Since 1st July 2000, the new concept of transaction value has been brought in to the central excise law.

(c) Duty may also be fixed on the basis of maximum retail price after giving permissible deductions: This has been done under section 4A on many mass consumption products where the retail price and wholesale price of goods are at wide variance and the Government wants to raise revenues knowing that the manufacturer has shifted much of the overheads away from the manufacturing location.

Valuation under section 4 and also section 4A (MRP valuation) are discussed in detail in the coming paragraphs. The scheme of *ad valorem* valuation in general is summarised below:



3.1.3 Compounded levy scheme [Rule 15 of the Central Excise Rules, 2002]: Central Government is empowered to specify, by notification, the goods in respect of which an assessee shall have the option to pay the duty of excise on the basis of specified factors relevant to production of such goods (size of equipment employed, number and the types of machines used for manufacture etc.) at the specified rates. The prescribed duty has to be paid by the manufacturer for the specified period. The advantage of this scheme is that it frees the manufacturer from observing day to day central excise formalities and maintenance of detailed accounts after making the lump sum periodic payment. Thus, small manufacturers generally benefit from this scheme [Sub-rule (1)].

The Central Government has been empowered to specify the procedure for making an application for availing of the special procedure for payment of duty, the abatement, if any, that may be allowed on account of closure of a factory during any period, and any other matter incidental thereto [Sub-rule (2)].

The Central Government has notified stainless steel pattas/patties and aluminium circles for the purpose of compounded levy scheme. These articles are not eligible for SSI exemption.

3.1.4 Duty based on capacity of production in respect of notified goods [Section 3A]

(1) The Central Government in order to safeguard the interest of the revenue may notify goods on which excise duty shall be levied and collected in accordance with the provisions of this section. The Government may notify the goods having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant. Pan masala, Gutkha, Tobacco etc. are notified under this section.

(2) Where the goods are so notified, the Central Government may, by rules,—

(a) provide the manner for determination of the annual capacity of production of the factory by an officer not below the rank of Assistant Commissioner of Central Excise. Such annual capacity shall be deemed to be the annual production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of such goods and the quantity that is deemed to be produced by the use of a unit of such factor; and

(ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

However, where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production:

Further, in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

(3) The duty of excise on notified goods shall be levied, at such rate, on the unit of production or, as the case may be, on such factor relevant to the production, as the Central Government may, by notification in the Official Gazette, specify, and collected in such manner as may be prescribed:

However, where a factory producing notified goods did not produce the notified goods during any continuous period of 15 days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.

(4) The provisions of this section do not apply to goods produced or manufactured, by a 100% export oriented undertaking and brought to any other place in India.

For the purposes of section 3 of the Customs Tariff Act, 1975, the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985, read with any notification for the time being in force.

"Factor" relevant to production, as mentioned in sub-sections (2) and (3) includes "factors" relevant to production.

3.2 Valuation under section 4

Section 3(1) of the Act is the charging section, and the goods are chargeable with rate of duty as specified in the Central Excise Tariff Act, 1975. The rates specified in the Tariff for most of the goods are *ad valorem* and hence the valuation of the goods becomes very important. With the intention of making the valuation mechanism simple, from 1st July 2000 valuation mechanism based on "normal price" was replaced by a user friendly and commercially acceptable mechanism based on "transaction value". Valuation provisions are contained in section 4. Section 4 reads as under:

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation – For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section

(a) **"assessee"** means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be **"related"** if

(i) they are inter-connected undertakings

(ii) they are relatives

(iii) amongst them the buyer is a relative and a distributor of the assessee or a sub distributor of such distributor

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

Explanation: In this clause –

(i) "inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manners, namely :-

(A) if one owns or controls the other;

(B) where the undertakings are owned by firms, if such firms have one or more common partners;

(C) where the undertakings are owned by bodies corporate,-

(I) if one body corporate manages the other body corporate; or

(II) if one body corporate is a subsidiary of the other body corporate; or

(III) if the bodies corporate are under the same management; or

(IV) if one body corporate exercises control over the other body corporate in any other manner;

(D) where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm, —

(I) hold, directly or indirectly, not less than fifty per cent. of the shares, whether preference or equity, of the body corporate; or

(II) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate;

(E) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management;

(F) if the undertakings are owned or controlled by the same person or by the same group;

(G) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses.

Explanation 1. — For the purposes of this clause, two bodies corporate shall be deemed to be under the same management, -

(i) if one such body corporate exercises control over the other or both are under the control of the same group or any of the constituents of the same group; or

(ii) if the managing director or manager of one such body corporate is the managing director or manager of the other; or

(iii) if one such body corporate holds not less than one-fourth of the equity shares in the other or controls the composition of not less than one-fourth of the total membership of the Board of directors of the other; or

(iv) if one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together with relatives of such directors or employees of the first mentioned body corporate) one-fourth of the directors of the other; or

(v) if the same individual or individuals belonging to a group, while holding (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in one such body corporate also hold (whether by

themselves or together with their relatives) not less than one-fourth of the equity shares in the other; or

(vi) if the same body corporate or bodies corporate belonging to a group, holding, whether independently or along with its or their subsidiary or subsidiaries, not less than one-fourth of the equity shares in one body corporate, also hold not less than one-fourth of the equity shares in the other; or

(vii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individual (whether independently or together with his relatives) or the same body corporate (whether independently or together with its subsidiaries); or

(viii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individuals belonging to a group or by the same bodies corporate belonging to a group, or jointly by such individual or individuals and one or more of such bodies corporate; or

(ix) if the directors of one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

Explanation II.— If a group exercises control over a body corporate, that body corporate and every other body corporate, which is a constituent of, or controlled by, the group shall be deemed to be under the same management.

Explanation III. — If two or more bodies corporate under the same management hold, in the aggregate, not less than one-fourth equity share capital in any other body corporate, such other body corporate shall be deemed to be under the same management as the first mentioned bodies corporate.

Explanation IV. — In determining whether or not two or more bodies corporate are under the same management, the shares held by financial institutions in such bodies corporate shall not be taken into account.

Illustration

Undertaking B is inter-connected with undertaking A and undertaking C is inter-connected with undertaking B. Undertaking C is inter-connected with undertaking A; if undertaking D is inter-connected with undertaking C, undertaking D will be inter-connected with undertaking B and consequently with undertaking A; and so on.

Explanation V. — For the purposes of this clause, "group" means a group of—

(i) two or more individuals, associations of individuals, firms, trusts, trustees or bodies corporate (excluding financial institutions), or any combination thereof, which exercises, or is established to be in a position to exercise, control, directly or indirectly, over any body corporate, firm or trust; or

(ii) associated persons.

Explanation VI.— For the purposes of this clause,—

(I) a group of persons who are able, directly or indirectly, to control the policy of a body corporate, firm or trust, without having a controlling interest in that body corporate, firm or trust, shall also be deemed to be in a position to exercise control over it;

(II) "associated persons"-

(a) in relation to a director of a body corporate, means-

(i) a relative of such director, and includes a firm in which such director or his relative is a partner;

(ii) any trust of which any such director or his relative is a trustee;

(iii) any company of which such director, whether independently or together with his relatives, constitutes one-fourth of its Board of directors;

(iv) any other body corporate, at any general meeting of which not less than one-fourth of the total number of directors of such other body corporate are appointed or controlled by the director of the first mentioned body corporate or his relative, whether acting singly or jointly;

(b) in relation to the partner of a firm, means a relative of such partner and includes any other partner of such firm; and

(c) in relation to the trustee of a trust, means any other trustee of such trust;

(III) where any person is an associated person in relation to another, the latter shall also be deemed to be an associated person in relation to the former.

(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956[1];

(c) **"place of removal"** means –

(i) a factory or any other place or premises of production or manufacture of the excisable goods

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory

from where such goods are removed.

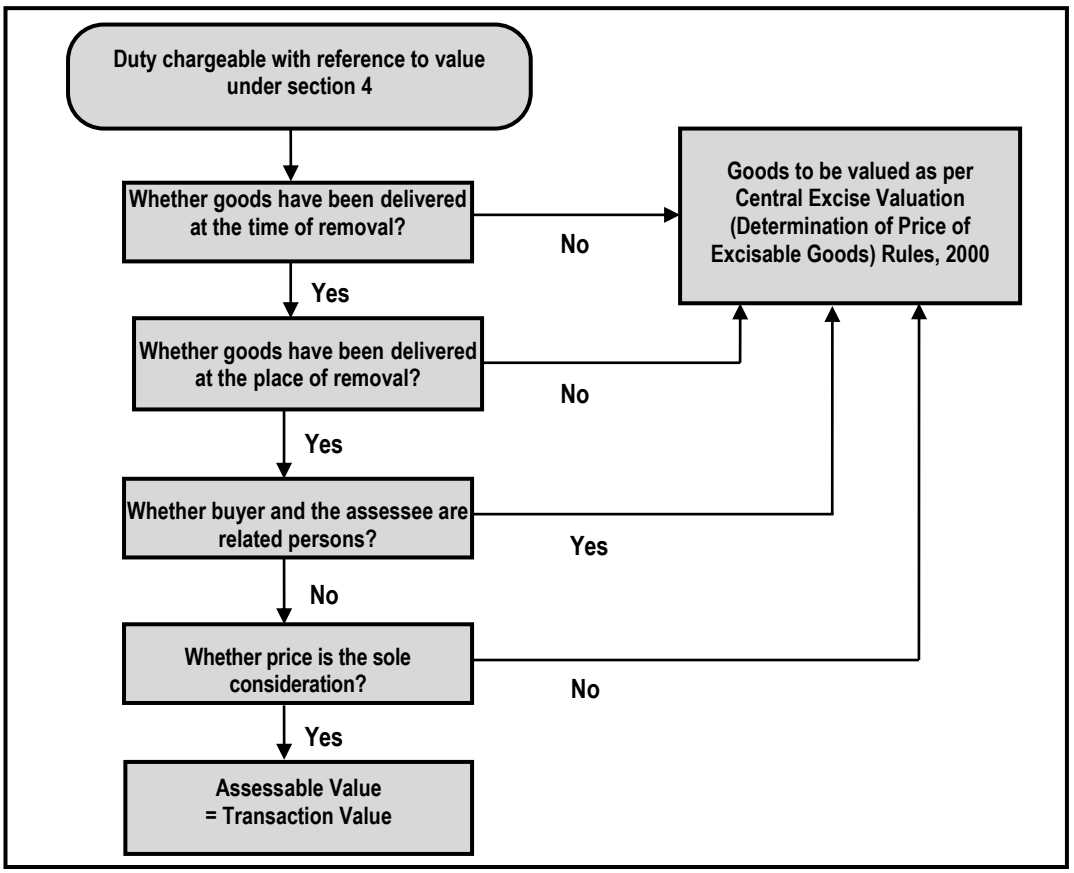
(cc) **"time of removal"**, in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), shall be deemed to be the time at which such goods are cleared from the factory.

(d) **"transaction value"** means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether

[1] Clause (77) of section 2 of Companies Act, 2013

payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

The scheme of valuation under section 4 can be put in the form of a chart given below:



3.3 Related Persons

Section 4(3) (b) states that persons shall be deemed to be related if:

(a) they are inter-connected undertakings;

(b) they are relatives;

(c) amongst them the buyer is a relative and distributor of the assessee or a sub-distributor of such distributor; or

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

3.3.1 Relative: Coming now to the definition of "relative", one has to read sections 2(41), 6 and schedule I-A of the Companies Act, 1956 together[2]. Section 2(41) of Companies Act, 1956 defines "relative" to mean persons related as per section 6 and no other. Section 6 of the said Act, states that the following are relatives:-

(a) members of a HUF;

(b) husband and wife;

(c) persons related to one another in the manner indicated in Schedule I-A. The Schedule is a detailed one and enumerates 22 different relationships. Thus, all of the above categories will be covered within the definition of relatives and transactions between an assessee and such relatives will be covered within the ambit of section 4(4)(c) of the Act.

3.3.2 Distributor: Section 4(3)(b) governing related person incorporates the word 'distributor'. The phrase 'relative and a distributor of the assessee' as occurring in the section apparently implies that even a distributor should be a related person. In its landmark decision in the *Bombay Tyres International's case*, the Supreme Court has given a narrow and interesting interpretation of this expression. The Court held that the words "a relative and distributor of an assessee", do not refer to any distributor but they are limited only to a distributor who is also a relative of the assessee, within the meaning of the Companies Act, 1956[3].

So analyzing the definition of relative read with the decision given by Supreme Court in Bombay Tyres case, if a company or a firm is appointed as a distributor, it can never be related person since an impersonal body cannot be treated as a relative under section 4(3)(b).

The words "relative & a distributor of the assessee" do not refer to any distributor but the distributor who is relative of the assessee within the meaning of the Companies Act, 1956 - *UOI* v. *Bombay Tyre International Ltd. 1983 (14) E.L.T. 1986 (S.C.)*

Price charged by the manufacturer to the distributor is to be assessable value, when the dealings are on principal to principal basis - *UOI* v. *Mahindra & Mahindra Ltd.* 1989 (43) E.L.T. 611 (Bom.)

3.3.3 Mutuality of business interest: In *U.O.I Vs. Atic Industries Ltd. 1984 (17) E.L.T. 323,* the Supreme Court has held that in order to attract the first part of the definition, the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have direct or indirect interest in the business of the other. The quality and degree of interest which each has in the business of the other may be different, the interest of the one in the business of the other may be direct, while interest of the latter in the business of the former may be indirect. That would not make any difference so long as each has got some interest, direct or indirect, in the business of the other .

In *U.O.I Vs. Hind Lamp 1989 (43)ELT 161*, the Supreme Court reiterated the principle that it is not enough that the assessee has an interest, direct or indirect, in the business of the assessee. Both must have an interest in the business of each other. The degree and quality of their respective interests in each other may be different. In *CCE Vs. Vikram Engineering Co.*

[2] Section 2(77) of Companies Act, 2013 read with Companies (Specification of Definitions Details) Rules, 2014
[3] Companies Act, 2013

1989 (39) ELT 143, the Tribunal followed the decision in Atic's case by holding that the degree of mutual interest was not material in order to attract the definition but the existence of some interest was all that was required.

3.3.4 Summary of various decisions on this issue is given in the following table:

Decision	Citation
The definition of 'related person' requires mutuality of interest in the business to be proved.	*UOI* v. *Atic Industries Ltd.* 1984 (17) E.L.T. 323(S.C.)
The mutuality of business interest between the manufacturer and his buyer can be shown only if one has special interest in the promotion or development of the business of another.	*Cibatul Ltd.* v. *UOI* 1979 (4) E.L.T. (J407) (Guj.)
If one of the directors of the buyer company is also chairman of the manufacturing company, it cannot be said that they have mutual interest in the business.	*Jay Engg. Works Ltd.* v. *UOI* 1981 (8) E.L.T. 284 (Del.)
A limited company cannot have indirect interests in the business carried by one of its shareholders.	*Collector* v. *T.I. Miller Ltd.* 1988 (35) E.L.T. 8 (S.C.)
The words "relative & a distributor of the assessee" do not refer to any distributor but the distributor who is relative of the assessee within the meaning of the Companies Act, 1956.	*UOI* v. *Bombay Tyre International Ltd.* 1983 (14) E.L.T. 1986 (S.C.)
Goods sold to dealers under agreement. Dealers to have own show room, repair shop etc. Dealer not a related person.	*Moped India Ltd* v. *AC* 1986 (23) E.L.T. 8 (S.C.)
Goods sold to dealers having no funds of their own or business premises. Dealers merely a sham and to be ignored.	*JK Cotton Spg. & Weaving Mills Co. Ltd* v. *CCE* 1997 (91) E.L.T. 534 (SC).
Once existence of mutual interest is established, the extent of such interest is not material.	*UOI* v. *Atic Inds. Ltd.* 1984 (17) E.L.T. 323 (S.C.)
Merely because, goods are manufactured with customer's brand name and entire production sold to customer, does not mean that sales are to related person.	*Ceam Electronics P. Ltd.* v. *UOI* 1991 (51) E.L.T. 309 (Bom.)
Regional sale offices/godowns are not related persons.	*Indo-National Ltd.* v. *UOI* 1979 (4) E.L.T. (J334) (A. P.)

After sales service by dealers during warranty period do not make such dealers related persons.	*S.M. Chemicals & Electronics* v. *R. Parthasarathi* 1980 (6) E.L.T. 197 (Bom.)
Price charged by the manufacturer to the distributor, to be assessable value, when the dealings are on principal to principal basis.	*UOI* v. *Mahindra & Mahindra Ltd.* 1989 (43) E.L.T. 611 (Bom.)
"Main dealer" cannot be treated as distributor or related person, when goods are sold through main dealer as well as independent purchasers.	*GOI* v. *Ashok Leyland Ltd.* 1983 (14) E.L.T. 2168 (Mad.)
Sale of entire production to one buyer does not make Buyer & Seller related persons.	*Ceam Electronics P. Ltd.* v. *UOI* 1991 (51) E.L.T. 309 (Bom.)
Customers can not be treated as related, if the sales are on principal to principal basis to a shareholding company and associate companies of foreign shareholding companies.	*UOI* v. *Hind Lamps Ltd.* 1989 (43) E.L.T. 161 (S.C.)
Merely because goods are manufactured with customer's brand name and entire production sold to him, it cannot be treated as a sale to a related person.	*UOI* v. *Play World Electronics P. Ltd.* 1989 (41) E.L.T. 368 (S.C.)
Brand name value cannot be added to the value of goods manufactured by manufacturer for brand name owner unless it is proved that they are related persons.	*UOI* v. *Purolator India Ltd.* 1989 (24) ECR 216 (S.C.)
Whole sale price at which goods are sold to the buyer to be the assessable value, when goods are manufactured under agreement with buyer's trade mark.	*UOI* v. *Cibatul Ltd.* 1985 (22) E.L.T. 302 (S.C.)
Buyer to be held as related person when manufacturer was to accept back unsold stock etc. and the buyer's price held to be assessable value.	*Snow White Indl. Corpn.* v. *Collector* 1990 (46) E.L.T. 3 (S.C.)
Partner of one of the dealers related to director of the manufacturing company to whom only 34% - 40% of production is sold, cannot be treated as related person and the price at which goods are sold to him is assessable value.	*UOI* v. *Kantilal Chunilal* 1986 (26) E.L.T. 289 (S.C.)
Dealers cannot be treated as relative of the manufacturer or even otherwise, when the dealer is required to deposit specific sum for each moped, getting fixed commission and all payments are through bank.	*Mopeds India Ltd. v. Asst. Collector* 1986 (23) E.L.T. 8 (S.C.)

When 90% of the goods are sold to the wholesaler, and only 10% to the related person, the assessable value will be price charged to wholesale dealers.	*Kirloskar Cummins Ltd.* v. *UOI* 1991(51) E.L.T. 325(Bom.)
Department can lift the corporate veil even if the assessee concerned are limited companies.	*Calcutta Chromotype Ltd v. CCE* 1998 (99) E.L.T. 202 (SC)
Two concerns belonging to the same family and members thereof sharing the benefits of both concerns also having common directors who are relatives, have a direct interest in the business of each other and mutuality of interest is apparent.	*CCE v. I.T.E.C (P) Ltd. 2002 (145) ELT 280 (SC)*
Sale of goods by the society to the federation of which the society is a member will not be sufficient to hold the federation as a related person of the society.	*UOI v. Kaira Distt. Co-Op Milk Producers Union Ltd 2002 (146) ELT 502 (SC)*

3.4 Place of removal

Section 4(3)(c) defines 'the place of removal' to mean

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty from where such goods are removed.

(iii) a depot, premises of a consignment agent or any other place or premises

from where the excisable goods are to be sold after their clearance from the factory.

3.5 Price is the sole consideration

The price should be the **'sole consideration for sale'.** Any other consideration in cash or in kind which forms part of the transaction has to be converted in monetary terms and added back to the price. Each such transaction has to be at arm's length and on principal to principal basis. If the transaction is not on principal to principal basis, the charges paid are to be added to the transaction value of the goods.

When the sale is at arm's length, sale price of subsequent seller is not relevant and does not matter that dealings were confined only to two buyers - *Atic Inds. Ltd.* v. *H.H. Dave, Asst. Collector* 1978 (2) E.L.T. (J444) (S.C)

Relationship between manufacturer & sole distributor though a special one is not a proof by itself to show that price is favourable price - *UOI* v. *Hind Lamps Ltd.* 1981 (8) E.L.T. 11 (Del.)

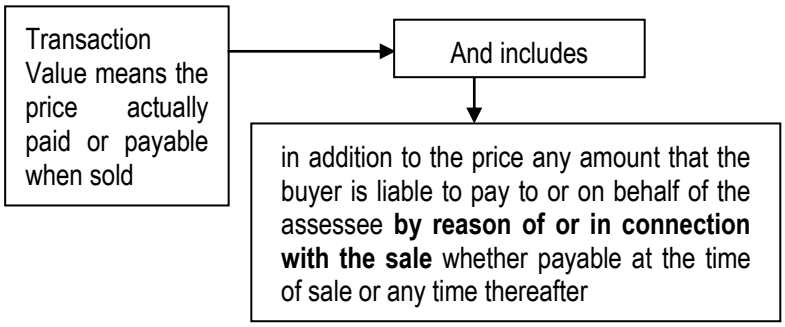
3.6 Ingredients of transaction value

It would be important to see that the definition of transaction value is an all inclusive definition which seems to extend its scope beyond the normal boundaries of central excise levy.

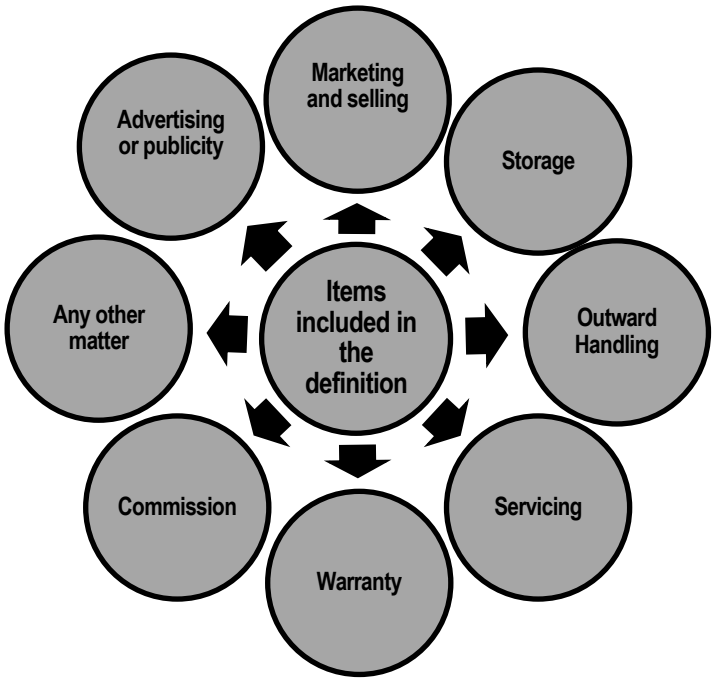
While it is true that such a definition is necessary when we have a full fledged VAT system, it is rather premature to include so many items within the parameters of excise, more so when the assesses are paying sales tax and service tax.

It is important to note that the Supreme Court has held in the context of customs law in *Associated Cement Companies Ltd*. v. *CC* 2000 (121) ELT 21 that the concept of transaction value is quite different from the concept of price and such value can include many items which may classically have been understood to be part of the sale price.

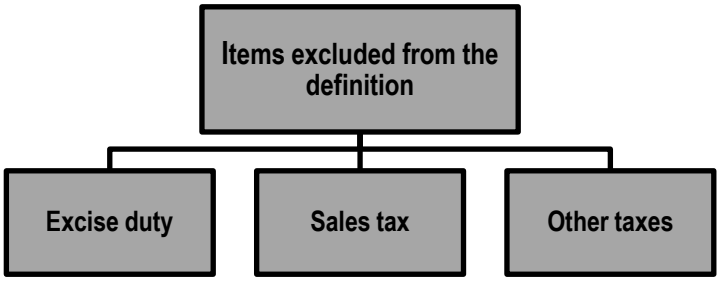
Let us analyse the definition of transaction value through the use of flow charts.



The definition also gives an illustration of what amounts are included as additions to price which the buyer may be liable to pay to or on behalf of the assessee. However, the definition specifically states as "including but not limited to" which clearly means that the items included in the definition are only illustrative and more may be includible.



It is clear that the above are includible only if the buyer is liable to pay for or on behalf of the assessee.



The above are not includible, if actually paid or payable.

It would be worthwhile to examine the issue of includibility or otherwise of certain items.

S. No	Items of Cost	Includibility or otherwise
1.	Advertising and publicity	Yes
2.	Warranty	Yes
3.	Marketing and selling	Yes
4.	Storage and outward handling	Yes
5.	Servicing	Yes
6.	Commission	Yes
7.	Discounts (Trade and Cash)	No. Since the same is already factored into the definition of transaction value. See also *CBEC Circular No. 354/81/2000-TRU, dated 30-6-2000* itself clarifies that reference to discounts in the definition of transaction value is not relevant since duty is to be charged on net price after allowing discounts. However, the Circular states that the discount should be actually passed on to the buyers.
8.	Erection, installation and commissioning	No. The erection, installation and commissioning charges should not be included in the assessable value, if the final product is not excisable.
9.	Packing	Yes. The durable and returnable packing is deductible.
10.	Taxes and duties	No. Specifically excluded by section.
11.	Interest on deposits, advances.	No.
12.	Accessories	No. See decision of Supreme Court in *Shriram Bearing Ltd* v. *CCE* 1997 *(91) E.L.T. 255*
13.	Dharmada	Yes. *[CBE&C Circular No. 763/79/2003 C.X. dated 21.11.2003]*
14.	Freight	No.

15.	Interest on delayed payment of receivables	No. Interest is nothing but finance charges and cannot be considered as payment by reason of sale.
16.	Warranty	The definition of transaction value itself includes warranty and service charges. It shall form a part of transaction value if it is recovered from buyer.
17.	Design, development and engineering charges	Yes, since it is by reason of sale or in connection with sale.
18.	Transit insurance	No, as it is part of transportation cost [Bombay Tyres International]. However, it should be shown separately in the invoice or can be included in the transportation cost shown separately.
19.	Delayed payment charges	No, as "transaction value" relates to the price paid or payable for the goods and delayed payment charge is nothing but the interest on the price of the goods which is not paid during the normal credit period. However, to be admissible as deduction it should be separately shown or indicated in the invoice and should be charged over and above the sale price of the goods.
20.	Pre-delivery inspection and after sale services	Yes, only if such charges are collected by the manufacturer *[Tata Motors Ltd. v. UOI 2012 (286) ELT 161 (Bom.)].*

However, the above is not conclusive in all cases and would be subject to interpretation of the Courts in future.

3.7 Situations where transaction value does not apply

As given in the chart for the valuation scheme under section 4 there are four conditions which have to be fulfilled.

(a) There should be sale of goods

(b) The goods sold should be for delivery at the time and place of removal

(c) The assessee and the buyer of the goods are not to be related persons

(d) The price should be the sole consideration for the sale.

In those cases where any of the above said requirements are missing, the assessable value shall be determined on the basis of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 notified under section 4(1)(b) by *Notification No. 45/2000-CE (NT), dated 30.6.2000*.

3.8 Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000

These rules were notified vide *Notification No. 45/2000-C.E. (N.T.) dated 30-6-2000.* They

came into effect from 01.07.2000. The text of the rules is given for the reference.

Rule - 1. (1) These rules may be called the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

(2) They shall come into force on and from the 1st day of July, 2000.

Rule - 2. In these rules, unless the context otherwise requires,-

(a) "Act" means the Central Excise Act, 1944;

(b) "normal transaction" means the transaction value at which the greatest aggregate quantity of goods are sold;

(c) "value" means the value referred to in Section 4 of the Act;

(d) words and expressions used in these rules and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

Rule - 3. The value of any excisable goods shall, for the purposes of clause (b) of sub-section (1) of section 4 of the Act, be determined in accordance with these rules.

Rule - 4. The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable to the proper officer.

Rule - 5. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstance in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal up to the place of delivery of such excisable goods.

Explanation 1 –"cost of transportation" includes-

(i) the actual cost of transportation; and

(ii) in case where freight is averaged the cost of transportation calculated in accordance with generally accepted principles of costing.

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

Rule - 6. Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

Provided that where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to such assessee, the

value of such goods shall be deemed to be the transaction value.

Explanation 1 - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of change or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely:-

(i) value of materials, components, parts and similar items relatable to such goods;

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

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

(iv) value or engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

Explanation 2 - Where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit.

Illustration 1: X, an assessee, sells his goods to Y against full advance payment at ₹100/- per piece. However, X also sells such goods to Z without any advance payment at the same price of ₹100/- per piece. No notional interest on the advance received by X is includible in the transaction value.

Illustration 2: A, an assessee, manufactures and supplies certain goods as design and specification furnished by B at a price of ₹10 lakhs. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. There is no evidence available with the Central Excise Officer that the notional interest on the advance has resulted in lowering of the prices. Thus, no notional interest on the advance received shall be added to the transaction value.

Rule - 7. Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment.

Rule - 8. Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other

articles, the value of such goods that are consumed shall be 110% of the cost of production or manufacture of such goods.

Rule - 9. Where whole or part of the excisable goods are sold by the assessee to or through a person who is related in the manner specified in any of the sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of such goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail;

Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.

Rule - 10. Where whole or part of the excisable goods are sold by the assessee to or through an inter-connected undertaking, the value of such goods shall be determined in the following manner, namely:-

(a) If the undertakings are so connected that they are also related in terms of sub-clause (ii) or (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act or the buyer is a holding company or subsidiary company of the assessee, then the value shall be determined in the manner prescribed in rule 9.

Explanation- In this clause "holding company" and "subsidiary company" shall have the same meanings as in the Companies Act, 1956[4];

(b) in any other case, the value shall be determined as if they are not related persons for the purpose of sub-section (1) of section 4.

Rule - 10A. Where the excisable goods are produced or manufactured by a job-worker, on behalf of a person (hereinafter referred to as principal manufacturer), then,-

(i) in a case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer;

(ii) in a case where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place from where the said goods are to be sold after their clearance from the factory of job-worker and where the principal manufacturer and buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of said goods from the factory of job-worker;

(iii) in a case not covered under clause (i) or (ii), the provisions of foregoing rules, wherever applicable, shall mutatis mutandis apply for determination of the value of the excisable goods:

[4] Companies Act, 2013

Provided that the cost of transportation, if any, from the premises, wherefrom the goods are sold, to the place of delivery shall not be included in the value of excisable goods.

Explanation. - For the purposes of this rule, job-worker means a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him.

Rule - 11. If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act.

3.9 Analysis of the Valuation Rules

The salient features of the Valuation Rules are as under:-

According to **rule 3** the valuation rules is invokable only when the condition in section 4(1)(b) is satisfied that is to say when the valuation is not possible as per section 4(1)(a). When the goods are clearly valued according to section 4(1)(a) itself then there is no question of applying the valuation rules.-

Rule 4 requires adjustment for the differences in the time of removal and the time of delivery when the delivery time is different from the time of removal. This rule will apply in situations where the asseseee does not sell goods at the time of removal of goods. Thus, situations like removal of free samples or free replacement under warranty claims will be covered under this rule. Valuation of such free samples or replacement will be based on price of identical goods sold by the assessee near about the time of removal of such free samples or replacements.

Valuation of samples: Value of samples distributed free as part of marketing strategy or as gifts or donations shall be determined under Rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 *[Circular No. 813/10/2005-CX dated 25.04.2005]*.

Rule 5 provides for the valuation when all the conditions as per section 4(1)(a) which are mentioned earlier are fulfilled except for the condition that the place of delivery is different from the place of removal. In such circumstances the rule allows the adjustment for the transportation from the place of removal to the place of delivery. The actual transportation cost may be excluded on an averaged or equalized basis. For this purpose, the average transportation cost shall be computed in accordance with the generally accepted principles of costing. Where necessary, the assessee may be asked to furnish certification from a Cost Accountant, inter alia, showing the computations separately in respect of the exempted, non-excisable and specific rated products and the basis for apportionment for arriving at the average cost of transportation.

However, no deduction shall be allowable whether on actual or equalized freight basis, for the cost of transportation from the factory to the point of removal (if other than the factory gate). Since as per the amended section 4, “place of removal” shall include a depot, the premises of the consignment agent as well as any other place or premises from which the goods are to be sold after their clearance from the factory, it may be noted that deduction in respect of the transportation cost from the factory premises to the depot or to any other place of removal shall not be allowed.

In other words, the deduction of average freight or actual freight is only in respect of cost of transportation beyond the place of removal when the goods are sold for delivery at a place

other than the place of removal. In case of a depot, the cost of transportation upto the point of depot or any other place from where the goods are sold will continue to be included.

Cost of transportation when vehicle is owned by the manufacturer: In cases where the vehicle is owned by the manufacturer, the cost of transportation can be calculated through costing method following the accepted principles of costing. A cost certificate from a certified Cost Accountant/Chartered Accountant/Company Secretary, may be accepted. The cost of transportation should, however, be separately shown in the invoice *[Circular No.643/34/2002 CX dated 1st July 2002]*

Cost of return fare not to be added for determining value: It has been clarified vide *Circular No. 923/13/2010 – CX dated 19.05.2010* that cost of return fare of vehicles is not required to be added for determining value.

Rule 6 takes up another condition and continues to say that other conditions as said above are being fulfilled except for the condition of consideration to be received for such goods. If the price received is not the sole consideration, then the rule requires to add the value of the additional consideration whether directly or indirectly received (not necessarily from the buyer, it may be received even from the third party but which should have relation with the goods being transferred) to the transaction value.

Where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to such assessee, the value of such goods shall be deemed to be the transaction value.

In Explanation 1 to **Rule 6** it is said that when any goods or services are given by the buyer free of cost or at concessional price, the value of such goods or service or the concession so received may be added or apportioned (in case such goods or service is used for the manufacture of more than one product) and should be included in the value of the finished goods. The examples given in the said explanation as to the goods and services are :

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

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

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

(e) value or engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods

Example:

1. A sells goods to B who supplies some raw materials free of cost to facilitate the manufacture process. The additional consideration represented as free raw materials has to be added in terms of Rule 6.

2. If X, a manufacturer, receives a subsidy from the buyer even if it is under the policy of Government it will be treated as additional consideration. However, if X himself manufactures

patterns and clears them with castings and duty is discharged on transaction value rule 6 is not applicable.

3. X, a manufacturer, bills ₹ 5 lakhs towards design charges and shows the same separately in the invoice along with the price of the material A. In the given case, the value of the design charges will be included in the assessable value of material A only if such design charges are related to the material A and not merely because it is shown in the invoice along with material A.

Explanation 2 to Rule 6 clarifies that where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit.

Rule 7 says that in cases where the goods are not sold at the factory gate or at the warehouse but they are transferred by the assessee to his depots or consignment agents or any other place for sale, the assessable value in such case for the goods cleared from factory/warehouse shall be the normal transaction value of such goods at the depot, etc. at or about the same time at which the goods as being valued are removed from the factory or warehouse.

It may be pertinent to take note of the definition of "normal transaction value" as given in the valuation rules. What it basically means is the transaction value at which the greatest aggregate quantity of goods from the depots etc. are sold at or about the time of removal of the goods being from the factory/warehouse. If, however, the identical goods are not sold by the assessee from depot/consignment agent's place on the date of removal from the factory/warehouse, the nearest date/time on which such goods were sold or would be sold shall be taken into account.

In either case if there are series of sales at or about the same time, the normal transaction value for sale to independent buyers will have to be determined and taken as basis for valuation of goods at the time of removal from factory/warehouse. It follows from the Valuation Rules that in such categories of cases also if the price charged is with reference to delivery at a place other than the depot, etc. then the actual cost of transportation will not be taken to be a part of the transaction value and exclusion of such cost allowed on similar lines as discussed earlier, when sales are effected from factory gate/warehouse.

Where the valuation in the above discussed manner is not possible, the assessee may opt for provisional assessment and discharge the duty at estimated values. At periodic intervals the same should be adjusted for actual values.

Greatest aggregate quantity: *Circular No.643/34/2002 CX dated 1st July 2002* has clarified *inter alia* that with reference to the term **"greatest aggregate quantity"** the time period should be taken as the whole day and the transaction value of the **"greatest aggregate quantity"** would refer to the price at which the largest quantity of identical goods are sold on a particular day, irrespective of the number of buyers.

In case the **"normal transaction value"** from the depot or other place is not ascertainable on the day identical goods are being removed from the factory/warehouse, the nearest day when clearances of the goods were affected from the depot or other place should be taken into consideration

Example: Goods are transferred from Chennai factory to Bangalore branch on 17.3.20XX. The normal transaction value at Bangalore branch on 17.3.20XX is to be adopted. If there is no such value available for 17.3.20XX, the transaction value at the nearest time, for instance, 16.3.20XX can be adopted.

Rule 8 provides to value goods which are captively consumed on cost construction method. The assessable value of captively consumed goods is taken at 110% of the cost of manufacture of goods even if identical or comparable goods are manufactured and sold by the same assessee. A margin of 10% by way of profit etc. is prescribed in the rule itself for ease of assessment of goods used for captive consumption. This rule is applicable irrespective of whether the whole or a part of the clearances of manufactured goods are captively consumed.

The Supreme Court in *CCE v. Cadbury India Ltd. 2006 (200) ELT 353 (SC)* has held that intermediate products (milk crumbs, refined milk chocolate and four other intermediate products) captively consumed in own factory is neither sold nor marketable and therefore, advertising, insurance and other expenses of factory which produces final product (chocolates) are not includible for valuation of intermediate products i.e., for ascertaining the cost of production.

Cost of production to be computed as per CAS-4: CBE&C, vide *Circular No. 692/8/2003 dated 13-2-2003*, has clarified that for the purpose of valuation of excisable goods in case of captive consumption as per Rule 8 of Central Excise Valuation Rules, 2000, calculation of cost of production should be as per CAS-4 issued by Institute of Cost Accountants of India. Cost Accounting Standard – 4 is given below in a summarized form.

Cost of production will include various cost components as defined in Cost Accounting Standard-1 ('Classification of Cost' – CAS-1). The various cost components are:

Direct Material Cost	Prime Cost	Cost of Production	Cost of Sales
+	**+**	**+**	**+**
Direct Labour Cost	Production Overheads	Selling Cost	Profit
+	**+**	**+**	**=**
Direct Expenses	Administration Overheads	Distribution Cost	**Selling Price**
=	**+**	**=**	
PRIME COST	Research & Development Expenses (Apportioned)	**COST OF SALES**	
	=		
	Cost of Production		

Cost of Production: Cost of production shall consist of Material Consumed, Direct Wages and Salaries, Direct Expenses, Works Overheads, Quality Control cost, Research and Development Cost, Packing cost, and Administrative Overheads relating to production.

To arrive at cost of production of goods dispatched for captive consumption, adjustment for Stock of work-in-Process, finished goods, recoveries for sales of scrap, wastage etc shall be made.

Material Consumed shall include materials directly identified for production of goods such as indigenous materials, imported materials, bought out items, self manufactured items, process materials and other items

Cost of material consumed shall consist of cost of material, duties and taxes, freight inwards, insurance, and other expenditure directly attributable to procurement. Trade discount, rebates and other similar items will be deducted for determining the cost of materials. Cenvat credit, credit for countervailing customs duty, Sales Tax set off, VAT, duty draw back and other similar duties subsequently recovered/ recoverable by the enterprise shall also be deducted.

Direct wages and salaries shall include house rent allowance, overtime and incentive payments made to employees directly engaged in the manufacturing activities.

Direct wages and salaries include fringe benefits such as contribution to provident fund and ESIS, bonus/*ex-gratia* payment to employees, provision for retirement benefits such as gratuity and superannuation, medical benefits, subsidised food, leave with pay and holiday payment, leave encashment and other allowances such as children's education allowance, conveyance allowance which are payable to employees in the normal course of business etc.

Direct expenses are the expenses other than direct material cost and direct employees costs which can be identified with the product.

Direct expenses include cost of utilities such as fuel, power, water, steam etc, royalty based on production, technical assistance/know –how fees, amortized cost of moulds, patterns, patents etc, job charges, hire charges for tools and equipment, and charges for a particular product designing etc.

Works overheads are the indirect costs incurred in the production process. Works overheads include consumable stores and spares, depreciation of and machinery, factory building etc, lease rent of production assets, repair and maintenance of plant and machinery, factory building etc, indirect employees cost connected with production activities, drawing and designing department cost., insurance of plant and machinery, factory building, stock of raw material & WIP etc., amortized cost of jigs, fixtures, tooling etc and service department cost such as tool room, engineering & maintenance, pollution control etc.

Quality control cost is the expenses incurred relating to quality control activities for adhering to quality standard. These expenses shall include salaries & wages relating to employees engaged in quality control activity and other related expenses.

Research and development cost incurred for development and improvement of the process or the existing product shall be included in the cost of production.

Administrative overheads in relation to production activities shall be included in the cost of production. Administrative overheads in relation to activities other than manufacturing activities e.g. marketing, projects management, corporate office expenses etc. shall be excluded from the cost of production.

Packing cost includes both cost of primary and secondary packing required for transfer/ dispatch of the goods used for captive consumption. If product is transferred/dispatched duly packed for captive consumption, cost of such packing shall be included.

Overheads shall be analysed into variable overheads and fixed overheads. The variable production overheads shall be absorbed in production cost based on actual capacity utilisation. The fixed production overheads and other similar item of fixed costs such as quality control cost, research and development costs, administrative overheads relating to manufacturing shall be absorbed in the production cost on the basis of the normal capacity or actual capacity utilization of the plant, whichever is higher. **Normal Capacity** is the production achieved or achievable on an average over a period or season under normal circumstances taking into account the loss of capacity resulting from planned maintenance (CAS-2).

Stock of work-in-progress shall be valued at cost on the basis of stages of completion as per the cost accounting principles. Similarly, stock of finished goods shall be valued at cost. Opening and closing stock of work-in-progress shall be adjusted for calculation of cost of goods produced and similarly opening and closing stock of finished goods shall be adjusted for calculation of goods despatched. In case the cost of a shorter period is to be determined, where the figures of opening and closing stock are not readily available, the adjustment of figures of opening and closing stock may be ignored.

In case **joint products** are produced, joint costs are allocated between the products on a rational and consistent basis. In case **by-products** are produced, the net realisable value of by-products is credited to the cost of production of the main product.

For allocation of joint cost to joint products, the sales values of products at the split off point i.e. when the products become separately identifiable may become the basis. Some other basis may also be adopted. For example, in case of petroleum products, each product is assigned certain value based on its certain properties, may be calorific value and these values become the basis of apportionment of joint cost among petroleum products.

The production process may generate **scrap or waste**. Realized or realizable value of scrap or waste shall be credited to the cost of production. In case, scrap or waste does not have ready market and it is used for reprocessing, the scrap or waste value is taken at a rate of input cost depending upon the stage at which such scrap or waste is recycled. The expenses incurred for making the scrap suitable for reprocessing shall be deducted from value of scrap or waste.

Miscellaneous income relating to production shall be adjusted in the calculation of cost of production, for example, income from sale of empty containers used for despatch of the captively consumed goods produced under reference.

Inputs received free of cost: In case any input material, whether of direct or indirect nature, including packing material is supplied free of cost by the user of the captive product, the

landed cost of such material shall be included in the cost of production.

The amortization cost of **moulds, tools, dies & patterns etc** received free of cost shall be included in the cost of production.

Interest and financial charges being a financial charge shall not be considered to be a part of cost of production.

Abnormal and non-recurring cost arising due to unusual or unexpected occurrence of events, such as heavy break down of plants, accident, market condition restricting sales below normal level, abnormal idle capacity, abnormal process loss, abnormal scrap and wastage, payments like VRS, retrenchment compensation, lay-off wages etc. The abnormal cost shall not form the part of cost of production.

The cost sheet should be prepared in the format as per Appendix – 1 or as near thereto as possible.

Statement of Cost of Production of _____ manufactured / to be manufactured during the period _____

		Qty	
Q1	Quantity Produced (Unit of Measure)		
Q2	Quantity Despatched (Unit of Measure)		

	Particulars	Total Cost (₹)	Cost/unit (₹)
1.	Material Consumed		
2.	Direct Wages and Salaries		
3.	Direct Expenses		
4.	Works Overheads		
5.	Quality Control Cost		
6.	Research & Development Cost		
7.	Administrative Overheads (relating to production activity)		
8.	Total (1 to 7)		
9.	Add: Opening stock of Work - in –Progress		
10.	Less: Closing stock of Work -in- Progress		
11.	Total (8+9-10)		
12.	Less: Credit for Recoveries/Scrap/By-Products / misc income		
13.	Packing cost		
14.	Cost of production (11 - 12 + 13)		
15.	Add: Inputs received free of cost		
16.	Add: Amortised cost of Moulds, Tools, Dies & Patterns etc received free of cost		

17.	Cost of Production for goods produced for captive consumption (14 + 15 + 16)		
18.	Add : Opening stock of finished goods		
19.	Less : Closing stock of finished goods		
20.	Cost of production for goods despatched (17 + 18 - 19)		

It should also be noted that Rule 8 is applicable only in cases where excisable goods are not sold but are cleared for captive consumption.

Rule 9 speaks of the situation where the whole or part of the goods are sold to or through a related person (except inter-connected undertakings which is dealt in Rule 10). In such cases the transaction value is not applicable. Here, the value to be adopted will be the price at which such related person sells to unrelated person.

If such related person sells it to another related person, then the price at which the second related person sells to unrelated person. Further, it is said when such related person uses such goods in the manufacture of other goods (captively consumed) then the valuation will be based on the principle of cost plus 10% as per Rule 8.

Example: X sells to its brother Y at ₹1000. Normal transaction value at which Y sells to unrelated buyers is ₹1200. By application of Rule 9 value in hands of X ,would be ₹1200.

The definition of inter-connected undertaking includes two or more undertakings which are inter-connected with each other in any of the ways such as if one owns or controls the other, or where the undertakings are owned by firm, if such firms have one or more common partners, etc.

Rule 10 is applied in situations where whole or part of the goods are sold to or through inter connected undertakings and

(a) the buyer is a holding or subsidiary of assessee or

(b) if it is related as per clause (ii),(iii) or (iv) of sections 4(3)(b).

In such cases, valuation will be based on rule 9 i.e., the assessable value will be the normal transaction value of buyer to unrelated persons.

In all other cases, the sale will be treated as a sale to unrelated person and concepts relating to transaction value will apply if the other two conditions, namely, price is for delivery at the time and place of removal and the price is the sole consideration for sale are satisfied. If any of the two aforesaid conditions are not satisfied then, quite obviously, value in such cases will be determined under the relevant rule.

Example: M/s A & Co is a partnership firm that has 2 partners A, B. Goods are sold to M/s B& Co that has 3 partners B, X,Y. The two firms are interconnected as there is a common partner. Unless it is established that there is mutuality of business between the two firms, transaction value would prevail.

Rules 8, 9 and 10 apply irrespective of whether the whole or a part of the clearances of manufactured goods are covered by the circumstances given in these rules. Each clearance is required to be assessed according to section 4(1)(a) or the relevant rule dealing with the circumstances of clearance of the goods, as the case may be.

For example, if an assessee clears his goods in such a way that first removal of goods is to an independent buyer, second removal is to such a related person who is covered under rule 9 and third removal is to a person who is covered under rule 10, while some goods are captively consumed, then the first removal should be assessed under section 4(1)(a), second removal should be assessed under rule 9 and third removal should be assessed under rule 10, while captively consumed goods should be assessed under rule 8 of these rules. It may be noted that Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 are not required to be followed sequentially.

Rule 10A provides for valuation in case of job-work. The rule provides that where goods are manufactured by a job-worker on behalf of a person (commonly known as principal manufacturer), the value for payment of excise duty would be based on the sale value at which the principal manufacturer sells the goods, as against the past practice where the value was taken as cost of raw material plus the job charges.

Where the goods are sold by the principal manufacturer from the factory of the job worker's factory, the price charged by the principal to his customer would have to be taken as the value on which duty would have to be paid at the applicable rate. If the buyer is related to the principal manufacturer, the valuation would have to be done as in case of clearances to related parties.

Where the goods are not removed for sale from the job worker's factory but cleared to some other premises of the principal from where the goods are sold, the valuation at the time of removal from the job worker's premises would be similar to what is followed under rule 7 i.e., normal transaction value of goods sold from such other place at the time of removal from the factory of the job worker or the time nearest to time of removal where such goods are not sold at the time of removal from the factory of the job worker.

Manufacture of motor vehicles by sending the chassis of the motor vehicles to independent body builders for building the body as per the design/specification of the manufacturer: *Circular No. 902/22/2009-CX dated 20.10.2009* has clarified the issue as under:

Issue	Clarification
Some manufacturers of Motor Vehicles were getting complete Motor Vehicles manufactured by sending the Chassis of the Motor Vehicles to independent body builders for building the body as per the design/specification of the manufacturer. Following practice was being followed:- Chassis was transferred to the body builder on payment of appropriate excise duty on stock transfer basis and was not sold to them. The body builder availed the CENVAT credit of the duty paid on the chassis and cleared the same	It has been clarified that:- 1. Wherever goods are manufactured on job work basis, their value would be determined in terms of the provisions of rule 10A subject to fulfillment of the requirements of the said rule. 2. Rule 10A(ii) stipulates that the assessable value, in the cases where the job-worker transfers the excisable goods to the Depot/Sale office/Distributor and/or any other

on payment of duty to the Depot/Sales Office/Distributor of the Motor Vehicle (MV) manufacturer. The duty was discharged by the body builder on the assessable value comprising the value of Chassis and the job charges i.e. cost construction method. The Depot/Sales office of the MV manufacturer sold the vehicles at a higher price than the price on which duty had been paid.	sale point of the principal manufacturer, shall be the **transaction value on which goods are sold by the principal manufacturer from such a place**. 3. Accordingly, after the insertion of rule 10A, the practice of discharging the duty on cost construction method by the body builder is not legally correct.

Rule 11 is a residuary rule, which says when the value of any excisable goods cannot be determined under any of the aforesaid rules, the value shall be determined using reasonable means which are consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act.

The Supreme court in case of *United Glass Vs. Collector, 1995 (75) ELT 209 (SC)* has held that Rule 11 being in the nature of residuary rule is applicable only when the value cannot be determined under any rule.

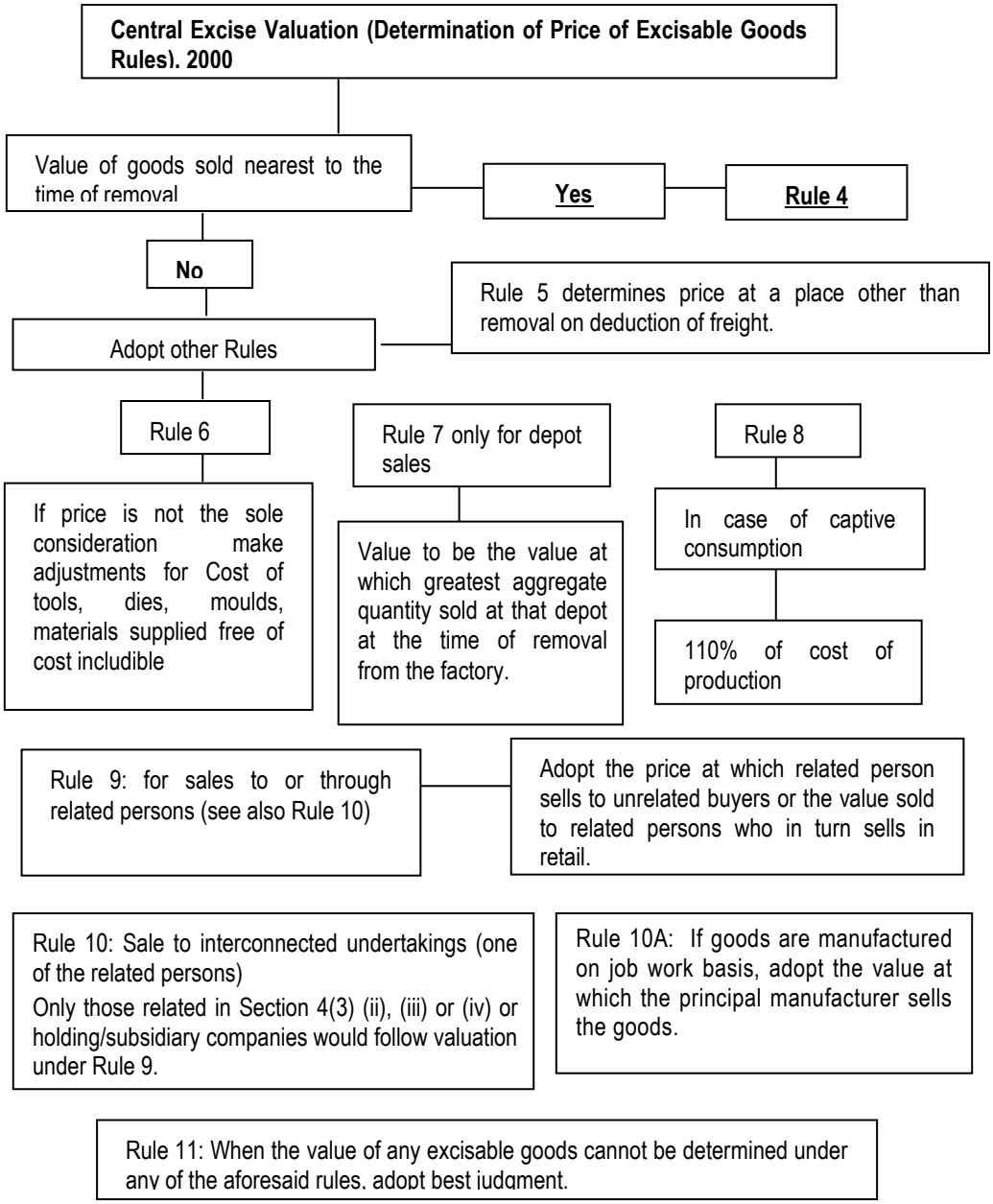
3.9.1 The rules can be summarized through the chart on page 3.30.

3.10 Valuation under different circumstances

3.10.1 Assessable value where the raw material is provided by the customer: The value of the raw material supplied by the customer would form a part of the assessable value. The fact that the manufacturer does not pay for the raw material is immaterial. The matter stands concluded by the judgement of the Supreme Court in the case of *Burn Standard Co. Ltd. Vs. UOI – (1991) 36 ECC-1(SC)*. In this case the assessee manufactured wagons for Railways. The latter supplied wheel sets and certain other items free of cost. The price charged for the vehicle did not include the value of the items supplied free of cost. The Supreme Court held that free supply items like wheel sets etc. form part of the complete wagon and would lose their identity. It hardly matters as to how and in what manner the components of wagons were procured by the manufacturer. The assessee would be liable to pay duty on the normal price of the wagon. The present Valuation Rules follow this.

3.10.2 Effect of price escalation subsequent to the removal of goods, on the assessable value: The excess amount realised under an escalation clause would form part of the assessable value and thus attract central excise duty.

If the goods are removed on payment of duty, based on declared price, subsequent reduction of price for whatever reason, including Government interference, would not create a claim for refund of central excise duty paid on the quantum of price reduced.



3.10.3 In cases where interest is made payable after the general credit period is over, such interest will not form part of the assessable value:

Example: Assessee charges ₹100/- per unit for his goods, if the payment is made within 45 days. ₹100/- per unit will of course include the interest component pertaining to the general

credit period of 45 days. Even if the payment is made at the time of delivery ₹100/- would be the assessable value, irrespective of the possible inclusion of interest element in the price. If the assessee charges ₹102/- per unit after 45 days and ₹2/- per unit is identifiable as being relatable to time lag in payment, this amount of ₹2/- per unit will not form a part of the value. This is based on the decision of the Supreme Court *in GOI vs MRF Ltd. 1995 (77) ELT 433.*

3.10.4 Role of notional interest on the advances/deposits taken by the manufacturer from the buyer in influencing the assessable value: Interest on advance deposits is includible in the assessable value only if there is a nexus between the advance deposit and the sale price. The ratio decided in the *Metal Box case – 1995 (75) ELT 449(SC)* requires, before adding notional interest, establishment of the facts that the interest free advance reflected favoured or special treatment and that advances had the effect of pegging down the wholesale price. If the assessee charges the same price from those who give advances and those who do not, the question of including notional interest on advances does not arise – *VST Industries Ltd vs CCE 1998 (97) ELT 395 (SC).*

3.10.5 Value of trade mark and assessable value: Where a manufacturer is the owner of the brand name, the price including the value of the brand name, at which he sells the goods in the course of wholesale trade, would constitute the normal price. But where the goods are manufactured by somebody else and then sold to a dealer who owns the brand name, the value of the brand name cannot be added for computing the assessable value for the brand name owner cannot be treated as manufacturer and the price at which the brand name owner sells the goods cannot be taken as assessable value.

3.10.6 Consultancy /technical services and assessable value: The costs towards drawing, designing and technical specifications are clearly elements of machinery costs and are to be included in the assessable value. However, the cost towards project report, plant layout, civil works and training are in the nature of services and are not includible in the assessable value.

3.10.7 Excess amounts charged to customer whether dutiable: If the amounts recovered from the customers is in excess of expenditure actually incurred on permissible deductions, the excess amount will form part of the assessable value.

Amount charged and recovered from customers by separate bills will be considered as gross receipts or cum duty price and duty payable is to be calculated after working out the assessable value from the gross receipts.

3.10.8 Handling cost and assessable value: Handling cost incurred before the clearance of the goods from the place of removal is includible in the assessable value.

3.10.9 Assessable value in case of repair activities: If the assessee replaces certain parts while repairing a manufactured product, he is liable to pay duty only on value of spare parts manufactured and used in the said manufactured product.

3.10.10 Maintenance charges, whether part of assessable value: Maintenance charges (being optional and distinct from warranty obligations), and site service charges recovered for rendering special services are not includible in the assessable value. But if the price is marked up to cover servicing costs, *prima facie* such amount would form a part of the assessable value.

3.10.11 Cost of preventive maintenance service contract: This cost for life time service of vehicle would not form part of assessable value for excise [*Commissioner v. Volvo India Ltd. - 2009 (240) E.L.T. A82 (S.C.)].*

3.10.12 Repair and maintenance charges and machine hire charges: These charges would not form part of assessable value [*Commissioner v. Dhillon Kool Drinks & Beverages - 2009 (238) E.L.T. A26 (S.C.)].*

3.11 Maximum Retail Price (MRP) based valuation [Section 4A]

The provisions relating to duty based on MRP are dealt with under section 4A. Section 4A was introduced to fight the evil of manufacturers transferring cost to trading companies and reducing the excise duty payable by them.

The provisions of section 4A are discussed below:

(a) Excisable goods can be valued on the basis of MRP under section 4A, if Legal Metrology Act, 2009 or related rules or any other law requires declaration of the retail sale price on the package of such goods **and** the Central Government has notified said goods for the purpose of this section [sub-section (1)]. Thus, both the conditions need to be followed cumulatively i.e., declaration under Legal Metrology Act, 2009 and notification under section 4A.

(b) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, the valuation has to be done on the basis of retail sale price declared on the package less abatement as prescribed in the notification issued by the Central Government under sub-section (1) [sub-section (2)]. Abatements can be given by the Central Government after taking into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods [sub-section (3)].

(c) The 'retail sale price' has been defined to mean the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale.

However, if the provisions of the Act, rules or other law referred to in (a) above requires the retail sale price to exclude any taxes, local or otherwise, the retail sale price shall be construed accordingly [explanation 1].

(d) It is also stated that where there is more than one retail sale price, the maximum of such retail sale price will be deemed to be the retail sale price for the purpose of this section [Explanation 2(a)].

(e) The excisable goods shall be confiscated and the retail sale price will be ascertained in the manner prescribed by the Central Government if the manufacturer does any of the following acts:

(i) removes excisable goods from the place of manufacture, without declaring the retail sale price of such goods on the packages, or

(ii) declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law referred to in (a) above or

(iii) tampers with, obliterates or alters the retail sale price declared on the package of such goods after their removal from the place of manufacture [sub-section 4].

(f) Where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates [explanation 2(c)].

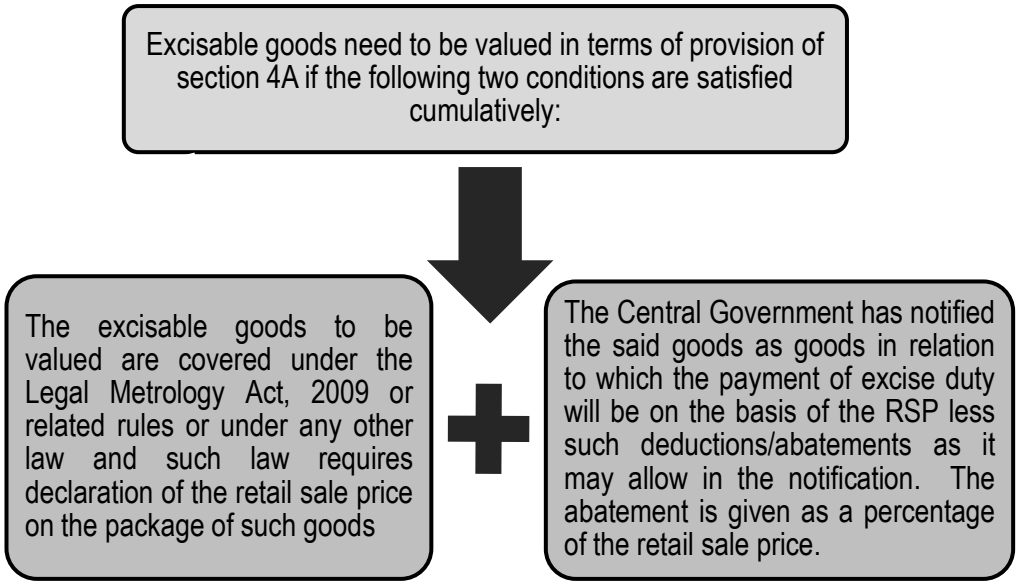
(g) If the retail sale price declared on the package of any excisable goods at the time of its clearance from the place of manufacture, is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price [explanation 2(b)].

ANALYSIS

3.11.1 Statutory requirement of declaring retail sale price on the package of notified excisable goods is a pre-requisite for applying section 4A :

The provisions of section 4A of Central Excise Act, 1944 would apply only if a particular product [on which declaration of the retail sale price is required as per the Legal Metrology Act, 2009] is also notified with abatement under provisions of the Central Excise Act. Otherwise, such product will be valued as per section 4 of the Central Excise Act, 1944 or as per section 3(2) of the Central Excise Act, 1944, if tariff values have been fixed for the commodity.

For instance, hand tools require MRP to be printed on package. However, these are not notified under section 4A. Therefore, shall not be valued on basis of MRP less abatment under section 4A of the Central Excise Act.



A. **MRP provisions are overriding provisions:** MRP provisions override the provisions of section 4. In other words, when the provisions of section 4A are applicable, the assessable value shall be determined on the basis of MRP less abatement and not on the basis of section 4 of the Act.

B. **When is MRP required to be declared?:** Let us now understand on what kind of goods the provisions of Legal Metrology Act, 2009 and rules made thereunder are applicable. **The provisions requiring MRP declaration apply only to package intended for retail sale.** Thus, MRP declaration will not be required if good are sold in bulk or they are not packed or they are not intended for retail sale.

Section 18(1) of Legal Metrology Act, 2009 provides that no person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any **pre-packed commodity** *(commodity placed in a package without buyer being present, containing a pre-determined quantity)* unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed under Legal Metrology (Packaged Commodities) Rules, 2011.

Legal Metrology (Packaged Commodities) Rules, 2011, *inter alia*, envisage two types of packages – (a) Retail package and (b) Wholesale package.

Rule 6(1)(e) provides that every package intended for retail sale shall, inter alia, have declaration of the retail sale price of the package.

'Retail sale price' means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and the price shall be printed on the package in the manner given below;

'Maximum or Max. retail price.....Rs……/₹……inclusive of all taxes or in the form MRP Rs...../₹……incl., of all taxes after taking into account the fraction of less than

fifty paise to be rounded off to the preceding rupee and fraction of above 50 paise and up to 95 paise to the rounded off to fifty paise [Rule 2(m) of Legal Metrology (Packaged Commodities) Rules, 2011].

'Retail package' means the packages which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein and includes the imported packages [Rule 2(k) of Legal Metrology (Packaged Commodities) Rules, 2011].

'Retail sale', in relation to a commodity, means sale, distribution or delivery of such commodity through retail sale shops, agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer [Rule 2(l) of Legal Metrology (Packaged Commodities) Rules, 2011].

C. **Non-applicability of MRP provisions:** The provisions of marking MRP are not applicable to the following:

(a) **Packages above 25kg/ 25litre:** Provisions do not apply to packages of commodities containing quantity of more than 25 kg or 25 litre [excluding cement and fertilizer sold in bags up to 50 kg].

(b) **Packaged commodities meant for industrial consumers or institutional consumers:** Provisions do not apply to packaged commodities meant for industrial consumers or institutional consumers (this exclusion is irrespective of weight or volume of package).

'Industrial consumer' means the consumer who buys packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that industry and the package shall have declaration 'not for retail sale' [Rule 2(bb) of Legal Metrology (Packaged Commodities) Rules, 2011].

'Institutional consumer' means the institution who hires or avails of the facilities or services in connection with transport, hotel, hospital or other organisation which buy packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that institution, and the package shall have declaration 'not for retail sale'.[Rule 2(bc) of Legal Metrology (Packaged Commodities) Rules, 2011].

(c) **Wholesale packages:** Retail sale price is required to be declared only on packages intended for retail sale and not on wholesale packages. The valuation of wholesale packages will be as per section 4 of the Central Excise Act, 1944.

'Wholesale package' means a package containing:

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

(ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in similar quantities; or

(iii) packages containing ten or more than ten retail packages provided that the retail packages are labelled as required under the rules [Rule 2(r) of Legal Metrology (Packaged Commodities) Rules, 2011].

(d) **Small packages of 10gm/10 ml or less:** Provisions do not apply to packages containing commodity if the net weight or measure of the commodity is ten gram or ten millilitre or less, if sold by weight or measure. However, the provisions of this clause shall not be applicable for tobacco and tobacco products.

(e) **Fast food items:** Provisions do not apply to any package containing fast food items packed by restaurant or hotel and the like.

(f) **Scheduled drugs and formulations:** Provisions do not apply to package containing scheduled formulations and non-scheduled formulations covered under the erstwhile Drugs (Price Control) Order, 1995 [now DPCO, 2013] made under section 3 of the Essential Commodities Act, 1955.

(g) **Agricultural farm produce:** Provisions do not apply to agricultural farm produces in packages of above 50 kg.

(h) **Thread sold in coils to handloom weavers:** Provisions do not apply to any thread which is sold in coil to handloom weavers.

(i) **Bidis for retail sale:** Declaration of retail price is not required on any package containing bidis.

(j) **Domestic LPG gas:** MRP is not required to be indicated in domestic LPG of which the price is covered under Administrative Price Mechanism of Government.

D. **Same product partly sold in retail and partly in wholesale:** CBE&C has clarified in *Circular No. 625/16/2002-CX dated 28.02.2002* that when goods covered under section 4A are supplied in bulk to large buyer (and not in retail), valuation is required to be done under section 4. Provisions of section 4A apply only where manufacturer is legally obliged to print MRP on the packages of goods. Thus, there can be instances where the same commodity would be partly assessed on basis of section 4A and partly on basis of transaction value under section 4.

E. **Valuation of free samples of the product assessed on the basis of MRP:** As explained earlier, *Circular No. 813/10/2005-CX dated 25.4.2005* clarifies that in the case of free samples, the value should be determined under rule 4.

The CBEC has further clarified vide *Circular No. 915/05/2010-CX dated 19.02.2010* that in respect of the free samples of the products covered under MRP based assessment, the valuation of these samples shall also be done under rule 4 of the valuation rules by taking into consideration the deemed value under section 4A(1) notwithstanding the non availability of normal price under section 4(1)(a) of the Act. Accordingly, the value for

excise duty would be determined under section 4A for the similar goods (subject to adjustment for size, pack etc.).

F. Some important decisions:

1. **Provisions applicable to all packaged commodities:** The provision of Legal Metrology Act applies to all pre-packaged commodities. Specific notification indicating classes of goods is not required *[Khaitan Electricals v. UOI (2011) 267 ELT 185 (Kar.) and Reebok India Co. v. UOI (2011) 270 ELT 513 (Kar.)]*
2. **Provisions not applicable if product is not packed:** Provisions of Legal Metrology Act do not apply to sale of a car *[Mahindra and Mahindra v. Director of Standards of Weights and Measures (2011) 272 ELT 488 (Ker.)].*
3. **Outer packaging for protection/safety during transportation not wholesale package:** Such packaging does not require details like name/address, cost, month year etc. *[State of Maharashtra v. Raj Marketing (2011) 272 ELT 8 (SC)]*. Therefore, valuation of such package will be done on the basis of section 4A i.e., RSP less abatement.

Examples of some goods that are notified along with percentage of abatement under section 4A is as follows:		
(i)	Biscuits	30%
(ii)	Toothbrush	30%
(iii)	Photographic cameras	30%
(iv)	Pressure cooker	25%

3.11.2 Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008: Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 determine the retail sale price of any excisable goods under sub-section (4) of section 4A of the Act.

Rule 4 provides that where a manufacturer removes the excisable goods:

(a) without declaring the retail sale price on the package or

(b) by declaring the retail sale price, which is not the retail sale price as per law or

(c) by declaring the retail sale price but obliterates the same after their removal ,

then, the retail sale price of such goods shall be

retail sale price of identical goods manufactured by the manufacturer and removed within a period of one month, before or after removal of such goods,

otherwise, it shall be ascertained by conducting the enquiries in the retail market at or about the same time of the removal of such goods.

However, if more than one retail sale price is ascertained, then the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all such goods.

It has been clarified that where the retail sale price is required to be ascertained based on market inquiries, the said inquiries shall be carried out on sample basis.

Rule 5 provides that where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price, then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of one month before and after the date of removal of such goods. However, where the manufacturer alters or tampers the declared retail sale price resulting into more than one retail sale price available on such goods, then, the highest of such retail sale price shall be taken as the retail sale price of all such goods.

Rule 6 further provides that if the retail sale price of any excisable goods cannot be ascertained under these rules, the retail sale price shall be ascertained in accordance with the principles and the provisions of section 4A of the Act and the rules aforesaid.

4

CENVAT Credit

4.1 Introduction

The powers conferred on the Central Government under clause (xviaa) and clause (xvia) of section 37(2) of the Central Excise Act, 1944 provide for credit of Central Value Added Tax (CENVAT). Section 37(2) (xvia) empowers the Central Government to make rules to provide for the credit of duty paid or deemed to have been paid on the goods used in or in relation to manufacture of excisable goods. Section 37(2) (xviaa) empowers Central Government to make rules to provide for credit of service tax leviable under Chapter V of the Finance Act, 1994, paid or payable on taxable services used in, or in relation to, the manufacture of excisable goods.

CENVAT was initially introduced as MODVAT in the year 1986 whereby the manufacturers could avail credit of duty paid on inputs used in or in relation to manufacture of the final products for being set off against the duty payable on the final products. Later on the scheme was extended to capital goods also. In the year 2001, CENVAT Credit Rules, 2001 were introduced which were superseded by the CENVAT Credit Rules, 2002. Credit of service tax paid on input services was introduced for the first time in the year 2002.

CENVAT Credit Rules, 2004: On 10.09.2004, CENVAT Credit Rules, 2004 were notified to replace the erstwhile CENVAT Credit Rules, 2002 and Service Tax Credit Rules, 2002. These rules have integrated the credit of goods and services. In other words, duties of excise paid on inputs/capital goods and service tax paid on input services can be adjusted against a manufacturer's excise duty liability or a service provider's service tax liability.

The CENVAT Credit Rules, 2004 extend to the whole of India. However, the provisions of these rules in relation to availment and utilization of credit of service tax do not apply to the State of Jammu and Kashmir as service tax law is not applicable to Jammu & Kashmir. The rules cover all the three categories, namely manufacturers, service providers and manufacturers-cum-service providers.

4.2 Rule 2 - Definitions

The CENVAT rules have to be interpreted progressively to ensure that the purpose of the scheme is preserved. Therefore, the Rules are to be read liberally and not literally.

(1) Capital Goods [Rule 2(a)] : Capital goods means

(A) the following goods, namely :-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii);

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof;

(vii) storage tank, and

(viii) motor vehicles other than those falling under tariff headings 8702, 8703, 8704, 8711** and their chassis, but including dumpers and tippers.

used -

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(1A) outside the factory of the manufacturer of the final products for generation of electricity for captive use within the factory; or

(2) for providing output service.

(B) motor vehicle designed for transportation of goods including their chassis registered in the name of the service provider, when used for-

(i) providing an output service of renting of such motor vehicle; or

(ii) transportation of inputs and capital goods used for providing an output service; or

(iii) providing an output service of courier agency.

(C) motor vehicle designed to carry passengers including their chassis, registered in the name of the provider of service, when used for providing output service of-

(i) transportation of passengers; or

(ii) renting of such motor vehicle; or

(iii) imparting motor driving skills.

(D) components, spares and accessories of motor vehicles which are capital goods for the assessee.

**Tariff headings 8702, 8703, 8704, 8711 are as follows:-

(i) Motor vehicles for the transport of 10 or more persons, including the driver.

(ii) Motor cars and other motor vehicles principally designed for the transport of persons (other than those covered in (i) above), including station wagons and racing cars.

(iii) Motor vehicles for transport of goods.

(iv) Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars.

(2) Exempted Goods [Rule 2(d)]: Exempted goods means excisable goods which are exempt from the whole of the duty of excise leviable thereon and includes goods which are chargeable to "Nil" rate of duty and goods in respect of which the benefit of an exemption under *Notification No. 1/2011-CE, dated 01.03.2011* or under entries at serial numbers 67 and 128 of *Notification No. 12/2012 CE dated 17.03.2012* is availed**.**

Note: Excise duty @ 2% is paid under Notification No.1/2011-CE dated 01.03.2011 and @ 1% on coal and fertilizers under Notification No. 12/2012 C.E. dated 17.03.2012.

(3) Exempted Service [Rule 2(e)]: Exempted service means a-

(i) taxable service which is exempt from the whole of the service tax leviable thereon; or

(ii) service, on which no service tax is leviable under section 66B of the Finance Act; or

(iii) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;

but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994 [Rule 2(e)].

(4) Final Products [Rule 2(h)]: Final products means excisable goods manufactured or produced from input, or using input service.

Excisable goods are defined in section 2(d) of the Act to mean “goods which are specified in the Tariff as being subject to a duty of excise. Therefore, this term is wide enough to cover all products, whether final or intermediate, which are manufactured by the assessee by a manufacturing process. This may also include the goods which are exempted by way of notification.

(5) First Stage Dealer [Rule 2(ij)]: First Stage Dealer means a dealer who purchases the goods directly from-

(i) the manufacturer under the cover of an invoice issued in terms of the provision of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice; or

(ii) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice.

(6) Inputs [Rule 2(k)]*:* Input means-

(i) all goods used in the factory by the manufacturer of the final product; or

(ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or

(iii) all goods used for generation of electricity or steam for captive use; or

(iv) all goods used for providing any output service;

but **excludes**-

(A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;

(B) any goods used for -

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods,

except for the provision of service portion in the execution of a works contract or construction service as listed under clause (b) of section 66E of the Act;

(C) capital goods except when used as parts or components in the manufacture of a final product;

(D) motor vehicles;

(E) any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee; and

(F) any goods which have no relationship whatsoever with the manufacture of a final product.

ANALYSIS: *Circular No. 943/4/2011 CX dated 29.04.2011* clarifies that the expression "no relationship whatsoever with the manufacture of a final product" must be interpreted and applied strictly and not loosely. Only credit of goods used in the factory but having absolutely no relationship with the manufacture of final product is not allowed. Goods such as furniture and stationary used in an office within the factory are goods used in the factory and are used in relation to the manufacturing business and hence the credit of same is allowed.

Free warranty means a warranty provided by the manufacturer, the value of which is included in the price of the final product and is not charged separately from the customer.

(7) Input Service [Rule 2(l)]: -

I. Meaning: Input service means any service, -

(i) used by a provider of output service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and

II. Inclusions: Input service includes:-

Services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

III. Exclusions: Input service excludes:-

(A) Following services, if they are used for construction or execution of works contract of a building or a civil structure or a part thereof; or laying of foundation or making of structures for support of capital goods:-

(i) Service portion in the execution of a works contract

(ii) Construction service as listed under section 66E(b) of the Act.

However, if works contract services are used for provision of construction services, or vice versa, they shall be eligible as input services.

(B) Services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods

ANALYSIS: It implies that the credit of the service tax paid on hiring of the motor vehicles, which are eligible as capital goods, is available.

(BA) Service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by -

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person

ANALYSIS: The credit of the service tax paid on insurance, servicing, repair, maintenance etc. of the motor vehicles which are eligible as capital goods, is available.

Exceptions: Credit of the service tax paid on insurance, servicing, repair, maintenance etc. of the motor vehicle, even if not a capital good, is available to the following:-

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person;

or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person.

In other words,

(a) A manufacturer of motor vehicle can avail credit of the service tax paid on the insurance and on the repair and maintenance of the motor vehicles manufactured by him.

(b) A motor insurance company can avail credit of the service tax paid on the re-insurance and third party insurance and repair and maintenance of the motor vehicles insured /re-insured by them.

(C) Services such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee.

ANALYSIS: The aforesaid services are **not** eligible as input services **only when** they are used primarily for personal use or consumption of any employee. Further, the list is only illustrative and not exhaustive.

Note: With regard to determination of place of removal in case of export of goods, following has been clarified:

(i) Place of removal in case of direct export of goods by the manufacturer exporter to his foreign buyer will be the port/ICD/CFS where the shipping bill is filed by the manufacturer exporter.

(ii) Place of removal in case of clearance of goods from the factory for export by a merchant exporter will be the factory gate. However, in isolated cases, it may extend further also depending on the facts of the case, but in no case, this place can be beyond the Port/ ICD/CFS where shipping bill is filed by the merchant exporter.

[Circular No. 999/6/2015 CX dated 28.02.2015]

(8) Input Service Distributor [Rule 2(m)]: Input service distributor means an office of the manufacturer or producer of final products or provider of output service, which receives invoices issued under rule 4A of the Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be.

(9) Job Work [Rule 2(n)]: Job work has been defined in Rule 2(n) as processing or working upon of raw material or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for aforesaid process and the expression "job worker" shall be construed accordingly.

(10) Large Tax Payer [Rule 2(na)]: Rule 2(na) defines large tax payer to have the meaning assigned to it in the Central Excise Rules, 2002. The concept relating to large tax payer has been dealt in Chapter 5: General Procedures Under Central Excise of Section A of this Study Material. .

(11) Manufacturer or producer [Rule 2(naa)]: Manufacturer or producer

(i) in relation to articles of jewellery or other articles of precious metals falling under heading 7113 or 7114 as the case may be of the First Schedule to the Excise Tariff Act, includes a person who is liable to pay duty of excise leviable on such goods under sub-rule (1) of rule 12AA of the Central Excise Rules, 2002;

(ii) in relation to goods falling under Chapters 61, 62 or 63 of the First Schedule to the Excise Tariff Act, includes a person who is liable to pay duty of excise leviable on such goods under sub-rule (1A) of rule 4 of the Central Excise Rules, 2002.

(12) Output Service [Rule 2(p)]: Output service means any service provided by a provider of service located in the taxable territory but shall not include a service,-

(1) specified in the negative list under section 66D of the Finance Act; or

(2) where the whole of service tax is liable to be paid by the recipient of service.

(13) Person liable for paying service tax [Rule 2(q)]: Person liable for paying service tax has the meaning as assigned to it in rule 2(1)(d) of the Service Tax Rules, 1994.

(14) Place of removal [Rule 2(qa)]: Place of removal means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory,

from where such goods are removed.

Note: Circular No. 999/6/2015 CX dated 28.02.2015 has clarified the following with regard to place of removal:

(i) Place of removal in case of direct export of goods by the manufacturer exporter to his foreign buyer will be the port/ICD/CFS where the shipping bill is filed by the manufacturer exporter.

(ii) Place of removal in case of clearance of goods from the factory for export by a merchant exporter will be the factory gate. However, in isolated cases, it may extend further also depending on the facts of the case, but in no case, this place can be beyond the Port/ ICD/CFS where shipping bill is filed by the merchant exporter.

(15) Provider of taxable service [Rule 2(r)]: Provider of taxable service includes a person liable for paying service tax.

(16) Second Stage Dealer [Rule 2(s)]: Second stage dealer means a dealer who purchases the goods from a first stage dealer.

4.3 Rule 3 – CENVAT Credit

(1) Duties/tax eligible for credit: A manufacturer and an output service provider can take

credit of excise duty paid on inputs or capital goods and service tax paid on input services. Such credit of excise duty and service tax together is known as 'CENVAT credit'. This credit can be utilized to pay excise duty on final products /service tax on output services in accordance with the conditions and restrictions prescribed in CENVAT Credit Rules, 2004.

As per sub-rule (1) of rule 3, a manufacturer or an output service provider can take CENVAT credit of-

(i) Basic excise duty;

However, CENVAT credit of basic excise duty is not allowed if excise duty @ 2% is paid under Notification No.1/2011-CE dated 01.03.2011 or excise duty @ 1% is paid on coal and fertilizers under Notification No. 12/2012 CE dated 17.03.2012.

(ii) National calamity contingent duty;

(iii) Additional duty leviable under section 3 of the Customs Tariff Act (CVD), equivalent to the duty of excise specified under (i), and (ii);

However, CENVAT credit of CVD (leviable under section 3(1) of the Customs Tariff Act) paid on ships, boats and other floating structures up [Entry 8908 00 00 of the Customs Tariff] for breaking is allowed only to the extent of 85%.

(iv) Additional duty leviable under section 3(5) of the Customs Tariff Act (Special CVD);

However, a provider of output service is not eligible to take credit of such additional duty.

(v) Service tax;

(vi) Additional duty of excise leviable on pan masala and tobacco products under the Finance Act, 2005

paid on-

(i) any input or capital goods **received** in the factory of manufacture of final product or by the provider of output service; and

(ii) any input service received by the manufacturer of final product or by the provider of output services.

Points to be noted:

(i) Job-worker manufacturing exempt intermediate goods eligible to avail credit: CENVAT credit is allowed in respect of the above-mentioned duties, tax or cess paid on any inputs or input service used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the *Notification No. 214/86* and received by the manufacturer for use in, or in relation to, the manufacture of final products.

[Notification No. 214/86 grants exemption to specified goods manufactured in a factory as a job work and used in the manufacture of final products, which are liable to excise duty.]

(ii) **Amount of excise duty paid on capital goods at the de-bonding of a unit allowed as credit:** The amount equal to excise duty paid on the capital goods at the time of de-bonding of a unit in terms of the para 8 of *Notification No. 22/2003 CE dated 31.03.2003* (which exempts certain goods when brought into 100% EOU / STP complex) is allowed as CENVAT credit. *[Notification No. 22/2003 CE dated 31.03.2003 exempts certain goods when brought into 100% EOU/STP complex.]*

It may be noted here that in this case the credit is allowed for an amount equal to excise duty and not for excise duty.

(iii) **CVD paid on Project Imports allowable as credit:** The manufacturer of the final products and the provider of output service are allowed CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act on goods falling under heading 9801 (project imports) of the First Schedule to the Customs Tariff Act.

(iv) **'Duty paid' as per the invoice available as credit in case of subsequent reduction in price:** Where a manufacturer avails credit of the amount of duty paid by supplier as reflected in the excise invoice, but subsequently the supplier allows some trade discount or reduces the price, without reducing the duty paid by him, the entire amount of duty paid by the manufacturer, as shown in the invoice would be available as credit. This is because rule 3 allows credit of duty "paid" by the inputs manufacturer and not duty "payable" by the said manufacturer. However, the supplier, who has paid duty, should not file/claim the refund on account of reduction in price.

It may, however, be noted that if the duty paid is also reduced, along with the reduction in price, the reduced excise duty would only be available as credit *[Circular No. 877/15/2008-CX dated 17.11.2008].*

(2) Availment of credit when exempt/non-excisable goods or exempt services become dutiable/excisable goods or taxable services:

Goods: An assessee manufacturing exempted goods or non-excisable goods cannot avail CENVAT credit of duty paid on inputs used in the manufacture of such final products. However, if such final product becomes dutiable or excisable at a later date CENVAT credit of inputs in stock as on that date can be availed by virtue of rule 3(2).

In effect sub-rule (2) provides that an assessee entering into the tax net will be able to avail CENVAT credit of excise duty paid on

- inputs lying in stock
- inputs contained in work-in-progress
- inputs contained in finished goods lying in stock

on the date on which any goods manufactured by the said manufacturer or producer cease to be exempted goods or any goods become excisable.

This provision is mainly invoked when the aggregate value of clearances of SSI units crosses ₹ 150 lakh and they become liable to excise duty.

Services: Sub-rule (3) lays down that in relation to a service which ceases to be an exempted service, the provider of the output service shall be allowed to take CENVAT credit of the duty paid on the inputs received and lying in stock on the date on which any service ceases to be an exempted service and used for providing such service.

(3) Utilization of credit:

(i) Eligible payments: As per Rule 3(4), CENVAT credit can be utilized for payment of:

(a) **any** excise duty on *any* final products; or

(b) an **amount** equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an **amount** equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(d) an **amount,** when goods are cleared after repairs under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or

(e) service tax on any output service.

Since, the credit can be utilized for payment of *any* excise duty on *any* final product or service tax on output service, 'one to one' co-relation between inputs/input services and final product/output services is not required.

(ii) Non-eligible payments: CENVAT credit cannot be utilized/used for payment of:

(a) any duty of excise on goods in respect of which the benefit of an exemption under *Notification No. 1/2011 CE dated 01.03.2011* is availed.

(b) service tax in respect of services where the person liable to pay tax is the service recipient.

(c) clean energy cess

(iii) Credit available on the last day of the month/quarter only to be utilized: While paying excise duty or service tax, the CENVAT credit can be utilised only to the extent such credit is available on the last day of the month or quarter for payment of duty or tax relating to that month or the quarter [First proviso to rule 3(4)].

Points to be noted:

(a) Units situated in North Eastern States, Jammu and Kashmir, Sikkim and Kutch district availing exemption of duty payable in cash (i.e, duty other than the duty paid by utlilizing CENVAT credit) can avail CENVAT credit on inputs and input services, used in the manufacture of final products cleared after availing the said exemptions, only for payment of duty on final products in respect of which exemption has been availed. [Such exemption is given by way of refund i.e., duty is first paid by the manufacturer and later claimed back as refund.]

(b) Credit of the special CVD (additional duty leviable under section 3(5) of the Customs Tariff Act) cannot be utilised for payment of service tax on any output service.

(c) Credit of only National Calamity Contingent duty (NCCD) can be utilised for payment of the NCCD payable on mobile phones. In other words, in the absence of the credit of NCCD, NCCD payable on mobile phones will have to be paid in cash (even if credit of other duties/tax is available) as no other credit can be utilized to pay such duty.

(d) Credit of only additional duty of excise leviable on pan masala and tobacco products under the Finance Act, 2005 can be utilized for payment of said additional duty of excise on final products. In other words, in the absence of the credit of such additional duty, the additional duty leviable on pan masala and tobacco products will have to be paid in cash (even if credit of other duties/tax is available) as no other credit can be utilized to pay such duty.

(4) Reversal of credit on inputs/capital goods/input services: The CENVAT credit taken on inputs/capital goods/input services by the manufacturer of goods or the provider of output service need to be paid (reversed) in certain cases under rule 3. Unless specified otherwise, such amount has to be paid by debiting the CENVAT credit or otherwise on or before the 5th day of the following month and on or before the 31st day of March in case of month of March. **However, if the manufacturer of goods or the provider of output service fails to pay such amount, the same would be recovered in the manner provided under rule 14.** The cases where CENVAT credits need to be reversed are:

(i) Inputs/capital goods removed as such: Rule 3(5) states that if the inputs or capital goods on which CENVAT credit has been taken are removed as such from the factory or premises of the provider of output service, the manufacturer of the final products or provider of output service has to pay an amount equal to the credit availed in respect of such inputs or capital goods. Such removal shall be made under the cover of an invoice referred to in Rule 9. The buyer will be able to take credit of such amount by virtue of rule 3(6).

Exceptions: The payment referred to in rule 3(5) above is not required to be made if:

(i) inputs or capital goods are removed outside the premises of the provider of output service for providing the output service;

(ii) inputs are removed outside the factory for providing free warranty for final products. .

(ii) Capital goods removed after being used: As per clause (a) of sub-rule (5A), if the capital goods, on which CENVAT credit has been taken, are removed after being used, the manufacturer or provider of output services shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT credit, namely:-

S.No.	Type of capital goods	Percentage points calculated by straight line method	
1.	Computers and computer peripherals	For each quarter in	Percentage
		Year* 1	10 %
		Year 2	8 %
		Year 3	5 %

		Year 4 & 5	1 %
2.	Other capital goods	2.5% for each quarter	

** Here, year is taken to be the financial year.*

However, if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value.

In other words, if the capital goods are removed after being used, the manufacturer/provider of output services shall pay an amount equal to:-

(I) CENVAT credit taken on the said capital goods reduced by the percentage points calculated by straight line method (mentioned above) for each quarter of a year or part thereof from the date of taking the CEVAT credit;

or

(II) Duty leviable on transaction value;

whichever is higher. The buyer will be able to take credit of such amount by virtue of rule 3(6).

(iii) Capital goods removed as waste or scrap: As per clause (b) of sub-rule (5A), if the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value. The buyer will be able to take credit of such amount by virtue of rule 3(6).

(iv) Inputs/capital goods written off before use: Sub-rule (5B) provides that if the value of any

(a) input, or

(b) capital goods before being put to use,

on which CENVAT credit has been taken is written off fully or partially or where any provision to write off fully or partially has been made in the books of account, then the manufacturer or service provider is required to pay an amount equivalent to the CENVAT credit taken in respect of the said inputs or capital goods. However, if such inputs or capital goods are subsequently used in the manufacture of final products or the provision of output services, the manufacturer or output service provider can take credit of the amount paid earlier.

Credit in case of inputs contained in written off WIP/finished goods: *Circular No. 907/27/2009-CX dated 07.12.2009* sets out the manner of reversal of CENVAT credit taken on the inputs, which have gone into manufacture of work in progress (WIP), semi finished goods and finished goods which have also been written off fully in the books of accounts as under-

(A) Finished goods written off:

S.No.	Case	Treatment
1.	Excise duty on the finished goods not remitted	Manufacturer is liable to pay excise duty. Thus, he need not reverse the CENVAT credit taken on inputs.

2.	Excise duty on the finished goods remitted under rule 21 of the Central Excise Rules, 2002	Manufacturer is required to reverse the credit on the inputs used.

(B) Work in progress (WIP) written off:

S.No.	Stage of completion of the WIP goods	Treatment
1.	WIP can be considered as manufactured goods	Same treatment as applicable to finished goods in point (i) mentioned above
2.	WIP cannot be considered as manufactured goods	Goods to be considered as inputs and the treatment for reversal of credit applicable to inputs to apply in this case as well

(v) Remission of duty on final product: Sub-rule (5C) provides that where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of the Central Excise Rules, 2002, the CENVAT credit taken on the inputs used in the manufacture or production of said goods and the CENVAT credit taken on input services used in or in relation to the manufacture or production of said goods shall be reversed.

(5) Credit in case of inputs/capital goods procured from 100% EOU/EHTP/STP: As per sub-rule (7) the amount of CENVAT credit in respect of inputs and capital goods cleared **on or after the 07.09.2009** from an export-oriented undertaking (EOU) or by a unit in Electronic Hardware Technology Park (EHTP) or in a software technology park (STP), as the case may be, on which such undertaking or unit has paid excise duty leviable under section 3 of the Excise Act read with serial number 2 of the *Notification No. 23/2003 CE, dated 31.03.2003 [Notification No. 23/2003 CE dated 31.03.2003 grants exemption to specified goods produced in EOU/EHTO/STP]* shall be the aggregate of that portion of excise duty, as is equivalent to -

- the additional duty leviable under section 3(1) of the Customs Tariff Act (Countervailing duty), which is equal to the duty of excise under section 3(1)(a) of the Excise Act;
- the additional duty leviable under section 3(5) of the Customs Tariff Act (special countervailing duty @ 4%); and

Rule 3(7) has to be applied only for the duties levied under section 3 of the Central Excise Act. The availment of credit in respect of any other duties charged by the EOU/EHTP/STP unit would be governed by Rule 3(1).

(6) Inter-changeability of credit: (1) Clause (b) of sub-rule 7 provides that CENVAT credit in respect of -

(i) NCCD;

(ii) Additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified above; and

(iii) Additional duty of excise leviable on pan masala and tobacco products,

shall be utilized towards payment of -

- NCCD, or the additional duty of excise leviable on pan masala and tobacco products, **respectively,** on any final products manufactured by the manufacturer, or
- for payment of such duty on inputs themselves, if such inputs are removed as such or after being partially processed or on any output service.

(7) Credit of CVD paid on marble slabs: CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act (CVD) paid on marble slabs or tiles is allowed to the extent of ₹ 30 per square metre.

(8) Credit *vis a vis* notification granting exemption on condition of non-availability of credit: It has been explained that where the provisions of any other rule or notification provide for grant of whole or part exemption on condition of non-availability of credit of duty paid on any input or capital goods, or of service tax paid on input service, the provisions of such other rule or notification shall prevail over the provisions of these rules.

4.4 Rule 4 – Conditions for allowing CENVAT credit

A. INPUTS

(1) Credit available on receipt of inputs in the factory of the manufacturer/premises of the provider of output service: Sub-rule 1 allows instant credit on inputs after receipt in the:

- factory of the manufacturer, or
- premises of the provider of output service, ***or***
- ***premises of job worker, in case goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be.***

Two points to be noted here are that the manufacturer/output service provider can take the credit immediately as soon as the inputs are received in the factory/premises:

(a) without waiting till the inputs are actually utilized in the manufacture and

(b) even if the payment for the inputs to the supplier is pending.

(2) Credit available on receipt of inputs in the premises of principal manufacturer in case of jewellery manufactured on job-work basis: The first proviso to rule 4(1) lays down that where articles of jewellery or other articles of precious metals falling under heading 7113 or 7114, as the case may be, of the Central Excise Tariff are manufactured on job work basis, the CENVAT credit of duty paid on inputs may be taken immediately on receipt of such inputs in the registered premises of the principal manufacturer subject to the condition that such inputs are used in the manufacture of articles of jewellery by the job worker.

(3) Credit available to output service provider on maintenance of documentary evidence of delivery and location of the inputs: CENVAT credit in respect of inputs may be taken by the provider of output service when the inputs are delivered to such provider, subject to maintenance of documentary evidence of delivery and location of the inputs

[Second proviso to sub-rule (1)]. In other words, credit can be availed by an output service provider even if the inputs are not received in the premises of the output service provider, but are delivered at some other place; if documentary evidence of delivery and location of such inputs is maintained.

(4) Credit to be availed within *one year* of the date of invoice: The manufacturer or the provider of output service shall not take CENVAT credit after ***one year*** of the date of issue of any of the documents specified in rule 9(1) - invoice/bill/challan etc. [Third proviso to sub-rule (1)].

B. CAPITAL GOODS

(1) 50% credit on capital goods in the year of receipt: Sub-rule 2(a) restricts the quantum of credit in respect of capital goods received in the

- factory of the manufacturer, or
- premises of the provider of output service, or
- outside the factory of the manufacturer of the final products for generation of electricity for captive use within the factory at any point of time in a given financial year, ***or***
- ***premises of job worker, in case capital goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be***

as under:

a. **Upto** 50% in the same financial year;

b. Balance in one or more subsequent financial years provided the capital goods is still in the possession of the manufacturer or the output service provider.

Exception:

Credit in case of components, spares accessories etc.: In respect of certain capital goods like components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the Central Excise Tariff, the condition regarding possession of the capital goods in the second year is not applicable. This is so because such items, being consumables, may not be available in next year or in subsequent years at all. Further, even if they are available, it would be practically impossible to locate them and prove their possession.

Availing full 50% credit not mandatory in the first year: Credit of any amount not exceeding 50% of the duty paid on the capital goods can be taken in the first year. Therefore, even 25% credit can be taken in the first year and the balance (75% in this case) can be taken in the subsequent financial years. Similarly, assessee can take full credit in the second year, if he does not take any CENVAT credit in the first year (as nil does not exceed 50%).

(2) Credit available to output service provider on maintenance of documentary evidence of delivery and location of the capital goods: CENVAT credit in respect of capital goods may be taken by the provider of output service when the capital goods are delivered to such provider, subject to maintenance of documentary evidence of delivery and

location of the capital goods [Fourth proviso to sub-rule (2)(a)]. Thus, credit can be availed by an output service provider even if the capital goods are not received in the premises of the output service provider, but are delivered at some other place; if documentary evidence of delivery and location of such capital goods is maintained.

(3) Cases where 100% credit on capital goods is allowed in the year of receipt: In the following cases 100% credit of duty paid on capital goods is available:

(i) Receipt of capital goods by SSI: An assessee eligible to avail of the exemption under a notification based on the value of clearances in a financial year is allowed to take the CENVAT credit in respect of capital goods received by him for the **whole amount of the duty** paid on such capital goods in the same financial year [Third proviso to sub-rule (2)(a)].

> **Above relaxation is available** to a unit who is **"eligible"** to claim SSI exemption regardless of whether the unit actually claims it or opts to pay duty.
>
> An **"eligible" unit** is one whose aggregate value of clearances of all excisable goods for home consumption did not exceed ₹ 400 lakh in the preceding financial year.

(ii) Capital goods cleared as such in the year of acquisition: If the capital goods are cleared as such in the same financial year, CENVAT credit in respect of such capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year.

(iii) Credit of CVD leviable under section 3(5): CENVAT credit of the additional duty leviable under section 3(5) of the Customs Tariff Act in respect of capital goods shall be allowed immediately on receipt of the capital goods in the factory of a manufacturer.

(4) Capital goods acquired on lease, hire purchase: Sub-rule (3) allows CENVAT credit on capital goods even when the same are acquired on lease, hire-purchase or through loan from a financing company.

(5) Credit *vis a vis* depreciation on capital goods: Sub-rule (4) provides that no CENVAT credit shall be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer or provider of output service claims as depreciation under section 32 of the Income-tax Act, 1961.

In other words the manufacturer or provider of output service cannot enjoy the benefit of both depreciation allowance as well as CENVAT credit.

C. INPUT SERVICE

(1) Credit allowed on receipt of invoice: Sub-rule (7) provides that the CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 is received.

(2) Credit allowed on payment of service tax, if service tax is paid under reverse charge (both full and partial reverse charge): In respect of input service where the whole or part of the service tax is liable to be paid by the recipient of the service, credit of service tax payable by the service recipient shall be allowed after the service tax is paid [First proviso to sub-rule (7)].

(4) Credit to be reversed if value of input service and service tax payable not paid within 3 months of the date of invoice/bill/challan: In case the payment of the value of input service and the service tax paid or payable as indicated in the invoice, bill or, as the case may be, challan referred to in rule 9, is not made within three months of the date of the invoice, bill or, as the case may be, challan, the manufacturer or the service provider who has taken credit on such input service, shall pay an amount equal to the CENVAT credit availed on such input service, ***except an amount equal to the CENVAT credit of the tax that is paid by the manufacturer or the service provider as recipient of service.***

In case the said payment is made, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules [Second proviso to sub-rule (7)].

(5) Proportionate credit to be reversed in case of partial refund of payment made towards input service or receipt of credit note by the manufacturer/service provider: If any payment or part thereof, made towards an input service is refunded or a credit note is received by the manufacturer or the service provider who has taken credit on such input service, he shall pay an amount equal to the CENVAT credit availed in respect of the amount so refunded or credited [Third proviso to sub-rule (7)].

(6) Credit to be availed within *one year* of the date of invoice: The manufacturer or the provider of output service shall not take CENVAT credit after ***one year*** of the date of issue of any of the documents specified in rule 9(1) - invoice/bill/challan etc. [Fifth proviso to sub-rule (7)].

Points which merit consideration

1. The amount mentioned in rule 4 shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month ["following quarter" in case of SSI manufacturer and service provider who is an individual/proprietary firm/partnership firm] except for the month of March ["quarter ending with the month of March" in case of SSI manufacturer and service provider who is an individual/proprietary firm/partnership firm], when such payment shall be made on or before the 31st day of the month of March.
2. If the manufacturer of goods or the provider of output service fails to pay the amount payable under rule 4, it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.
3. ***The limitation period for availing CENVAT credit would not apply when re-credit is taken of amount reversed under:***

   (i) second proviso to rule 4(7)

   (ii) rule 3(5B)

   (iii) rule 4(5)(a)

   after meeting the conditions prescribed in these rules. The limitation period applies only when the credit is taken for the first time on an eligible document [Circular No. 990/14/2014 CX dated 19.11.2014].

4.5 Job Work provisions [Rule 4(5) and 4(6)]

(1) Credit allowed on inputs sent to job-worker when the same are received back within 180 days: *CENVAT credit on inputs can be availed even if any inputs as such or after being partially processed are sent to a job worker and from there subsequently sent to another job worker and likewise, for*

- *further processing,*
- *testing,*
- *repairing,*
- *re-conditioning or*
- *for the manufacture of intermediate goods necessary for the manufacture of final products or*
- *any other purpose.*

Such credit will be allowed only if it is established from the records /challans/ memos/ or any other document produced by the manufacturer/ output service provider taking CENVAT credit that the inputs or the products produced therefrom are received back by the manufacturer/ output service provider within 180 days of their being sent from the factory/premises of output service provider, as the case may be [Rule 4(5)(a)(i)].

(2) Credit allowed on capital goods sent to job-worker when the same are received back within 2 years: CENVAT credit on capital goods can be availed allowed even if any capital goods as such are sent to a job worker for

- *further processing,*
- *testing,*
- *repair,*
- *re-conditioning or*
- *for the manufacture of intermediate goods necessary for the manufacture of final products or*
- *any other purpose.*

Such credit will be allowed only if it is established from the records, challans or memos or any other document produced by the manufacturer /output service provider taking the CENVAT credit that the capital goods are received back by the manufacturer /output service provider, as the case may be, within 2 years of their being so sent [Rule 4(5)(a)(ii)].

(3) Credit allowed on inputs or capital goods sent directly to job-worker: *The credit can be availed even if any inputs or capital goods are directly sent to a job worker without their being first brought to the premises of the manufacturer/ output service provider and in such a case, the period of 180 days or 2 years, as the case may be, will be counted from the date of receipt of such goods by the job worker [Provisos to rule 4(5)(a)(i) and (ii)].*

(4) Credit to be reversed when inputs and capital goods sent to job-worker are not returned within 180 days and 2 years respectively: ***If the inputs or capital goods are not received back within 180 days and 2 years respectively, the manufacturer/ output service provider will have to pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise. However, such credit may be retaken once the inputs or capital goods are received back in the factory/ premises of the output service provider [Rule 4(5)(a)(iii)].***

(5) Credit allowed on jigs, fixtures, moulds and dies sent to another manufacturer/job worker without the condition of being returned in 180 days: Sub-rule (5)(b) extends the CENVAT credit in respect of jigs, fixtures, moulds and dies sent by manufacturer of final products to:-

(a) another manufacturer for the production of goods, or

(b) a job worker for the production of goods on his behalf

according to his specifications.

Since these items are consumables in nature, it is obvious that the same cannot be received back in the factory of the manufacturer. Therefore, credit is allowed on such items without any condition of reversing the same after the expiry of 2 years.

(6) Direct dispatch of final products from job-worker's premises: Sub-rule (6) allows direct dispatch or clearance of final products from job worker's premises subject to the approval of Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, in each such case of removal. This approval can be granted on an annual basis to each job worker. The direct dispatch is to be carried out as per the conditions imposed by such Deputy/Assistant Commissioner of Central Excise.

For instance, when the job worker is in Bangalore, principal manufacturer is in Delhi and customer in Chennai, it may be practical to get authorization to remove the finished goods directly from Bangalore to Chennai.

4.6 Rule 5 – Refund of CENVAT credit

(1) Credit to be refunded where goods/services are exported without payment of duty/service tax: A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette [Sub-rule (1)].

Refund amount is calculated as follows:-

$$\left[\frac{\text{Export turnover of goods} + \text{Export turnover of services}}{\text{Total Turnover}} \times \text{Net CENVAT credit}\right]$$

(A) **Refund** amount means the maximum refund that is admissible.

(B) **Net CENVAT** credit means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of rule 3(5C), during the relevant period.

(C) **Export turnover of goods** means the value of final products and intermediate products cleared during the relevant period and exported without payment of central excise duty under bond or letter of undertaking.

(D) **Export turnover of services** means the value of the export service calculated in the following manner, namely:-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period – advances received for export services for which the provision of service has not been completed during the relevant period.

(E) **Total turnover** means sum total of the value of -

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under rule 3(5) against an invoice, during the period for which the claim is filed.

(F) **Export service** means a service which is provided as per rule 6A of the Service Tax Rules 1994.

(G) **Relevant period** means the period for which the claim is filed.

(H) ***Export goods means any goods which are to be taken out of India to a place outside India.***

(2) Credit not to be refunded when rebate of tax/duty claimed or drawback allowed: No refund of credit shall be allowed if the manufacturer or provider of output service avails the drawback allowed under the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Service Tax Rules, 1994 in respect of such tax.

(3) Value of services: For the purposes of this rule, the value of services shall be determined in the same manner as the value for the purposes of sub-rule (3) and (3A) of rule 6 is determined.

(4) Procedure, safeguards, conditions and limitations for claiming refund of credit: *Notification No. 27/2012-CE (NT) dated 18.06.2012* provides that refund of CENVAT credit shall be allowed subject to the procedure, safeguards, conditions and limitations as specified below, namely:-

A. Safeguards, conditions and limitations

(a) The manufacturer or provider of output service shall submit not more than one claim of refund under this rule for every quarter.

However, a person exporting goods and service simultaneously, may submit two refund claims one in respect of goods exported and other in respect of the export of services every quarter.

(b) In this notification quarter means a period of three consecutive months with the first quarter beginning from 1st April of every year, second quarter from 1st July, third quarter from 1st October and fourth quarter from 1st January of every year.

(c) The value of goods cleared for export during the quarter shall be the sum total of all the goods cleared by the exporter for exports during the quarter as per the monthly or quarterly return filed by the claimant.

(d) The total value of goods cleared during the quarter shall be the sum total of value of all goods cleared by the claimant during the quarter as per the monthly or quarterly return filed by the claimant.

(e) In respect of the services, for the purpose of computation of total turnover, the value of export services shall be determined in accordance with clause (D) of sub-rule (1) of rule 5 of the said rules.

(f) For the value of all services other than export during the quarter, the time of provision of services shall be determined as per the provisions of the Point of Taxation Rules, 2011.

(g) The amount of refund claimed shall not be more than the amount lying in balance at the end of quarter for which refund claim is being made or at the time of filing of the refund claim, whichever is less.

(h) The amount that is claimed as refund under rule 5 of the said rules shall be debited by the claimant from his CENVAT credit account at the time of making the claim.

(i) In case the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and amount sanctioned.

B. Procedure for filing the refund claim

1. The manufacturer/provider of output service shall submit a duly signed application in Form A to the jurisdictional Assistant Commissioner/Deputy Commissioner of Central Excise (AC/DC) along with the specified documents and enclosures before the expiry of the period specified in section 11B of the Central Excise Act [*one year from the date of export of goods/services]*.

2. The refund claim shall be accompanied by the copies of bank realization certificate and a certificate duly signed by the auditor certifying the correctness of refund claimed in respect of export of services.

3. Assistant/Deputy Commissioner, after satisfying himself in respect of the correctness of the claim and the fact that goods cleared for export or services provided have actually been exported, shall allow the refund claim in full or part.

4.7 Rule 5A – Refund of CENVAT credit to units in specified areas

The Central Government may allow refund of CENVAT credit of duty taken on inputs used in the manufacture of final products cleared in terms of *Notification No. 20/2007-CE dated 25.04.2007,* if the manufacturer is unable to utilize such credit for paying duty on such final products. *[Notification No. 20/2007 CE dated 25.04.2007 grants exemption to certain specified goods cleared from units located in North-Eastern States in respect of duty paid in cash.]*

However, the refund shall not be allowed if the final products are exempt or subject to nil rate of duty. The refund of credit shall be allowed subject to prescribed procedures, conditions and limitations.

For the purposes of this rule, "duty" means any of the duties specified in rule 3 (1).

4.8 Rule 5B – Refund of CENVAT credit to service providers providing services taxed on reverse charge basis

A service provider rendering services notified under section 68(2) of the Finance Act (services taxed on reverse charge basis) and being unable to utilise the CENVAT credit availed on inputs and input services for payment of service tax on such output services, shall be allowed refund of such unutilised CENVAT credit. The procedure, safeguards, conditions and limitations to which such refund shall be subject to have been prescribed by CBEC vide *Notification No. 12/2014 CE (NT) dated 03.03.2014* as under:

A. SAFEGUARDS, CONDITIONS AND LIMITATIONS

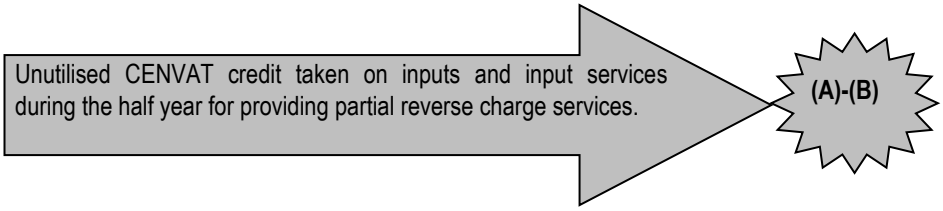
(a) Refund is admissible, of unutilised CENVAT credit taken on inputs and input services during the half year for which refund is claimed, for providing following output services:

(i) renting of a motor vehicle designed to carry passengers on non-abated value, to any person who is not engaged in a similar business;

(ii) supply of manpower for any purpose or security services; or

(iii) service portion in the execution of a works contract;

(hereinafter above mentioned services will be termed as partial reverse charge services). The amount of refund would be computed as follows:



Where

$$A = \text{CENVAT credit taken on inputs and input services during the half year} \times \frac{\text{Turnover of output service under partial reverse charge duirng the half year}}{\text{Total turnover of goods and services during the half year}}$$

B = Service tax paid by the service provider for such partial reverse charge services during the half year.

(b) Refund shall not exceed the amount of service tax liability paid/payable by the service receiver with respect to the partial reverse charge services provided during the period of half year for which refund is claimed.

(c) Amount claimed as refund shall be debited by the claimant from his CENVAT credit account at the time of making the claim. However, if the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and the amount sanctioned.

(d) The claimant shall submit not more than one claim of refund under this notification for every half year.

(e) Refund claim shall be filed after filing of service tax return for the period for which refund is claimed.

Half year means a period of six consecutive months with the first half year beginning from the 1st day of April every year and second half year from the 1st day of October of every year.

B. PROCEDURE FOR FILING THE REFUND CLAIM

(a) The output service provider shall submit an application in Form A, along with specified documents and enclosures, to jurisdictional Assistant Commissioner/Deputy Commissioner, before the expiry of 1 year* from the due date of filing of return for the half year. Copies of return(s) filed for the said half year shall also be filed along with the application.

*In case of more than one return required to be filed for the half year, 1 year shall be calculated from due date of filing of the return for the later period.

(b) The Assistant Commissioner/Deputy Commissioner, may call for any document in case he has reason to believe that information provided in the refund claim is incorrect or insufficient and further enquiry needs to be caused before the sanction of refund claim, and shall sanction the claim after satisfying himself that the refund claim is correct and complete in every respect.

4.9 Rule 6 – Obligation of manufacturer or producer of final products and a provider of output service

(1) No credit on inputs/input services used in manufacture of exempted goods/for provision of exempted services [Sub-rule (1)]: CENVAT is not allowed on:-

(i) such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services

or

(ii) input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services

except in the circumstances mentioned in sub-rule (2).

(2) Credit available in respect of the goods removed without payment of duty by a job worker doing job-work in articles of jewelley: CENVAT credit on inputs is not denied to a job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule [Proviso to sub-rule (1)].

Since, as per rule 12AA, the liability of payment of duty has been cast on the principal manufacturer, goods are cleared by a job-worker without payment of duty. However, CENVAT credit on the inputs used in the manufacture of such goods is not denied by virtue of the proviso to rule 6(1) mentioned above.

(3) Exempted goods/final products include non-excisable goods: ***For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 includes non-excisable goods cleared for a consideration from the factory [Explanation 1].***

Value of non –excisable goods for the purpose of this rule, is the invoice value. Where such invoice value is not available, the value will be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder [Explanation 2].

It is to be noted that the above explanations are applicable only to rule 6. By virtue of the said Explanation, inputs and input services used in the manufacture of non-excisable goods also attract the reversal provisions under rule 6. To illustrate, if a manufacturer manufactures dutiable and non-excisable goods, credit on input or input services used in the manufacture of non-excisable goods will have to be reversed in accordance with the provisions of rule 6.

It is worthwhile to note here that since exempted service inter alia means services on which no service tax is leviable under section 66B of Finance Act, 1994, credit of inputs or input services used in provision of non-taxable services is also required to be reversed under rule 6. Thus, there is no difference with regard to reversal of credit by a manufacturer vis-a-vis a service provider. In other words, provisions for reversal of credit on exempted goods and exempted services are at par.

Points to be noted:

(i) Expression "in or in relation" to be read harmoniously with the definition of "inputs": It has been clarified vide *Circular No.943/04/2011-CX dated 29.04.2011* that the expression "in or in relation" used in rule 6 does not override the definition of "input" under rule 2(k) for determining the eligibility of CENVAT credit. The definition of "input" is given in rule 2(k) and rule 6 only intends to segregate the credits of inputs used

towards dutiable goods and exempted goods. Therefore, while applying rule 6, the expression "in or in relation" must be read harmoniously with the definition of "inputs".

(ii) Reversal of credit where nil rated/exempted waste products arise during the course of manufacture: *Circular No. 904/24/09 CX dated 28.10.2009* has clarified that in case the rate of duty in respect of bagasse, aluminium/zinc dross and other waste products arising during the course of manufacture and capable of being sold is NIL in the tariff or they are exempt from duty in terms of any exemption notification, and if CENVAT credit has been taken on the inputs which are used for manufacture of dutiable and exempted goods, then in terms of rule 6 of the CENVAT Credit Rules, 2004, the assessee is required to reverse the proportionate credit or pay 6% amount.

(4) Credit on inputs/input services allowed where separate accounts are maintained [Sub-rule (2)]: Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for -

(i) Receipt, consumption and inventory of following INPUTS–

(a) Exempted goods and services

- Inputs used in or in relation to the manufacture of exempted goods
- Inputs used for the provision of exempted services

(b) Dutiable goods and taxable services

- Inputs used in or in relation to the manufacture of dutiable final products excluding exempted goods
- Inputs used for the provision of output services excluding exempted services

AND

(ii) Receipt and use of following INPUT SERVICES—

(a) Exempted goods and services

- Input services used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal
- Input services used for the provision of exempted services.

(b) Dutiable goods and taxable services

- Input services used in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal
- Input services used for the provision of output services excluding exempted services.

The manufacturer or output service provider shall take CENVAT credit only on inputs under sub-point (b) of point (i) and input services under sub-point (b) of point (ii) above.

(5) Options where separate accounts are not maintained [Sub-rule(3)]: Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods/the provider of output service, **opting not to maintain separate accounts**, shall follow **any one of the following options**, as applicable to him, namely:-

(i) Option to pay 6% of value of exempted goods and *7%* of the value of exempted services [Clause (i)]: The manufacturer of goods has an option to pay the following:-

Particulars	Amount (₹)
Amount equal to **6%** of value of the exempted goods	xxxx
Less: Duty of excise, if any, paid on the exempted goods	xxxx
Amount payable under rule 6(3)(i)	xxxx

The provider of output service has an option to pay an amount equal to ***7%*** of the value of exempted services.

Points to be noted:

(a) *7%* of the value of the exempted service to be paid in case of partially exempted services with no facility of credits: If any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be ***7%*** of the value so exempted.

For example, if the abatement on certain service is 60%, the amount required to be paid shall be ***4.2%*** (***7%*** of 60) of the full value of the exempted service.

(b) Reversal of 2% in case of transport of goods/passengers by rail: In case of transportation of goods or passengers by rail, the amount required to be paid under clause (i) of rule 6(3) shall be an amount equal to 2% of the value of the exempted services.

(ii) Option to pay proportionate amount determined under sub-rule (3A) [Clause (ii)]: The manufacturer of goods/the provider of output service has an option to pay an amount as determined under sub-rule (3A).

(iii) Option to maintain separate accounts only in respect of inputs and payment of amount under sub-rule (3A) in respect of input services [Clause (iii)]: The manufacturer of goods/the provider of output service has an option to:-

(a) **maintain separate accounts** only for the receipt, consumption and inventory of inputs and take CENVAT credit only on inputs used in or in relation to the manufacture of dutiable final products and for the provision of taxable output services

AND

(b) pay an **amount as determined under sub-rule (3A)** in respect of input services.

However, the provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment.

Points which merit consideration:

(i) If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

(ii) It is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.

(iii) No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.

(6) Method of computation of amount payable under sub-rule 3(ii) [Sub-rule (3A)]: For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely:-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-

  (i) name, address and registration no. of the manufacturer of goods or provider of output service;

  (ii) date from which the option under this clause is exercised or proposed to be exercised;

  (iii) description of dutiable goods or output services;

  (iv) description of exempted goods or exempted services;

  (v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month,-

  (i) the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;

  (ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional)= (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of output services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods [and their clearance upto the place of removal] or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

(c) the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely :-

(i) the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of output services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods [and their clearance upto the place of removal] or provision of exempted services = (M/N) multiplied by P, where M denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and P denotes total CENVAT credit taken on input services during the financial year;

(d) the manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid;

(e) the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of 24% per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

(f) where the amount determined as per condition (c) is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;

(g) the manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely :-

(i) details of CENVAT credit attributable to exempted goods and exempted services, monthwise, for the whole financial year, determined provisionally as per condition (b),

(ii) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c),

(iii) amount short paid determined as per condition (d), alongwith the date of payment of the amount short-paid,

(iv) interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and

(v) credit taken on account of excess payment, if any, determined as per condition (f);

(h) where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that no dutiable goods were manufactured and no output service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.

(i) where the amount determined under condition (h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of 24% per annum from the due date till the date of payment.

(7) Banking company & financial institution (including NBFC) required to pay 50% of credit availed [Sub-rule (3B)]: Notwithstanding anything contained in sub-rules (1), (2) and (3), a banking company and a financial institution including a non-banking financial company (NBFC), engaged in providing services by way of extending deposits, loans or advances, shall pay for every month an amount equal to 50% of the CENVAT credit availed on inputs and input services in that month.

(8) Payment under sub-rule (3) deemed to be credit not taken for the purpose of exemption notification [Sub-rule (3D)]: Payment of an amount under sub-rule (3) shall be deemed to be CENVAT credit not taken for the purpose of an exemption notification wherein any exemption is granted on the condition that no CENVAT credit of inputs and input services shall be taken.

(9) "Value" for the purpose of sub-rules (3) and (3A):-

(a) shall have the same meaning as assigned to it under section 67 of the Finance Act, read with rules made thereunder or, as the case may be, the value determined under section 3, 4 or 4A of the Excise Act, read with rules made thereunder;

(b) in the case of a taxable service, when the option available under sub-rules (7),(7A),(7B) or (7C) of rule 6 of the Service Tax Rules, 1994, has been availed, shall be the value on which the rate of service tax under section 66B of the Finance Act, read with an exemption notification, if any, relating to such rate, when applied for calculation of service tax results in the same amount of tax as calculated under the option availed;

(c) in case of trading, shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards their purchase) or 10% of the cost of goods sold, whichever is more;

[The taxes and year end discounts should be included in the sale price and cost of goods sold. All taxes for which set off or credit is available or are refundable/ refunded may not be included. Discounts are to be included - *Circular No. 943/4/2011 CX dated 29.04.2011*].

(d) in case of trading of securities, shall be the difference between the sale price and the purchase price of the securities traded or 1% of the purchase price of the securities traded, whichever is more;

(e) shall not include the value of services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount.

Points which merit consideration

1. The amount mentioned in sub-rules (3), (3A) and (3B), unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.
2. If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (3), (3A) and (3B), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.
3. In case of a manufacturer who avails the exemption under a notification based on the value of clearances in a financial year and a service provider who is an individual or proprietary firm or partnership firm, the expressions, "following month" and "month of March" occurring in sub-rules (3) and (3A) shall be read respectively as "following quarter" and "quarter ending with the month of March.

(10) Credit not allowed on capital goods used exclusively in manufacture of exempted goods/for provision of exempted services [Sub-rule (4)]: No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods/in providing exempted services.

However, CENVAT credit in respect of the capital goods used in the manufacture of the exempted final products of an SSI unit shall be allowed.

Note: *A SSI unit can avail the CENVAT credit of the capital goods used exclusively in manufacture of the exempted final product, but the same can be utilised for payment of duty only when the clearances cross ₹ 150 lakh.*

Credit not allowed on capital goods used in manufacture of goods exempt under *Notification 1/2011- CE* or provision of partially exempted service subject to non-availment of credit of inputs and input services: As per Rule 6(4), no credit can be availed on capital goods used exclusively in manufacture of exempted goods or in providing exempted service. Goods in respect of which the benefit of an exemption under *Notification No. 1/2011-CE, dated 01.03.2011* is availed are exempted goods [Rule 2(d)]. Taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service shall be taken are exempted services [Rule 2(e)].

Hence, credit of capital goods used exclusively in manufacture of such goods or in providing such service is not allowed *[Circular No.943/04/2011-CX dated 29.04.2011].*

(11) Provisions of sub-rule (1) to (4) not applicable in respect of certain excisable goods removed without payment of duty [Sub-rule (6)]: The provisions of sub-rules (1), (2), (3) and (4) do not apply to removal of certain specified excisable goods without payment of duty. In case of these removals, though the final product is removed without payment of duty, CENVAT credit on inputs/capital goods/input services used in the manufacture of such final product can be availed. In other words, in such cases, reversal of credit or payment of amount will not be required. Such cases are as follows:-

(i) Clearances to unit/developer of SEZ: The excisable goods cleared to a unit in a special economic zone (SEZ) or to a developer of a special economic zone for their authorized operations without payment of duty.

(ii) Clearances to 100% EOU: The excisable goods cleared to a hundred percent export-oriented undertaking (100% EOU) without payment of duty.

(iii) Clearances to EHTP/STP: The excisable goods cleared to a unit in an Electronic Hardware Technology Park (EHTP) / Software Technology Park (STP) without payment of duty.

(iv) Goods supplied to the UN/International organization: The excisable goods supplied, without payment of duty, to the United Nations (UN) or an international organization for their official use or supplied to projects funded by them which are exempt under *Notification No. 108/95-CE dated 28.08.1995.*

(iva) Goods supplied to diplomatic missions/consular missions etc.: The excisable goods supplied, without payment of duty, for the use of foreign diplomatic missions or consular missions or career consular offices or diplomatic agents in terms of the provisions of *Notification No. 12/2012-CE dated 17.03.2012*.

(v) Export under bond: The excisable goods cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002 without payment of duty.

(vi) Gold/silver (falling within Chapter 71): Gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting are removed without payment of duty.

(vii) Specified goods exempt from import duty and CVD: All goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied, without payment of duty —

(a) against International Competitive Bidding; or

(b) to a power project from which power supply has been tied up through tariff based competitive bidding; or

(c) to a power project awarded to a developer through tariff based competitive bidding, in terms of *Notification No. 12/2012 CE dated 17.03.2012*.:

(viii) Supplies made without payment of duty for setting up of solar power generation projects or facilities

(12) Provisions of sub-rule (1) to (4) not to apply in respect of services provided to a unit/developer of SEZ without payment of service tax [Sub-rule (7)]: The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the taxable services are provided, without payment of service tax, to a unit in a Special Economic Zone or to a developer of a Special Economic Zone for their authorized operations or when a service is exported.

(13) Export of service *vis a vis* exempt service [Sub-rule (8)]: For the purpose of this rule, a service provided or agreed to be provided shall not be an exempted service when:-

(a) the service satisfies the conditions specified under rule 6A of the Service Tax Rules, 1994 and the payment for the service is to be received in convertible foreign currency; and

(b) such payment has not been received for a period of six months or such extended period as may be allowed from time-to-time by the Reserve Bank of India, from the date of provision.

However, if such payment is received after the specified or extended period allowed by the Reserve Bank of India but within one year from such period, the service provider shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier in terms of rule 6(3). The credit can be availed to the extent it relates to such payment, on the basis of documentary evidence of the payment so received.

4.10 Rule 7 – Manner of distribution of credit by input service distributor

(1) In real life situations, many a times the bill/invoice is raised in the name of head office/regional office etc. for services which are actually received in the factory (or factories) or premises of service provider. In addition, the bill for services which are not specific for any factory/premises, such as advertising, market research, management consultancy etc. would

also be received only in these offices. Rule 7 tends to provide a way to distribute such credit to the factory or the premises of the output service provider.

For instance, A Ltd has a corporate office at Bangalore and plants at Hosur and Doddaballapur. Advertisement bills are received by the Bangalore office and also paid there. By virtue of rule 7, Bangalore office can distribute such credit to its plants located at Hosur and Doddaballapur. The plants can take credit and utilize the same to pay excise duty as well as service tax.

(2) Rule 2(m) read with rule 7 defines an "input service distributor" as an office of manufacturer or provider of output service which receives invoices towards purchase of input services and issues invoice, bill or challan for the purpose of distributing the credit of service tax paid on the services to its manufacturing units or units providing output service.

Thus, the distributor is comparable to dealers under the CENVAT scheme of inputs and capital goods. The document issued by him is being accepted under law as eligible document under rule 9(1)(g) for availing credit.

To pass on the credit, the input service distributor has to obtain service tax registration, comply with rule 4A of Service Tax Rules and file half-yearly return with the Superintendent under rule 9(10) of CENVAT rules 2004.

(3) Distribution of credit by input service distributor: The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely:—

(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon;

(b) credit of service tax attributable to service used by one or more such units exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;

(c) credit of service tax attributable to service used wholly by a unit shall be distributed only to that unit; and

(d) credit of service tax attributable to service used

Points to be noted:- For the purposes of rule 7,

(i) **Unit** includes the premises of a provider of output service and the premises of a manufacturer including the factory, whether registered or otherwise.

(ii) **Total turnover** shall be determined in the same manner as determined under rule 5.

(iii) **Relevant period:** For the purposes of this rule, the 'relevant period' shall be,-

(a) If the assessee has turnover in the 'financial year' preceding to the year during which credit is to be distributed for month or quarter, as the case may be, the said financial year; or

(b) If the assessee does not have turnover for some or all the units in the preceding financial year, the last quarter for which details of turnover of all the units are available, previous to the month or quarter for which credit is to be distributed.

Manner of distribution of common input service credit under rule 7(d): It has been clarified vide Circular No. 178/4/2014 dated 11.07.2014 that rule 7(d) seeks to allow distribution of input service credit to all units in the ratio of their turnover of the previous year.

Example

An Input Service Distributor (ISD) has a total of 4 units namely 'A', 'B', 'C' and 'D', which are operational in the current year. How will the credit of input service pertaining to more than one unit be distributed?

Answer

Distribution to 'A'= X/Y x Z

X = Turnover of unit 'A' during the relevant period

Y = Total turnover of all its unit i.e. 'A'+'B'+'C'+'D' during the relevant period

Z = Total credit of service tax attributable to services used by more than one unit

Similarly the credit shall be distributed to the other units 'B', 'C' and 'D'.

Example

An ISD has a common input service credit of ₹ 12000 pertaining to more than one unit. The ISD has 4 units namely 'A', 'B', 'C' and 'D' which are operational in the current year.

Unit	Turnover in the previous year (₹)
A (Manufacturing excisable goods)	25,00,000
B (Manufacturing excisable and exempted goods)	30,00,000
C (providing exclusively exempted service)	15,00,000
D (providing taxable and exempted service)	30,00,000
Total	1,00,00,000

The common input service relates to units 'A', 'B' and 'C'. How will the credit be distributed?

Answer

The distribution of credit will be as under:

(i) Distribution to 'A'

= 12,000 * 25,00,000/1,00,00,000

= 3,000

(ii) Distribution to 'B'

= 12,000 * 30,00,000/1,00,00,000

= 3,600

(iii) Distribution to 'C'

= 12,000 * 15,00,000/1,00,00,000

= 1,800

(iv) Distribution to 'D'

= 12,000 * 30,00,000/1,00,00,000

= 3,600

The distribution for the purpose of rule 7(d) will be done in this ratio in all cases, irrespective of whether such common input services were used in all the units or in some of the units.

4.11 Rule 7A – Distribution of credit on inputs by the office or any other premises of output service provider

(1) While rule 7 allows the distribution of credit on input services by the input service distributor, rule 7A allows the distribution of credit on inputs and capital goods by the office or any other premises of output service provider.

(2) Many a times bills / invoices for inputs and capital goods are raised in the name of head office/regional office etc. while the same are received in some other premises of the service provider from where the services are actually provided. In such a case, the head office can distribute the credit of such inputs and capital goods to the service provider by issuing an invoice.

(3) Sub-rule (1) lays down that a provider of output service shall be allowed to take credit on inputs and capital goods received, on the basis of an invoice or a bill or a challan issued by an office or premises of the said provider of output service, which receives invoices, issued in terms of the provisions of the Central Excise Rules, 2002, towards the purchase of inputs and capital goods.

(4) Sub-rule (2) provides that the provisions of these rules or any other rules made under the Central Excise Act, 1944, as made applicable to a first stage dealer or a second stage dealer, shall *mutatis mutandis* apply to such office or premises of the provider of output service.

4.12 Rule 8 – Storage of inputs outside the factory of the manufacturer

(1) The Assistant/Deputy Commissioner can permit the inputs in respect of which CENVAT has been taken to be stored outside the factory of the manufacturer concerned. However, such storage of inputs outside the factory shall be allowed only in the exceptional circumstances having regard to the nature of the goods and shortage of storage space at the premises of such manufacturer, and shall be subject to suitable safeguards against any loss of revenue.

(2) Where such inputs are not subsequently used in the manner prescribed in these rules for any reason whatsoever, it has been stipulated that the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such inputs.

4.13 Rule 9 – Documents and accounts

(1) Eligible documents: Sub-rule (1) allows manufacturer or the provider of output service or input service distributor to avail CENVAT credit on the basis of *any* of the following documents:

	Nature of document
1.	Invoice issued by a manufacturer for clearance of inputs or capital goods from his factory or depot or from the premises of his consignment agent or from any other premises from where the goods are sold
2.	Invoice issued by a manufacturer for clearance of inputs or capital goods as such
3.	Invoice issued by an importer
4.	Invoice issued by an importer from his depot or from the premises of his consignment agent if the said depot or the premises are registered under central excise.
5.	Invoice issued by a first stage dealer or a second stage dealer under Central Excise Rules, 2002.
6.	Bill of entry.
7.	A supplementary invoice issued by a manufacturer or importer of inputs or capital goods where additional amount of excise duty or CVD has been paid except in a case where such payment was on account of fraud, suppression of facts etc. [A supplementary invoice includes challan or any other similar document evidencing payment of additional duty leviable under section 3 of the Customs Tariff Act.]
8.	A supplementary invoice, bill or challan issued by a provider of output service except where the additional amount of tax became recoverable from the service provider on account of fraud, suppression of facts etc.
9.	Certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office.
10.	A challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax
11.	An invoice, a bill or challan issued by a provider of input service
12.	An invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

Points to be noted:

(i) Credit of special CVD (additional duty of customs levied under section 3(5) of the Customs Tariff Act, 1975) shall not be allowed if the invoice or the supplementary invoice, as the case may be, bears an indication to the effect that no credit of the said additional duty shall be admissible.

(ii) Since, rule 9 states that credit can be taken on the basis of *an* invoice issued by a manufacturer/importer/dealer/service provider; credit can be availed on the basis of *any* copy of the invoice viz., ORIGINAL FOR BUYER or DUPLICATE FOR TRANSPORTER or TRIPLICATE FOR ASSESSEE.

(iii) A supplementary invoice is issued by the supplier-manufacturer/service provider when he pays additional duty/service tax on inputs or capital goods/input services supplied/provided by

him. The additional payment of duty/tax can be on account of reasons like any demand, audit objection, cost escalation granted by buyer etc.

(2) Contents of the documents: Sub-rule (2) provides that the CENVAT credit can be taken only if **all** the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994 are available on the invoice or other duty-paying document.

However, the Deputy/Assistant Commissioner may allow the CENVAT credit even if the said document does not contain all the particulars but the following two conditions are satisfied:

(a) The document contains the following information:

- details of duty or service tax payable,
- description of the goods or taxable service,
- assessable value,
- central excise/service tax registration number of the person issuing the invoice
- name and address of the factory or warehouse or premises of first or second stage dealers or provider of output service, and

(b) The Deputy/Assistant Commissioner is satisfied that the:

(i) goods or services covered by the said document have been received and

(ii) accounted for in the books of the account of the receiver.

(3) Credit on goods purchased from first stage dealer/ second stage dealer/ *registered importer*: Sub-rule (4) lays down that the CENVAT credit in respect of inputs or capital goods purchased from a first stage dealer or second stage dealer shall be allowed only if-

- such first stage dealer/second stage dealer has maintained records indicating the fact that the input or capital goods was supplied from the stock on which duty was paid by the producer of such input or capital goods; **and**
- only an amount of such duty on *pro rata* basis has been indicated in the invoice issued by him.

The provisions of this sub-rule are also applicable in case of an importer who issues an invoice on which CENVAT credit can be taken.

(4) Records for inputs and capital goods: As per sub-rule (5), the manufacturer of final products or the provider of output service has to maintain proper records for the-

- receipt,
- disposal,
- consumption; and
- inventory

of the input and capital goods.

The records should have the relevant information regarding the-

- value,

- duty paid,
- CENVAT credit taken and utilized, and
- the person from whom the input or capital goods have been procured.

The burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit.

(5) Records for input service: Sub-rule (6) specifies that the manufacturer of final products or the provider of output service has to maintain proper records for the receipt and consumption of the input services.

The records should have the relevant information regarding the value, tax paid, CENVAT credit taken and utilized and the person from whom the input service has been procured. The burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit.

(6) CENVAT credit returns: The provisions with regard to filing of CENVAT credit returns are explained in sub-rules (7) to (11). Returns are required to be filed by (i) manufacturer, (ii) first stage dealer or a second stage dealer, (iii) output service provider and (iv) input service distributor in the manner described below:

(i) Monthly/Quarterly return for a manufacturer: The manufacturer of final products shall submit within ten days from the close of each month to the Superintendent of Central Excise, a **monthly return** in Form **ER-1**.

However, in case of SSI units a quarterly return in Form **ER-3** is filed within ten days after the close of the quarter to which the return relates [Sub-rule 7].

(ii) Quarterly return for a first stage dealer/ second stage dealer/ registered importer: A first stage dealer or a second stage dealer or a registered importer, as the case may be, shall submit within fifteen days from the close of each quarter of a year to the Superintendent of Central Excise, a return in the form specified, by notification, by the Board [Sub-rule (8)].

(iii) Half-yearly return for an output service provider: Sub-rule (9) lays down that the provider of output service availing CENVAT credit, shall submit a **half yearly return** in **Form ST-3** to the Superintendent of Central Excise, by the end of the month following the particular quarter or half year.

(iv) Half-yearly return for an input service distributor: Sub-rule (10) prescribes that the input service distributor, shall submit a **half yearly return in Form ST-3,** giving the details of credit received and distributed during the said half year, to the jurisdictional Superintendent of Central Excise, by the end of the month following the half year.

Note: All the above returns have to be filed electronically.

(7) Revision of return: Sub-rule (11) allows the output service provider or the input service distributor to rectify mistakes or omission and file revised return within 60 days from the date of filing of original return.

4.14 Rule 9A – Information relating to principal inputs

Principal inputs: Principal inputs means any input which is used in the manufacture of final products where the cost of such input constitutes not less than 10% of the total cost of raw-materials for the manufacture of unit quantity of a given final product.

(1) Declaration of principal inputs: A manufacturer of final products has to furnish to the Superintendent of Central Excise a declaration in the prescribed Form (ER 5) electronically in respect of the principal inputs and the quantity of such principal inputs required for use in the manufacture of unit quantity of each of the excisable goods manufactured or to be manufactured by him. Such declaration has to be filed annually by 30th April of each Financial Year.

(2) Alteration in the declaration: If a manufacturer of final products intends to make any alteration in the information so furnished he shall furnish information to the Superintendent of Central Excise together with the reasons for such alteration before the proposed change or within 15 days of such change in the prescribed Form.

(3) Monthly return of principal inputs: Further, a manufacturer of final products has to submit, a monthly return in the prescribed Form (ER 6) electronically, in respect of information regarding the receipt and consumption of each principal inputs with reference to the quantity of final products manufactured by him. Such return shall be filed within 10 days from the close of each month, to the Superintendent of Central Excise.

(4) Manufacturers exempt from filing of return/declaration of principal inputs: The Central Government may, by notification and subject to such conditions or limitations, as may be specified in such notification, specify manufacturers or class of manufacturers who may not be required to furnish such declaration or monthly return.

The assessees who

- manufacture excisable goods falling under Chapters 22, 28 to 30, 32 to 34, 38 to 40, 48, 72 to 74, 76, 84, 85, 87, 90 and 94 and Heading Nos. 54.02, 54.03, 55.01, 55.02, 55.03 and 55.04 and
- have paid excise duty of ₹ 100 lakh or more during the preceding financial year are required to submit the return ER-6. All other assessees are exempted from furnishing such return.

4.15 Rule 10 - Transfer of credit

(1) Transfer of credit by manufacturer [Sub-rule (1)]: If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.

(2) Transfer of credit by service provider [Sub-rule (2)]: If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the provider of output service shall be allowed to

transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.

(3) Credit to be transferred when inputs or capital goods are also transferred [Sub-rule (3)]: Transfer of CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise.

4.16 Rule 10A - Transfer of CENVAT credit of SAD from one factory to another

(1) Transfer of credit of SAD: Special additional duty @ 4% is paid on imported goods under section 3(5) of Customs Tariff Act, 1975 and CENVAT credit for the same can be availed by a manufacturer/producer of final products. A manufacturer having more than one registered premises (but a common Permanent Account Number) may transfer unutilised CENVAT credit of such additional duty lying in balance with one of his registered premises at the end of a quarter, to his other registered premises.

(2) Manner of transferring credit: The credit can be transferred by-

(i) making an entry for such transfer in the documents maintained under rule 9;

(ii) issuing a transfer challan containing registration number, name and address of the registered premises transferring the credit and receiving such credit, the amount of credit transferred and the particulars of such entry as mentioned in clause (i), and such recipient premises may take CENVAT credit on the basis of the transfer challan.

(3) Filing of separate monthly returns: The manufacturer will have to file a monthly return separately in respect of transferring and recipient registered premises.

(4) Units availing area based exemptions not entitled for transfer of credit: However, transfer of credit will not be allowed if the transferring and recipient registered premises are availing areas based exemption in North Eastern States, Jammu and Kashmir, Sikkim or Kutch district

4.17 Rule 11 - Transitional provisions

(1) Reversal of credit by manufacturer opting for SSI exemption: Sub-rule (2) specifically provides that whenever the manufacturer opts out of CENVAT and opts for exemption based on value of clearances, he shall pay the amount equivalent to the CENVAT credit allowed to him in respect of the inputs lying in stock or in process or contained in final products lying in stock and the balance, if any, would lapse.

(2) Reversal of credit by manufacturer in case of absolute exemption or when he opts for exemption granted under section 5A: Sub-rule (3) provides that a manufacturer shall be required to pay an amount equivalent to the CENVAT credit in respect of inputs received for

use in the manufacture of the final product which is lying in stock or in process or is contained in the final product lying in stock, if,-

(i) he opts for exemption from whole of the excise duty leviable on the said final product under a notification issued under section 5A of the Central Excise Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act.

If after deducting the said amount from the balance of CENVAT credit (if any lying in his credit) there still remains a balance, it shall lapse. Such balance shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

(3) Reversal of credit by output service provider opting for exemption: Similar is the situation in respect of cases wherein taxable services become exempted. Sub-rule (4) provides that a output service provider shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service.

After deducting the said amount from the balance of CENVAT credit (if any lying in his credit) if there still remains a balance, it shall lapse. Such balance shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported.

It should be noted that in this case reversal of credit of input services is not required.

4.18 Rule 12 - Special dispensation in respect of inputs manufactured in factories located in specified areas of North East region, Kutch district of Gujarat, State of Jammu and Kashmir and State of Sikkim

It has been the Government's policy to develop trade in specified States/regions areas by giving area based incentives. Rule 12 is aimed at achieving the said objective of the Government by extending credit on exempt inputs and capital goods cleared from specified areas under prescribed notifications.

Rule 12 provides that CENVAT credit on inputs or capital goods cleared by units situated in North Eastern States, Jammu and Kashmir, Sikkim and Kutch district under notifications granting area based exemptions from duty, shall be admissible as if no portion of the duty paid on such inputs or capital goods was exempted under any of the said notifications. The exemption to these units is given by way of refund i.e., duty is first paid by the manufacturer and later claimed back as refund.

Rule 12 overrides other CENVAT Credit Rules but is subject to the proviso to clause (i) of sub-rule (1) of rule 3. In other words, the provisions of rule 12 do not apply if the inputs/capital goods cleared by such units are:

- liable to 2% duty [cleared under *Notification No. 1/2011 CE dated 01.03.2011]* or
- liable to 1% duty [cleared under *Notification No. 12/2012 CE dated 17.03.2012]* i.e., they

are goods specified at serial numbers 67 and 128 of *Notification No. 12/2012 C.E. dated 17.03.2012*.

4.19 Rule 12A – Procedures and facilities for the Large tax payer

(1) Removal of inputs/capital goods as such by LTU without reversal of CENVAT credit [Sub-rule 1]: A large taxpayer may remove inputs (except motor spirit, commonly known as petrol, high speed diesel and light diesel oil) or capital goods, as such, on which CENVAT credit has been taken **without payment of an amount specified in rule 3(5)** of the CENVAT Credit Rules, 2004 under the cover of a transfer challan or invoice from any of his registered premises (sender premises) to his other registered premises (recipient premises) other than a premises of a first or second stage dealer for further use in the manufacture or production of final products in the recipient premises.

Conditions for removal: Such removal shall be subject to the conditions that-

(a) the final products are manufactured or produced using the said inputs and cleared on payment of appropriate duties of excise leviable thereon within a period of 6 months, from the date of receipt of the inputs in the recipient premises; or

(b) the final products are manufactured or produced using the said inputs and exported out of India, under bond or letter of undertaking within a period of 6 months, from the date of receipt of the inputs in the recipient premises,

and that any other conditions prescribed by the Commissioner of Central Excise, Large Taxpayer Unit in this regard are satisfied.

The transfer challan or invoice shall be serially numbered and shall contain the registration number, name, address of the large taxpayer, description, classification, time and date of removal, mode of transport and vehicle registration number, quantity of the goods and registration number and name of the consignee.

Consequences of non-compliance with the specified conditions for removal: If the final products manufactured or produced using the said inputs are not cleared on payment of appropriate duties of excise leviable thereon or are not exported out of India within the said period of 6 months from the date of receipt of the input goods in the recipient premises, or such inputs are cleared as such from the recipient premises, an amount equal to the credit taken in respect of such inputs by the sender premises shall be paid by the recipient premises with interest in the manner and rate specified under rule 14 of these rules.

Sub-rule (2) lays down that the first recipient premises may however take CENVAT credit of such amount paid by it as if it was a duty paid by the sender premises who removed such goods on the basis of a document showing payment of such duties.

Also, if such capital goods are used exclusively in the manufacture of exempted goods, or such capital goods are cleared as such from the recipient premises, an amount equal to the credit taken in respect of such capital goods by the sender premises shall be paid by the recipient premises with interest in the manner and rate specified under rule 14 of these rules.

If a large taxpayer fails to pay any of such amount, it shall be recovered along with interest in the manner as provided under rule 14 of these rules.

Exceptions: The afore-mentioned provisions are not applicable:

(a) if the recipient premises avail area based exemptions from excise duty under specified notifications [Units located in North Eastern States, Jammu and Kashmir, Sikkim and Kutch district are entitled to area based exemptions from excise duty]

(b) in respect of an EOU or a unit located in a EHTP or STP.

(2) CENVAT credit taken by sender premises not to be denied [Sub-rule (3)]: CENVAT credit of the specified duties taken by a sender premises shall not be denied or varied in respect of any inputs or capital goods, removed as such under sub-rule (1) on the ground that the said inputs or the capital goods have been

(i) removed without payment of an amount specified in rule 3(5) of these rules; or

(ii) used in the manufacture of any intermediate goods removed without payment of duty under sub-rule (1) of rule 12BB of Central Excise Rules, 2002.

For the purpose of this sub-rule intermediate goods shall have the same meaning assigned to it in sub-rule (1) of rule 12BB of the Central Excise Rules, 2002.

(3) Transfer of CENVAT credit by LTU [Sub-rule 4]: A large taxpayer may transfer CENVAT credit taken by one of his registered manufacturing premises or premises providing taxable service to its other registered premises by,-

(i) making an entry for such transfer in the records maintained under rule 9;

(ii) issuing a transfer challan containing registration number, name and address of the registered premises transferring the credit as well as receiving such credit, the amount of credit transferred and the particulars of such entry as mentioned in clause (i),

and such recipient premises can take CENVAT credit on the basis of such transfer challan as mentioned in clause (ii):

It may be noted that such transfer or utilisation of CENVAT credit shall be subject to the limitations prescribed under rule 3(7)(b).

Thus, a large tax payer unit will not be able to transfer the credit taken by any of its registered manufacturing premises or premises providing taxable service to his other registered premises.

(4) Transfer of credit not allowed in specific cases: Transfer of credit (as discussed in point (3) above) is not allowed if the registered manufacturing premises avails area based exemptions from excise duty under specified notifications in North Eastern States, Jammu and Kashmir, Sikkim or Kutch district.

(5) Return by LTU: A large taxpayer shall submit a monthly return, as prescribed under these rules, for each of the registered premises [Sub-rule 5].

4.20 Rule 12AAA - Power to impose restrictions in certain types of cases

Rule 12AAA empowers the Central Government to provide for certain measures including restrictions on a manufacturer, ***registered importer***, first stage and second stage dealer or an exporter if there is a misuse of CENVAT credit. The Central Government can exercise such powers where having regard to the extent of misuse of CENVAT credit, nature and type of such misuse and any other relevant factors, it is of the opinion that in order to prevent the misuse of the provisions of CENVAT credit, it is necessary in the public interest to impose restrictions. The nature of restrictions, (e.g. restrictions on utilization of CENVAT credit and suspension of registration in case of a dealer) types of facilities to be withdrawn and procedure for issue of such order by the Chief Commissioner of Central Excise may be specified by a notification in the Official Gazette. The provisions of this rule shall not be subject to anything contained in CENVAT Credit Rules, 2004.

[Refer Chapter 5: General Procedures under Central Excise for notification issued under the above rule]

4.21 Rule 13 – Power of Central Government to notify goods for deemed CENVAT credit

This Rule seeks to empower the Government to declare vide notifications certain input or input service on which the excise duty, additional duty of customs or service tax paid shall be deemed to have been paid at a rate or equivalent to such amount as may be mentioned in the notification. CENVAT credit shall be allowed on such inputs or input services even if such input or input services are not used directly by the manufacturer of final products or by the provider of output service but are contained in the final products or used in providing output service.

Presently, no notification is issued under this rule and hence, deemed credit is not available on any inputs. Prior to 0.1.04.2003, some notifications were issued under this rule which allowed deemed CENVAT credit for certain textile products.

4.22 Rule 14 - Recovery of CENVAT credit wrongly taken and utilised or erroneously refunded

The provisions of the rule 14 are discussed hereunder:

(a) Where CENVAT credit has been taken wrongly but not utilised, the same will be recovered from the manufacturer/ output service provider in accordance with the provisions of section 11A of the Central Excise Act, 1944/ section 73 of the Finance Act, 1994 [Clause (i) of sub-rule (1)].

(b) Where CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same will be recovered along with interest from the manufacturer/ output service provider in accordance with the provisions of sections 11A and 11AA (interest @ 18% for excise duty) of Central Excise Act, 1944/ sections 73 and 75 (graded interest ranging from 18% to 30% for service tax) of the Finance Act, 1994 [Clause (ii) of sub-rule (1)].

(c) For this purpose, all credits taken during a month will be deemed to have been taken on the last day of the month and the utilisation thereof will be deemed to have occurred in the following manner, namely: -

(i) the opening balance of the month has been utilised first;

(ii) credit admissible in terms of these rules taken during the month has been utilised next;

(iii) credit inadmissible in terms of these rules taken during the month has been utilized thereafter.

4.23 Rule 15 - Confiscation and Penalty

1. Wrongful availment/utilization of CENVAT credit on inputs, capital goods or input services [Sub-rule (1)]: If any person, takes or utilises CENVAT credit in respect of input/capital goods/input services, **wrongly or in contravention of any of the provisions of these rules,** then:-

(a) all such goods shall be liable to confiscation and,

(b) such person shall be liable to penalty in terms of clause (a) or clause (b) of section 11AC(1) of the Central Excise Act, 1944 or section 76(1) of the Finance Act, 1994 as the case may be.

The quantum of such penalties can be reduced or even nullified depending on the time of payment of excise duty/service tax, interest and reduced penalty, as the case may be, in accordance with clause (a) or clause (b) of section 11AC(1) and section 76(1), as the case may be.

2. Wrongful availment/utilization of CENVAT credit by reason of fraud etc. with the intent to evade the payment of duty [Sub-rule (2)]: Where the CENVAT credit in respect of input/capital goods/input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty then, the manufacturer shall also be liable to pay ***penalty in terms of the provisions of clause (c), clause (d) or clause (e) of sub-section (1) of section 11AC of the Excise*** Act.

3. Wrongful availment/utilization of CENVAT credit by reason of fraud etc. with the intent to evade the payment of service tax [Sub-rule (3)]: Where the CENVAT credit in respect of input/capital goods/input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax then, the provider of output service shall also be liable to pay ***penalty in terms of the provisions of sub-section (1) of section 78 of the Finance Act.***

4. Principle of natural justice [Sub-rule (4)]: Any order under sub-rule (1), sub-rule (2) or sub-rule (3) shall be issued by the Central Excise Officer following the principles of natural justice.

4.24 Rule 15A – General Penalty

This rule provides for general penalty upto Rs.5000/- in case of contravention of any of the provisions of the CENVAT Credit Rules, 2004, for which no specific penal provision exists.

4.25 CENVAT credit need not be reversed where the manufacturing process is held as not chargeable to excise duty by the Courts [Section 5B]

Sometimes it happens that a process undertaken by a manufacturer is held as not chargeable to excise duty by the Courts, though the assessee has been availing credit of excise duty/service tax/cess paid on the inputs/capital goods/input services used in manufacturing the final product and paying excise duty on such final products. In such cases the assessee is at liberty to approach the Central Government for issue of appropriate notification for regularization of the CENVAT credit availed under section 5B of the Central Excise Act, 1944. However, if the assessee has not paid duty and the process undertaken by him indisputably does not amount to manufacture, the Department has to inform the assessee about the correct legal position and advise him not to pay duty and not to avail credit on inputs.

Section 5B of the Central Excise Act, 1944 provides that the Central Government may order for non-reversal of the credit allowed to the assessee by issuing a notification. The notification may specify the conditions subject to which such non-reversal of credit may be ordered. Further, the Central Government may also order for non-reversal of credit, if any, taken by the buyer of the said product in such notification.

It may be noted that such non-reversal of the credit shall not be ordered if the assessee has preferred a claim for refund of excise duty paid by him.

5

General Procedures under Central Excise

5.1 Introduction

5.1.1 Physical control system (Till 1969): Till 1969, there was physical control system. Under physical control system, each clearance of manufactured goods from the factory was done under the supervision of the Central Excise Officers.

5.1.2 Self-Removal procedure (1969 onwards): Introduction of self-removal procedure was a welcome procedure in the industry. It was made applicable to almost all the commodities except a few items. Under the self removal procedure, the assessees were allowed to quantify the duty on the basis of approved classification list and the price list and clear the goods on payment of appropriate duty.

5.1.3 Gate pass system gave way to the invoice-based system (1994): In 1994, the, gate pass system gave way to the invoice-based system and all clearances started getting effected on manufacturer's own invoice. Under **Gate Pass System**, manufacturers were required to issue gate pass counter-signed by Central Excise Officer at the time of clearance of excisable goods. However, under Invoice-based System, assessee is required to prepare invoice while clearing goods form factory and himself assess the duty payable. This duty is indicated on the invoice.

5.1.4 Self-Assessment system (1996): Another major change was brought about in 1996, when the Self-Assessment system was introduced. This system is continuing today also.

Under this system:-

(i) The assessee himself assesses his returns and files it with the Department.

(ii) Department scrutinises the return or conducts selective audit to ascertain correctness of the duty payment.

(iii) Even the classification and value of the goods have to be merely declared by the assessee instead of obtaining approval of the same from the Department. The system of classification of goods and price lists had now been done away with.

5.1.5 Fortnightly payment of duty (2000): Prior to March 2000, the duty had to be discharged before removing the goods from the factory and in some circumstances on the day on which it is removed.

However, in 2000, the fortnightly payment of duty was introduced for all commodities as an extension of the monthly payment system which was introduced for Small Scale Industries.

Further, the declaration of inputs for availing the Modvat (now Cenvat) was dispensed with from April 2000 itself.

5.1.6 Central Excise Rules, 1944 replaced with Central Excise (No.2) Rules, 2001 (2001)

Reasons for replacement

- The Central Excise Rules, 1944 were in existence for long. It was widely perceived that quite a few of them had lost relevance or utility in the context of the changes being taken place in the administration of excise duties.
- Many of the rigidities and technicalities engulfing some of the rules had not been compatible with the spirit of tax reforms.
- Quite a few rules owed their birth to Department's succumbing to pressure to resolve trivial or peripheral issues.
- Some others appeared to justify their existence to Department's weakness to remain attached to past, oblivious of the needs of present or future.
- New rules were simple and concise.
- New rules were facilitator to the trade and industry and not be a material comprising complex and complicated reading.

Rules relating to CENVAT scheme, appeal procedure, etc. were deliberately not amalgamated in the Central Excise Rules, 2001 and were kept separate.

5.1.7 Central Excise Rules, 2002 (2002): Central Excise (No.2) Rules, 2001 were again superseded by the Central Excise Rules, 2002 with effect from 1st March, 2002. The re-issue of Central Excise Rules was to give effect to minor modifications.

5.1.8 Monthly payment of duty (2003): With effect from 1.04.2003, the monthly payment system of duty has been reinforced.

5.2 Removal of excisable goods [Rule 4]

5.2.1 Payment of excise duty before removal of excisable goods [Sub-rule (1)]: No excisable goods shall be removed from the place of manufacture or from warehouse, when the goods are stored in warehouse **without payment of duty** whether for

- ❖ consumption, or
- ❖ export, or
- ❖ manufacture of any other commodity in or outside the place of manufacture

until the excise duty leviable thereon has been paid in such manner as provided in rule 8 or under any other law.

The liability to pay excise duty has been casted on every person:-

- who produces or manufactures any excisable goods, or
- who stores such goods in a warehouse

Transfer in ownership and possession does not amount to removal of goods: When stock that is lying in the factory is transferred to new owners without any physical removal of goods from the factory, no duty can be imposed. In other words, mere change in ownership and possession of the goods will not amount to removal of the same as removal means physical shifting of goods *[Indorama Synthetics (I) Ltd. v. CCE 2005 (190) E.L.T. 193 (Tri. - Mumbai)]*

Removal of goods is not the taxable event for levy of duty: In *Collector v. Vazir Sultan Tobacco Co. Ltd. 1996 (83) E.L.T. 3,* the Supreme Court held that the taxable event in Central Excise is the manufacture or production of goods and not the removal of goods. Section 3 cannot shift levy of excise duty from the stage of manufacture to the stage of removal. It has only shifted the stage of collection

5.2.2 In case of ready-made garments and made-up articles of textiles manufactured on job-work basis, liability to pay duty is on the merchant manufacturer [Sub-rule (1A)]: It is the practice in the garment and made up industry for brand owners to have goods manufactured from several job-workers. The brand owners may or may not, themselves, possess any manufacturing facility.

In case of ready-made garments and made-up articles of textiles manufactured on job-work basis [products covered under Chapter 61, 62 and 63 of the First Schedule to the Tariff Act], liability to pay duty is on the merchant manufacturer (person on whose behalf the goods are manufactured by job-workers) and not on the job-workers. Hence, the job-worker is exempt from payment of duty.

Further, merchant manufacturer would be required to register his private store-room or warehouse in which inputs are received for distribution to job-workers and finished goods are received from the job-workers. He would also be required to comply with all the other provisions of Central Excise law.

5.2.3 Price of the goods to indicate the amount of duty paid thereon [Section 12A]: Section 12A casts a liability on every person who is liable to pay duty of excise on any goods. It prescribes that at the time of clearance of the goods the amount of such duty which will form part of the price at which such goods are to be sold should be prominently indicated in all the documents relating to assessment, sales invoice, and other like documents.

5.2.4 Special provisions for removal of molasses [Sub-rule (2)]

(a) Procurer of molasses liable to pay excise duty on molasses: Where molasses are produced in a Khandsari sugar factory, the person who procures such molasses, whether directly from the factory or otherwise, for use in the manufacture of any commodity shall pay the duty leviable on such molasses as if the molasses had been produced by the procurer.

(b) Duty to be paid on molasses used in the manufacture of excisable/non-excisable product: Duty on the molasses shall be payable whether or not the goods, which are manufactured with the use of the molasses, are excisable or not.

5.2.5 Removal of goods for storage in a warehouse without payment of duty [Sub- rule (4)] : In certain industries like sugar, the production is seasonal, but the off-take from the factory is throughout the year. In such cases, storage of huge quantities within the

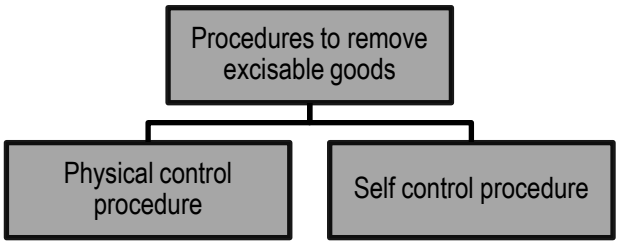
factory is burdensome. Further, since a large quantity of off-take is controlled by the Government, the management may not be in a position to remove the goods on payment of duty.

Consequently, sub-rule (4) provides that Commissioner may in exceptional circumstances having regard to

- the storage of goods and
- storage space at the premises

permit a manufacturer to store his goods in any other place outside his premises without payment of duty. This will be subject to such conditions as may be prescribed.

5.2.6 Procedures to remove the excisable goods:-



(a) Physical Control Procedure: Each clearance of manufactured goods from the factory is done under the supervision of the Central Excise Officers. Today, only cigarettes are removed under physical control procedure. All other products fall under the self-removal procedure.

(b) Self Removal Procedure

1. The manufacturer may ensure that the goods, which are sought to be removed, have been duly intimated to the Department providing the process flow chart of manufacture as well as list of critical raw materials.
2. He shall ensure that the finished goods are all duly entered in the production register daily. (This was called the RG-I register earlier).
3. The invoice raised should be in line with the purchase order if any, received from the customer. Care is to be exercised in calculations in the invoice.
4. The assessable value (whether cum-duty price or otherwise) is to be arrived at accurately by applying section 4 read with Central Excise Valuation Rules, 2000. If the value is based on MRP or Tariff Value fixed under section 3(2), the same may be applied.
5. The manufacturer shall prepare an invoice in accordance with the provisions of rule 11 and calculate the assessable value and excise duty payable.
6. He shall make the removal entry in production register providing details of value, quantity and duty payable.

7. It is to be ensured that the person/carrier who/which carries the goods is provided with "duplicate for transporter" copy of invoice.

8. He shall ensure that at the end of the month (1st to 30th), he debits the duty payable in the CENVAT Credit A/c and if the balance is not sufficient, pay through the Personal Ledger Account (PLA) by the 5th of the next month. For the month of March, payment will be made by the end of that month itself.

9. The units claiming SSI Exemption are required to pay the quarterly duty by the 5th of the month following that quarter. Here also, for quarter ending in the month of March, payment is to be made by 31st March itself.

10. It is hereby clarified that the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date. The Board has clarified that the liability would be discharged only on the date of realization of the cheque and not earlier as per the *CBEC Circular No.28/2002 dated 24.5.2002.*

5.3 Date for determination of duty and tariff valuation [Rule 5]

S.No.	In case of removal of	applicable rate of duty/tariff value shall be the rate/value in force on the
1.	any excisable goods (other than khandsari molasses)	date when such goods are removed from a factory or a warehouse, as the case may be.
2.	khandsari molasses	date of receipt of such molasses in the factory of the procurer of such molasses *(since in case of khandsari molasses, duty is paid by the procurer and not by the manufacturer)*
3.	excisable goods cleared for captive consumption	the date on which the goods are issued for such use *(since the date of removal of such goods shall be the date on which the goods are issued for such use-Explanation to rule 5)*

5.4 Assessment [Rule 6 & 7]

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

5.4.1 Meaning of assessment [Rule 2(b)]: Assessment includes:-

(a) Self-assessment of duty made by the assessee*, and

(b) Provisional assessment under rule 7 of the Central Excise Rules, 2002.

***Assessee** means**:-**

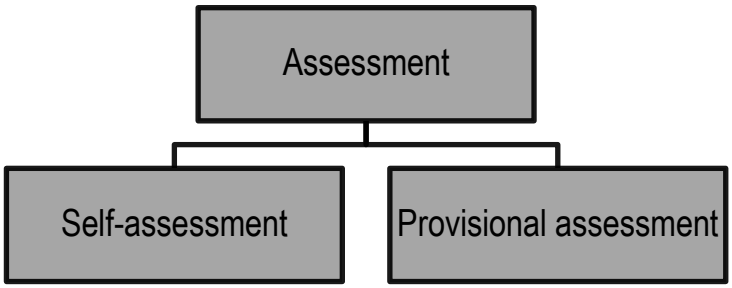
(a) any person who is liable for payment of duty assessed or

(b) a producer or

(c) manufacturer of excisable goods or

(d) a registered person of a private warehouse in which excisable goods are stored and includes:-

an authorized agent of such person [Rule 2(c)].



5.4.2 Self Assessment [Rule 6]

(a) Meaning of self-assessment: The assessee himself is required to determine duty liability at the time of removal of excisable goods and discharge the same. In other words,

- assessee should apply correct classification and value on the quantities being removed by him, and
- indicate the same on the invoice.

(b) Exception- Assessee manufacturing cigarettes: In the case of an assessee manufacturing cigarettes, the Superintendent or Inspector of Central Excise has to assess the duty payable before removal by the assessee.

(c) Main ingredients of assessment

(i) Ascertainment of date and time of intended removal;

(ii) Ascertainment of classification and rate of duty (dealt in Chapter 2) at the point of removal;

(iii) Valuation of goods (dealt in Chapter 3) at the point of removal;

(iv) Quantity intended to be removed;

(v) Indication of the duty so assessed on the invoice;

(vi) Assessment of the return for a month;

(vii) Submission of return to the Range Office having jurisdiction over the factory within ten days of the succeeding month (quarterly return in case of SSI);

(viii) Submission of 'CENVAT Return' for a month within 10 days of the succeeding month.

(d) Scrutiny of assessment

(i) Responsibility of Departmental officers to scrutinize the assessment: In view of the

self-assessment procedure wherein the assessee himself assesses the duty liability, the responsibility of the Departmental officers [Central Excise Officers having jurisdiction over the factory/premises of the assessee] is to scrutinize the assessment made for verification of its correctness.

(ii) Documents required by officer: For this purpose, the said officer(s) may require the relevant documents. Though the statutory records have been dispensed with, the assessee is required to maintain private records containing all requisite information as required by different rules and also provide a list of all records maintained by him to the Range Office.

The Officer responsible for scrutiny of return may require:-

- Invoices issued by the assessee
- Daily Stock Account
- CENVAT Account
- Cash ledgers
- Ledger of all receipts and payments
- Source documents etc.

(iii) Compulsory for assessee to furnish the documents: It shall be compulsory for the assessee to provide the necessary records upon receiving the `Requisition Letter' from the Range Officer or other superior officers. He shall hand over the records under proper acknowledgement and receive them back under proper acknowledgement. The officer scrutinizing return may require presence of the assessee or his authorised person at mutually convenient time, for seeking certain information relating to the records.

(iv) Scrutiny of assessment : The Superintendent of Central Excise in charge of the Range Office, with assistance of the Inspectors in-charge of the factory of an assessee, will scrutinise all the returns. They shall, in selected cases, call for all connecting documents including invoices and the records and scrutinise the correctness of assessment.

S.No.	Central Excise Officer who will scrutinise the return	Amount of duty paid by the unit through PLA per annum every six months
1.	Deputy/Assistant Commissioner of Central Excise	More than ₹ 1 crore, but less than ₹ 5 crores
2.	Additional/Joint Commissioner of Central Excise	₹ 5 crores or more

5.4.3 Provisional Assessment [Rule 7]

Cases where provisional assessment can be resorted to : Provisional assessment can be resorted to in the following cases:-

(a) Where the assessee is unable to determine the value of excisable goods

or

(b) Where the assessee is unable to determine the rate of duty applicable thereto.

Procedure for provisional assessment: Rule 7, read with the guidelines issued by the Board, sets out the procedure for provisional assessment as follows:

(i) Request in writing to the Divisional Deputy/Assistant Commissioner of Central Excise: Wherever an assessee finds that final assessment is not possible at the point of removal, he will make a detailed request in writing to the Divisional Deputy/Assistant Commissioner of Central Excise, indicating:-

a. specific grounds/reasons, and the documents or information, for want of which final assessment cannot be made.

b. period for which provisional assessment is required.

c. the rate of duty or the value or both, as the case may be, proposed to be applied by the assessee, for Provisional Assessment; and

d. that he undertakes to appear before the Assistant/Deputy Commissioner of Central Excise within 7 days or such date fixed by him, and furnish all relevant information and documents within the time specified by the Assistant/Deputy Commissioner of Central Excise in his order, so as to enable the proper officer to finalise the provisional assessment.

(ii) Order of provisional assessment: On receipt of the request, the Deputy/Assistant Commissioner of Central Excise will examine it, if necessary, in consultation with the concerned Range Officer, to ascertain whether provisional assessment is necessary at all.

A. Order rejecting provisional assessment: If the reasons/ grounds are not sufficient, he may ask the assessee to appear before him on an appointed day and time, and if he is satisfied that provisional assessment is not necessary, he may pass a reasoned order rejecting the same and also ordering the rate of duty or the value, to be applied by the assessee.

B. Order directing provisional assessment: Where the Deputy/Assistant Commissioner of Central Excise is satisfied with the genuineness of the assessee's request he will issue a specific order directing provisional assessment clearly stating:-

(a) The grounds on which provisional assessment has been ordered.

(b) The rate and /or value, as the case may be, at which duty has to be provisionally paid.

(c) The amount of differential duty for which bond is to be executed covering the period, if any, during which assessee paid duty provisionally under the deeming provisions, after applying the rate and/ or value specified in (b) above.

(d) The amount of security or surety as may be fixed by Assistant Commissioner keeping in view the instructions issued by the Board from time to time.

(iii) Furnishing of bonds: As mentioned earlier, provisional payment of duty is allowed if the assessee executes a bond in the prescribed form with such surety or security in

such amount as the Assistant/ Deputy Commissioner may order. Such bond shall bind the assessee for payment of the difference between the amount of duty finally assessed and the amount of duty paid provisionally.

Though it is incumbent upon the assessee to ensure that the bond amount and corresponding securities are sufficient, the Divisional as well as the Range Officer will also keep a strict vigil on such cases with the help of 'Provisional Assessment Register'.

The Assistant/Deputy Commissioner of Central Excise will be held responsible to ensure that bonds for proper amount i.e., 3 times of the estimated differential duty are taken, in case of general bonds and that these are backed by proper (25%) security/ bank guarantee of the bond amount.

The format of bond for provisional assessment has been specified in *Notification No. 56/2001-Central Excise (N.T.) dated 3.7.2001*.

(iv) Marking the documents and return as "PROVISIONALLY ASSESSED" vide Order No..... dated .....": The assessee is required to mark the E.R.1 (monthly/quarterly return) and documents covered under Provisional Assessment as "PROVISIONALLY ASSESSED" vide Order No..... dated ....." . There is a declaration in E.R.1 where assessees have to mention the goods under 'provisional assessment'.

(v) Finalization of provisional assessment (Order of final assessment)

A. Meaning of Finalisation of provisional assessment: Finalisation of provisional assessment means finalisation of an issue/ground and thereafter finalization of each E.R.1s.

B. Time limit for finalisation of provisional assessment: Notwithstanding 'self-assessment', all cases of provisional assessment have to be finalised by the Deputy/Assistant Commissioner of Central Excise, within a maximum period of 6 months from the date of communicating the order of provisional assessment.

Extension of time-limit of finalization of provisional assessment cases

(i) The Commissioner can extend the period of 6 months if sufficient cause is shown which is recorded in writing.

(ii) If the period of extension is beyond 6 months, then the permission of Chief Commissioner is required.

C. Communication of amount of duty to the assessee: The amount of duty finalized will be communicated to the assessee at the earliest.

D. Interest payable on differential amount: The amount of each differential duty shall be paid along with interest at the rate notified under section 11AA of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

Ascertainment of the duty by the assessee himself

In the event the assessee is in a position to ascertain the duty himself, he may pay the duty on his own at the earliest and in that case, he will not have to incur interest on account of time taken by the Department to finalise assessment and communicate the amount.

(vi) Refund after finalization of assessment

A. Refund order: Where any refund becomes due to the assessee, order shall be passed for such refund, but disbursement shall be subject to further verification about incidence of such duty.

B. Refund subject to provision of unjust enrichment: The assessee will be required to submit proof to the Assistant/Deputy Commissioner of Central Excise that the duty incidence was borne by him (assessee). If the assessee fails to produce such proof/evidence, the Assistant/Deputy Commissioner of Central Excise will pass an order for depositing the amount in Consumer Welfare Fund in the prescribed manner.

C. Interest payable on refund: The refund will be given along with interest as provided under section 11BB of the Act. Therefore, interest @ 6% will be computed from the date immediately after the expiry of three months from the date of receipt of refund application till the date of refund of such duty.

Department, *suo motu*, cannot issue directions for provisional assessment*:* It is important to note that rule 7 of the said Rules does not provide for the Department, *suo motu*, issuing directions for resorting to provisional assessment. Therefore, when the Central Excise Officers, during scrutiny or otherwise, find that self-assessment is not in order the assessee may be asked for all necessary documents, records or other information for issue of duty demand for differential duty, if any, after conducting inquiry. Where the assessee fails to provide the records or information and Department is unable to issue demand, 'Best Judgement' method may be used to raise demand based on collateral evidences. The burden will be on the assessee to provide information for appropriate re-determination of duty, if any.

Prospective application of provisions of provisional assessment relating to interest clause and statutory time limit: As per the general law, the provisions of provisional assessment relating to interest clause and statutory time limit can only be prospective. Therefore, the provisions of interest and statutory time limit shall be applicable only to those cases of provisional assessment, which are ordered on or after 1st July, 2001.

5.5 Manner of payment [Rule 8]

5.5.1 General rule [Sub-rule (1)]: The duty on the goods removed from the factory or the warehouse during the **month** shall be paid:

S.No.	Case	Due date for payment of duty
1.	If the duty is paid electronically through internet banking	6th day of the following **month**
2.	In any other case	5th day of the following **month**

3.	In the case of goods removed during the month of March	31st day of March

5.5.2 Due date for payment of duty in case of SSIs: In case of an assessee eligible to avail the exemption under a Notification based on the value of clearances in a financial year (SSIs), the duty on goods cleared during a **quarter** shall be paid:

S.No.	Case	Due date for payment of duty
1.	If the duty is paid electronically through internet banking	6th day of the month following that **quarter**.
2.	In any other case	5th day of the month following that **quarter.**
3.	In the case of goods removed during the month of March	31st day of March

Availability of the relaxation: Above relaxation is available to a unit who is **"eligible"** to claim SSI exemption regardless of whether he actually claims it or opts to pay duty. Further, the said relaxation is available to an **"eligible"** unit for the entire financial year even if it crosses the limit of ₹ 400 lakh (aggregate value of clearances) in the current financial year.

Meaning of eligible: An **"eligible" unit** is one whose aggregate value of clearances did not exceed ₹ 400 lakh in the preceding financial year.

5.5.3 E-payment of duty: Every assessee shall electronically pay the duty through internet banking. However, the Assistant/Deputy Commissioner of Central Excise may for reasons to be recorded in writing, allow the assessee to deposit excise duty by any mode other than internet banking.

Explanation - For the purpose of rule 8, -

(a) Amount of duty payable to be credited to account of the Central Government by specified date

The duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.

(b) Payment of duty by cheque

If the assessee deposits the duty by cheque, the date of presentation of the cheque in the bank designated by the Central Board of Excise & Customs for this purpose shall be deemed to be the date on which the duty has been paid subject to the realisation of that cheque.

5.5.4 Payment under sub-rule (1) deemed as duty paid on excisable goods [Sub-rule(2)]: The duty of excise shall be deemed to have been paid on the excisable goods removed in the manner provided under sub-rule(1) and the credit of such duty allowed as provided by or under any rule.

5.5.5 Interest @ 18% on delayed payment of duty [Sub-rule (3)]: If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate @ *18%* per annum on the outstanding amount, for the period starting

with the first day after due date till the date of actual payment of the outstanding amount.

5.5.6 Consequences of failure to pay duty beyond 30 days [Sub-rule (3A)]: If the assessee fails to pay the duty declared as payable by him in the return within a period of 1 month from the due date, then he would be liable to pay penalty @ 1% on such amount of the duty not paid, for each month or part thereof calculated from the due date, for the period during which such failure continues. Here, "month" means the period between two consecutive due dates for payment of duty.

5.5.7 *Recovery of duty and interest due and penalty thereon [Sub-rule (4)]:* The provisions of section 11 of the Act shall be applicable for recovery of duty as assessed under rule 6 ***and mentioned in the return filed under these rules,*** the interest under rule 8(3) ***and penalty under sub-rule (3A)*** in the same manner as it is applicable for recovery of any duty or other sums payable to the Central Government.

Duty includes the 'amount' payable in terms of the CENVAT Credit Rules, 2004

For the purposes of payment of duty, the expressions 'duty' or 'duty of excise' shall also include the 'amount' payable in terms of the CENVAT Credit Rules, 2004.

Implication: All 'amounts' payable [like payment under rule 6(3) of the CENVAT Credit Rules, 2004 etc.] should be paid along with duty payable by 5th /6th of the next month/quarter.

5.5.8 Procedure for payment of duty by conventional mode: In case the assessee is allowed to make payment by the conventional mode, following procedure would be followed:

(i) Bank to have EASIEST facility: Duty is payable in authorized bank by way of GAR-7 challan where Bank is having 'EASIEST' facility (Earlier, it was a TR-6 challans).

(ii) Single copy challan: GAR-7 challan is a single copy challan with tax payer's counterfoil at the bottom of challan. Both challan and counterfoil are to be filled in by assessee. The challan should be on white paper with black printing.

(iii) Challan to be serially numbered: The challans should be serially numbered from 1st April on wards.

(iv) Details required in GAR-7 challan: Details to be filled in GAR-7 challan are as follows-

(a) Full name of assessee
(b) Complete Address
(c) Telephone number
(d) PIN code
(e) Assessee Code (15 digit)
(f) Commissionerate name
(g) Commissionerate Code
(h) Division Code
(i) Range Code

(j) Accounting Code of duty

(k) Amount tendered in ₹ (6 columns)

(l) Total

(m) Total Rupees in words

(n) Cash/Cheque/Draft/Pay order No. and date

(o) Bank on which Cheque/Draft/Pay order No. is drawn.

(v) Relevant details to be repeated on counterfoil: Relevant among these details like assessee code, amount tendered in Rupees, accounting code of duty etc. are repeated in the Tax payer's counter-foil. Details filled in the challan and Taxpayer's counter-foil should be identical.

(vi) Receipt of payment: The counterfoil duly receipted by Bank with stamp of Bank will be given by receiving Bank to assessee. The stamp of receiving bank will contain Challan Identification Number (CIN). This CIN will have to be quoted in the return.

(vi) Evidence of payment of duty: The Taxpayers acknowledgement is the evidence of payment. The Challan Identification Number (CIN) appearing on this acknowledgement will have to be quoted in the return. The banks will be giving the tax payer a computer generated acknowledgement/receipt with the various details including the CIN.

5.5.9 Procedure for e-payment of duty: E-payment of excise duty facilitates anytime, anywhere payment of the duty. Moreover, after the payment of duty online, the receipt of the same is generated instantly. It provides the convenience of making on line payment of Central Excise and Service Tax through Bank's internet banking service. E-payment of the excise duty can be made through ACES.

For e-payment, assessees should open a net banking account with one of the authorized banks. For effecting payment, assessees can access the ACES website and click on the e-payment link that will take them to the EASIEST portal or they can directly visit the EASIEST portal.

Procedure for e-payment of excise duty can be summarized as follows:-

(i) To pay excise duty and service tax online, the assessee has to enter the 15 digit Assessee Code allotted by the Department under erstwhile SACER/SAPS or the current application ACES. There will be an online check on the validity of the Assessee Code entered.

(ii) If the Assessee code is valid, then corresponding assessee details like name, address, Commissionerate Code etc. as present in the Assessee Code Master will be displayed.

(iii) Based on the Assessee Code, the duty / tax i.e. Central excise duty or service tax to be paid will be automatically selected.

(iv) The assessee is required to select the type of duty / tax to be paid by clicking on Select Accounting Codes for excise or Select Accounting Codes for service tax, depending on the type of duty / tax to be paid.

(v) At a time the assessee can select up to six Accounting Codes.

(vi) The assessee should also select the bank through which payment is to be made.

(vii) On submission of data entered, a confirmation screen will be displayed. If the taxpayer confirms the data entered in the screen, it will be directed to the net-banking site of the bank selected.

(viii) The taxpayer will login to the net-banking site with the user id/ password, provided by the bank for net-banking purpose, and will enter payment details at the bank site.

(ix) On successful payment, a challan counterfoil will be displayed containing CIN, payment details and bank name through which e-payment has been made. This counterfoil is proof of payment made.

Automation of Central Excise and Service Tax (ACES)

(a) What is ACES?: In continuation of its efforts for trade facilitation, CBEC has rolled-out a new centralized, web-based and workflow-based software application called Automation of Central Excise and Service Tax (ACES) in all 104 Commissionerates of Central excise, service tax and large tax payer units (LTUs) as on 23rd December, 2009. ACES is a Mission Mode project (MMP) of the Govt. of India under the national e-governance plan and it aims at improving tax-payer services, transparency, accountability and efficiency in the indirect tax administration in India. This application has replaced the current applications of SERMON, SACER, and SAPS used in Central excise and service tax for capturing returns and registration details of the assessees.

(b) Automation of major processes: ACES has automated the major processes of Central excise and service tax-registration, returns, accounting, refunds, dispute resolution, audit, provisional assessment, exports, claims, intimations and permissions.

(c) Benefits to the assessee: The ACES offers following benefits to the assessee:-

1. Reduce physical interface with the Department
2. Save time
3. Reduce paper work
4. Online registration and amendment of registration details
5. Electronic filing of all documents such as applications for registration, returns [On-line and off-line downloadable versions of ER 1,2,3,4,5,6, Dealer Return, and ST3], claims, permissions and intimations; provisional assessment request, export-related documents, refund request.
6. System-generated E-Acknowledgement
7. Online tracking of the status of selected documents
8. Online view facility to see selected documents
9. Internal messaging system on business-related matters

(d) Registration with ACES: To transact business on ACES a user has to first register himself/herself with ACES through a process called 'Registration with ACES'. This

registration is not a statutory registration as envisaged in Acts/Rules governing Central Excise and Service Tax but helps the application in recognizing the bonafide users.

(e) E-filing of Returns: The assesses can electronically file statutory returns of Central excise and service tax by choosing one of the two facilities being offered by the Department at present:-

(a) they can file it online, or

(b) download the off-line return utilities which can be filled-in off-line and uploaded to the system through the internet.

(f) Certified Facilitation Centres (CFCs): CBEC has set up ACES Certified Facilitation Centres (CFCs) with the help of professional bodies like Institute of Chartered Accountants of India (ICAI), Institute of Cost and Works Accountants of India (ICWAI) etc.

(i) These CFCs provide a host of services to the assessees such as digitization of paper documents like returns etc. and uploading the same to ACES.

(ii) Assessees requiring the services of the CFCs may be required to pay service fees to the CFCs.

(iii) CBEC will approve the maximum rates at which CFCs can charge their customers for the services rendered by them.

(iv) For this purpose, assessees are required to write to the Department authorizing one of the CFCs, from the approved list, to work in ACES on their behalf. They have to furnish the name and other details of the CFCs, including the registration number issued by the ICAI/ICWAI etc.

(v) At any given time, one assessee can authorize one CFC, while one CFC can provide services to more than one assessee throughout India.

(vi) In case the assessee wants to withdraw the authorization, it can do so by intimating the department.

(vii) However, an assessee will be held liable for all actions of omission or commission of the CFC, during the period they are authorized by him/her to work in ACES.

EASIEST (Electronic Accounting System in Excise and Service Tax)

(i) What is EASIEST scheme?: EASIEST has been developed to make payment of tax easy.

(ii) Benefits of EASIEST to the taxpayer

(a) Only one copy of the challan has to be filled instead of earlier four copies.

(b) Facility of online verification of the status of tax payment using CIN.

(iii) Challan Identification Number (CIN): Challan Identification Number (CIN) is a 20 digit unique identifier which will be given on the Taxpayer's computer generated acknowledgement /receipt. This number is a combination of the BSR code of the bank branch (first 7 digits), the date of deposit (next 8 digits) and Challan Serial Number (last 5 digits).

(iv) Assessee code: Assessee code/registration number/ECC code are all one and the same. It is a 15-character identification number allotted by the system to the assessee based on the PAN number or temporary number (if PAN is not submitted) when the registration details are entered in the Central Server. The 15-character assessee code will be available in the registration certificate issued to the assessee by the Assistant Commissioner/Deputy Commissioner of the Division.

5.5.10 Personal Ledger Account

(a) Account current: Assessee may pay duty through account current. It is popularly known as PLA (Personal Ledger Account). Any assessee who has obtained 15 digit ECC number from Superintendent can operate a current account.

(b) Debits and credits in PLA: The PLA is credited when duty is deposited in bank by GAR-7 challan. Thereafter, the duty is required to be paid by making a debit entry in the PLA on monthly basis. PLA and CENVAT credit should be used only for payment of excise duty and not for other payment like rent, lines, penalties etc.

(c) PLA to be maintained in triplicate: PLA has to be maintained in triplicate using indelible pencil and both sided carbon. Two copies of PLA and zerox copy of GAR-7 (earlier TR-6) receipted challans shall be submitted along with monthly/quarterly ER-1/ER-3 return.

(d) Practically redundant: However practically, after introduction of monthly payment system, PLA has become redundant except in the month of March. In the month of March, duty is required to be paid before 31st March. Hence, generally assessee pays higher amount to be on safe side.

(e) CENVAT credit only of inputs received upto end of month: Duty can be paid through PLA and/or CENVAT credit. Excise duty is payable on monthly basis. CENVAT credit available at the end of the month can be availed, even if duty is payable by 5th/6th of following month.

CENVAT credit of all inputs and 50% duty paid on capital goods is available as soon as goods enter the factory, even if book entry is made later. Thus, CENVAT credit is available in respect of all goods received upto end of the month, even if book entry is made later.

5.5.11 Procedure for deposit of Central excise duties during bank strikes, natural calamities etc.: This procedure is to be followed only when all the banks nominated to collect revenues within a Commissionerate are unable to transact business, due to strike of banks or sudden closure of banks due to riots, imposition of curfew or natural calamities such as flood, cyclones, etc.

Normally in all cases of closure of bank business due to strike by bank employees, the public gets advance intimation either through the press, or otherwise. In all such cases, the assessees should make advance arrangements to deposit money into the banks and keep sufficient amounts in their account current [PLA] so that they do not face any difficulty in the clearance of the goods during the period of the strike.

In cases where the strike of bank employees is without notice, or where the strike called for after due notice is prolonged beyond a reasonable time (say over 3-4 days) or where there is sudden closure of banks due to riots, imposition of curfew or natural calamities such as flood,

cyclones, etc., the Commissioner may adopt the procedure specified hereinafter in partial relaxation of the provisions contained in the "Manual for collection of Revenue and payment of refunds etc." (hereinafter referred to as 'Manual')" only for the duration of the strike or the sudden closures.

The Commissioners should issue a Trade Notice stating that during the days of the closure of bank business due to such strikes (specifying the dates wherever possible), the assessees can send their cheques by registered post, acknowledgement due (R.P.A.D.) or special messenger, with the GAR-7 challan duly filled in, to the Chief Accounts Officers of the Commissionerates, with a clear declaration that they have sufficient balance in their bank account.

i. They should be advised to send a copy of the letter forwarding the cheque, to the concerned Range Officer also.

ii. On the strength of a cheque so sent, they may take credit in the P.L.As.

iii. On receipt of the cheque in his office, the Chief Accounts Officer will immediately intimate the concerned Range Officer about the name of the assessee, the number and date of the cheque and its amount.

iv. Immediately after the strike is over, all such cheques should be deposited by the Chief Accounts Officer into the Focal Point Bank/State Bank of India at the Headquarters or Reserve Bank of India, as the case may be, through GAR-7 challan according to the procedure prescribed in the Manual.

v. Bank commission or collection charges, if any, chargeable by the banks should be debited in the P.L.A of the assessees by the Chief Accounts Officer under intimation to them as also the R.Os.

vi. If any of the cheques sent by the assessees are dishonoured, the Commissioners shall take appropriate penal action as prescribed under the rules.

vii. The Chief Accounts Officer should maintain a suitable record in regard to receipt and disposal of such cheques.

5.5.12 Payment by cheque when not permitted: For removal of doubts and to ensure uniformity of application of the procedure it is clarified that the payment of duty/other dues through cheques should not be permitted in the following cases: -

i. If there is a strike in or closures of only one nominated bank of the Commissionerate and the assessee still remains in a position to deposit money in the other nominated banks or Departmental Treasury (wherever they exist) – unless the assessees' bank is the only nominated bank in the Commissionerate.

ii. In the case of declared bank holidays because such holidays are known well in advance.

iii. Where the public has been given advance intimation of a strike, unless the strike is unduly prolonged (say over 3-4 days).

iv. Where bank employees adopt "go-slow" tactics.

5.5.13 Duty payment under protest: Sometimes, it happens that the classification and assessable value of goods determined by the excise authorities are not agreeable to or acceptable to the assessee. In such cases, the assesee can file an appeal and in the meanwhile he can pay duty under protest if no stay is obtained from Appellate Authorities.

Tribunal held that significance of 'payment under protest' is that it safeguards the position of the person who makes the payment and ensures that it may not be claimed that the payment he made was a voluntary one *[Alpha Electrical Products v. CCE 1987 (30) E.L.T. 752 (T)]* (subsequently maintained by Supreme Court)

Time-limit of one year for claiming refund not applicable: Section 11B of the Central Excise Act, 1944 provides that the time limit of one year for claiming refund of excise duty shall not apply where the duty has been paid under protest.

Procedure for payment under protest: As per the Supplementary Instructions issued by Central Board of Excise and Customs, any assessee who desires to pay duty under protest, may do so by following the procedure mentioned below:

(a) The assessee shall inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and dated acknowledgement will be given to him.

(b) The assessee shall mark invoices or monthly/quarterly returns indicating the goods on which duty is paid 'under protest'. If it is a lump-sum duty payment in respect of past demand, he may record the fact of duty payment under protest in the Personal Ledger Account, CENVAT Account and the Daily Stock Account.

(c) If a case is appealed against by the assessee or where the appeal period for further appeal is available, he may continue to pay duty under protest. However, if decision is not in his favour and he exhausts the appellate remedy or does not appeal within stipulated period, he shall not have any right to pay duty under protest.

5.5.14 Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 [issued vide *Notification No.34/2001-C.E. (N.T.) dated 21.6.2001* as amended]: If a buyer is entitled to obtain the excisable goods at nil/concessional rate of duty under an exemption notification issued under section 5A, he has to follow the procedure prescribed in the said rules. The procedure for availing the benefit can be underlined as below:-

(a) Application by the manufacturer to obtain the benefit [Rule 3]

(i) Application to jurisdictional Assistant Commissioner/Deputy Commissioner of Central Excise: A manufacturer who intends to receive the specified goods for specified use at concessional rate of duty, is required to make an application in quadruplicate in the specified form to the jurisdictional Assistant/Deputy Commissioner of Central Excise.

However, he is required to make separate application in respect of each supplier of subject goods.

(ii) Execution of bond: Further, the manufacturer is required to execute a general

bond with surety or security to cover the recovery of duty liability estimated to be involved at any given point of time.

However, it would be sufficient if a manufacturer furnishes a letter of undertaking provided no show cause notice has been issued under section 11A(4) or 11A(5) of Central Excise Act, 1944 or no action is proposed under any notification issued in pursuance of rule 12CCC of Central Excise Rules, 2002 or rule 12AAA of CENVAT Credit Rules, 2004 against said manufacturer.

(iii) Application countersigned by jurisdictional authorities: The application shall be countersigned by the jurisdictional authorities (i.e. jurisdictional Assistant/Deputy Commissioner of Central Excise) certifying that the manufacturer has executed the required bond.

(iv) Subsequent procedure: Of the four copies of application, one copy shall be forwarded to the jurisdictional range Superintendent of the manufacturer of the subject goods and two copies shall be handed over to the applicant manufacturer and one copy shall be retained by the Assistant/Deputy Commissioner of Central Excise.

(b) Procedure to be followed by the manufacturer of subject goods [Rule 4]: The manufacturer of the goods can avail the exemption from duty based on the above referred application. The manufacturer receiving a copy of application shall avail the benefit of exemption notification issued under section 5A of the Central Excise Act and shall record the removal particulars like:-

(i) Date and number of invoice;

(ii) Description of goods;

(iii) Quantity of goods;

(iv) Value of goods;

(v) Amount of duty paid at concessional rate.

The said details shall be recorded on the application.

(c) Manufacturer to give information regarding receipt of the subject goods and maintain records [Rule 5]: The manufacturer receiving the above goods is required to maintain the simple account indicating the quantity and value of subject goods received, consumed and quantity remaining in stock. Further, he is also required to submit a quarterly return in the specified form.

(d) Goods received at concessional rate of duty not used for intended purpose [Rule 6]

(i) Consequence of goods not being used for intended purpose: If the material received at concessional rate of duty is not used for intended purpose, manufacturer is liable to pay differential duty along with interest.

(ii) **Responsibility cast on the jurisdictional Assistant/Deputy Commissioner:** The responsibility to ensure, that the material received at concessional rate of duty is used for intended purpose, is cast on the jurisdictional Assistant/Deputy Commissioner of Central Excise.

(iii) **Recovery of duties:** Provisions of section 11A and section 11AA shall apply mutatis mutandis for effecting such recoveries.

(iv) **Defective/ damaged/ unsuitable/ surplus goods returned to manufacturer:** If the manufacturer on receiving the subject goods finds them to be defective or damaged or unsuitable or surplus to his needs, he may return the subject goods to the original manufacturer of the goods. Such returned goods shall be added to the non duty paid stock of the manufacturer of the subject goods and dealt with accordingly.

(v) **Goods lost or destroyed by natural causes or by unavoidable accident deemed to be not used for intended purpose:** If the goods are lost or destroyed by natural causes or by unavoidable accident during transport from place of procurement to the manufacturer's premises or from place of manufacturer to the place of procurer (if goods are returned) during handling or storage in the manufacturer's premises, it will not be treated as used for intended purpose. Consequently, differential duty and interest will become payable.

5.6 Registration [Rule 9]

For the administration of the Central Excise Act, 1944 and the Central Excise Rules, 2002, manufacturers of excisable goods or any person who deals with **excisable goods** with some exceptions, are required to get the premises registered with the Central Excise Department before commencing business.

Rule 9(1) of Central Excise Rules, 2002 provides that every person, who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods or an importer who issues an invoice on which CENVAT credit can be taken shall get registered. It may be noted that rule 9 applies only to excisable goods and not just "goods".

5.6.1 Persons requiring registration: In accordance with rule 9 of the Central Excise Rules, 2002 read with section 6 of Central Excise Act, 1944 and Notifications issued thereunder, the following category of persons are required to register with jurisdictional Central Excise Officer in the Range office having jurisdiction over his place of business/factory:

i. Every manufacturer of excisable goods (including Central/State Government undertakings or undertakings owned or controlled by autonomous corporations) on which excise duty is leviable.

ii. First stage or second stage dealers (including manufacturer's depot and importers) desiring to issue cenvattable invoices.

iii. Persons holding private warehouses for storing non-duty paid goods.

iv. Persons who obtain excisable goods for availing end-use based exemption notification.

vi. Exporter-manufacturers under rebate/bond procedure; and Export Oriented Units, which have interaction with the domestic economy (through DTA sales or procurement of duty free inputs).

vii. Importer who issues an invoice on which CENVAT credit can be taken.

5.6.2 Exemption from Registration: Rule 9(2) gives power to the Board to issue the notification for giving exemption from registration subject to the conditions and safeguards. Accordingly the Central Board of Excise and Customs (CBEC), by *Notification No. 36/2001-CE (NT) dated 26.6.2001*, has exempted the following specified categories of persons/premises from obtaining registration.

i. Persons who manufacture the excisable goods, which are chargeable to nil rate of excise duty or are fully exempt from duty by a notification subject to the declaration to be made in the specified form.

ii. Small scale units availing the slab exemption based on value of clearances under a notification. However, such units will be required to give a declaration in a specified form once the value of their clearances touches ₹ 90 lakhs.

iii. In respect of final products falling under Chapter 61 or 62 the job-worker need not get registered if the principal manufacturer undertakes to discharge the duty liability.

iv. Persons manufacturing excisable goods by following the warehousing procedure under the Customs Act, 1962 subject to the following conditions:

   a. the said excisable goods and any intermediary or by-product including the waste and refuse arising during the process of manufacture of the said goods under the Customs Bond are either destroyed or exported out of the country to the satisfaction of the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, in charge of the Customs Bonded Warehouse;

   b. the manufacturer shall file a declaration in the specified form in triplicate for claiming exemption under this notification;

   c. no drawback or rebate of duty of excise paid on the raw materials or components used in the manufacture of the said goods, shall be admissible.

v. The person who carries on wholesale trade or deals in excisable goods (except first and second stage dealer, as defined in CENVAT Credit Rules, 2004).

vi. A hundred per cent Export Oriented Undertaking or a unit in Export Processing Zone or a unit in Special Economic Zone licensed or appointed, as the case may be, under the provisions of the Customs Act, 1962. These units are deemed to be registered for the purpose of rule 9.

   However, such 100% EOU or a unit in EPZ shall not be deemed to be registered if such undertaking or unit procures excisable goods from the domestic tariff area or removes excisable goods to the domestic tariff area.

vii. Persons who use excisable goods for any purpose other than for processing or manufacture of goods availing benefit of exemption extending concessional rate of duty.

viii. A godown or retail outlet of a Duty Free Shop appointed/licenced under section 57 or 58 of Customs Act, 1962. Such godown/retail outlet are deemed to be registered as warehouse under rule 9.

5.6.3 Procedure for registration: Notification No. 35/2001 CE (NT) dated 26.06.2001 as amended prescribes the conditions, safeguards and procedures for registration of a person and exemptions from registration in specified cases: -

(i) Application for registration: Every person specified under rule 9(1), unless exempted from doing so by the Board under rule 9(2), shall get himself registered with the jurisdictional Deputy or Assistant Commissioner of Central Excise by applying in the form provided for registration in the website www.aces.gov.in

(ii) Registration of different premises of the same registered person: If the person has more than one premises requiring registration, separate registration certificate shall be obtained for each of such premises.

However, if a person manufactures or carries on trade in goods falling under Chapter 50 to 63 (textile articles) of First Schedule to the Central Excise Tariff Act, 1985 and has more than one premises requiring registration, he may obtain a single registration for all such premises, which fall within the jurisdiction of one Commissioner of Central Excise provided he declares the details of all such premises in the specified form.

Also, if a person manufactures Compressed Natural Gas (Tariff item 2711 of Central Excise Tariff) and has more than one premises requiring registration, which fall within the jurisdiction of one Chief Commissioner of Central Excise, he may obtain a single registration for all such premises with any of the Commissioner of Central Excise falling within the jurisdiction of the said Chief Commissioner. He will have to submit the details of all such premises along with the application for registration, subject to the condition that prior intimation shall be given before starting any additional premises subsequent to obtaining such registration

(iii) Online filing of application: Application for registration or de-registration or amendment of the registration application shall be filed ONLY online on the website www.aces.gov.in, in the forms provided in the website.

(iv) PAN based Registration: Applicant for registration shall mandatorily quote Permanent Account Number (PAN) of the proprietor or the legal entity being registered in the specified column in the application form, failing which registration will not be granted. Government Departments are exempt from the requirement of quoting the PAN in their online application.

(v) (a) Applicant to quote e-mail address and mobile number: Applicant shall quote his e-mail address and mobile number in the requisite column of the application form for communication with the Department.

(b) Business Transaction Numbers: Business transaction numbers obtained from other Government departments or agencies such as Customs Registration No

(BIN No), Import Export Code (IEC) Number, State Sales Tax /(VAT) Number, Central Sales Tax Number, Company Index Number (CIN), Service Tax Registration Number, which have been issued prior to the filing of Central Excise Registration application, shall be filled in the form and for the numbers subsequently obtained, the application shall be amended.

(vi) Registration Number and Certificate: Pending post-facto verification of premises and documents by the authorized Officers, registration application shall be approved by the Deputy or Assistant Commissioner within 2 days of the receipt of duly completed online application form. A Registration Certificate containing registration number shall be issued online and a printed copy of such Registration Certificate shall be adequate proof of registration and the signature of the issuing authority is not required on the said Registration Certificate.

(vii) Submission of documents: The applicant shall tender self attested copies of the following documents at the time of verification of the premises:

- *(a) Plan of the factory premises;*
- *(b) Copy of the PAN Card of the proprietor or the legal entity registered;*
- *(c) Photograph and Proof of the identity of the applicant;*
- *(d) Documents to establish possession of the premises to be registered;*
- *(e) Bank account details;*
- *(f) Memorandum or Articles of Association and List of Directors; and*
- *(g) Authorization by the Board of Directors or Partners or Proprietor for filing the application by a third party.*

(viii) Physical verification:

- *(a) The authorized officer shall verify the premises physically within 7 days from the date of receipt of application through online. Where errors are noticed during the verification process or any clarification is required, the authorized Officer shall immediately intimate the same to the assessee for rectification of the error within 15 days of the receipt of intimation failing which the registration shall stand cancelled. The assessee shall be given a reasonable opportunity to represent his case against the proposed cancellation, and if it is found that the reasons given by the assessee are reasonable, the authorized Officer shall not cancel the registration to the premises.*
- *(b) On the physical verification of the premises, if it is found to be non-existent, the registration shall stand cancelled. The assessee shall be given a reason opportunity to represent his case against the proposed cancellation, and if it is found that the reasons given by the assessee are reasonable, the authorized Officer shall not cancel the registration to the premises recording the complete and correct address.*

(ix) Transfer of Business or acquisition of factory: Where a registered person transfers his business to another person, the transferee shall get himself registered afresh. Where an applicant has acquired an old factory from a Bank or a Financial Institution, he shall get himself registered afresh.

(x) Change in the Constitution: Where a registered person is a firm or a company or association of persons, then in the event of any change in the constitution of the firm leading to change in PAN, he shall get himself registered afresh. In other cases of change in constitution of business, where there is no change in PAN, the same shall be intimated to the jurisdictional Central Excise Officer within 30 days of such change by way of amendment to the registration details to be carried out online and this will not result in any change in the registration number.

(xi) De-registration: Every registered person, who ceases to carry on the business for which he is registered, shall de-register himself by making an online application. Where there are no dues pending recovery from the assessee, application for de-registration shall be approved within 30 days from the date of filing of online declaration and the assessee shall be informed, accordingly.

(xii) Cancellation of registration: A registration certificate granted under rule 9 may be cancelled after giving a reasonable opportunity to the assessee to represent his case against the proposed cancellation by the Deputy or Assistant Commissioner of Central Excise, in any of the following situations, namely:—

(a) where on verification , the premises proposed to be registered is found to be non-existent;

(b) where the assessee does not respond to request for rectification of error noticed during the verification of the premises within 15 days of intimation;

(c) where there is substantial mis-declaration in the application form; and

(d) where the factory has closed and there are no dues pending against the assessee

5.6.4 Mines engaged in the production of specified goods exempt from registration when premises from where centralised billing/accounting is done is registered: Every mine engaged in the production/manufacture of following goods is exempt from obtaining registration where the producer/manufacturer of such goods has a centralized billing/accounting system in respect of such goods produced by different mines and opts for registering only the premises or office from where such centralized billing or accounting is done:-

- Coal, briquettes, ovoids and similar solid fuels manufactured from coal [Chapter heading 2701]
- Lignite, whether or not agglomerated, excluding jet [Chapter heading 2702]
- Peat (including peat litter), whether or not agglomerated [Chapter heading 2703]

- Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon [Chapter heading 2704]
- Tar distilled from coal, from lignite or from peat and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars [Chapter heading 2706]

5.6.5 Other units of manufacturers of recorded smart cards exempt from registration when premises from where centralised billing is done is registered: Manufacturing units engaged in the manufacture of recorded smart cards falling under sub-heading 8523 have been exempted from obtaining registration if the manufacturer of such goods has a centralized billing or accounting system in respect of such goods manufactured by different manufacturing units and he opts for registering only the premises or office from where such centralized billing or accounting is done.

5.6.6 Job-workers of goods of Chapters 61-63 of Central Excise Tariff exempt from registration: Every job worker who undertakes job work in relation to goods falling under Chapter 61, 62 or 63 of Central Excise Tariff on behalf of any other person who pays the excise duty leviable on the said goods and comply with all procedural formalities under Central Excise Act, 1944, is exempt from obtaining registration.

However, the job worker who is authorised to pay excise duty on such final products manufactured by him on behalf of such other person, will have to register himself.

The term "job worker" shall have the meaning assigned to it in rule sub rule (1A) of rule 4 of Central Excise Rules, 2002.

5.6.7 Unregistered premises used solely for affixing lower ceiling prices on pharmaceutical products to comply with DPCO, 2013 exempt from registration: Unregistered premises used solely for affixing a sticker/re-printing/re-labeling/re-packing of pharmaceutical products falling under Chapter 30 of the Central Excise Tariff Act, 1985 with lower ceiling price to comply with the notifications issued under Drugs (Prices Control) Order, 2013 are exempt from obtaining registration under central excise. However, the exemption from registration is available subject to the conditions specified in *Notification No. 22/2013 CE dated 29.07.2013* exempting the pharmaceutical products from payment of central excise duty.

5.7 Records

Records shall mean all the records prepared or maintained by the assessee for accounting of transactions with regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods. All accounts, agreements, invoice, price-list, return, statement or any other source document, whether in writing or in any other form shall be treated as records. Source documents are those documents which form the basis of accounting of transactions and include sales invoice, purchase invoice, journal voucher, delivery challan and debit or credit note.

Prior to April 2000, the rules had prescribed the records to be maintained, referred to as 'Statutory records'. The statutory records under Central Excise Rules, 1944 were dispensed with in the year 2000 and it was decided to rely on private records of the assessee which they usually maintain for their activities. This was done as a measure of simplification and for

adopting a common accounting system. While framing the Central Excise (No.2) Rules, 2001 and subsequently, the new 2002 rules issued under the Central Excise Act, 1944, the Government has continued with the policy of relying on the private records of the assessee.

5.7.1 Main features: The main features of the acceptance of private records are as below: -

(a) No statutory records: The fact that the rules do not prescribe 'statutory records' shall not be construed that no record has to be maintained. Every assessee has to compulsorily maintain private records.

The rules which require certain records to be maintained are self contained and they specify the minimum information that an assessee MUST enter in their own record by which the assessee has to decide himself as to the form in which they are going to maintain such information.

(b) No format for record-keeping except 100% EOU: There is no format for record–keeping, except in the case of rule 17 of the said rules where it is provided that the 100% EOU unit or a unit in FTZ/SEZ shall maintain in proper form appropriate account relating to production, description of goods, quantity removed, duty paid and each removal shall be made on an invoice. This format has been notified by *Notification No. 59/2001-Central Excise (N.T.) dated 6th August, 2001*.

This means that the assessee is free to devise his record-keeping, depending upon his accounting requirements, but shall ensure that the requirements of particular rules are met.

(c) Daily Stock Account [Rule 10]: There is a specific requirement about maintenance of "Daily Stock Account' in rule 10 of the Central Excise Rules, 2002. It provides that every assessee shall maintain proper records, on a daily basis, in a legible manner indicating the particulars regarding

a. description of the goods produced or manufactured,
b. opening balance, quantity produced or manufactured,
c. inventory of goods,
d. quantity removed,
e. assessable value,
f. the amount of duty payable; and
g. particulars regarding amount of duty actually paid.

The first page and the last page of each such account book shall be duly authenticated by the producer or the manufacturer or his authorised agent.

No pre-authentication of records required: There is no requirement of 'authentication' of records by jurisdictional Central Excise Officer before a book/register is brought into use by an assessee. These records (relevant for Central Excise) shall, however, be authenticated on the first and last page by the assessee in the same manner as the Daily Stock Account.

Preservation of records: Records shall also be preserved for a period of five years immediately after the financial year to which such records pertain. ***Such records may be preserved in electronic form and every page of the record so preserved shall be authenticated by means***

of a digital signature. The Board may notify the conditions, safeguards and procedure to be followed by an assessee preserving digitally signed records.

For the purposes of this rule, the expressions, "authenticate", "digital signature" and "electronic form" shall have the respective meanings as assigned to them in the Information Technology Act, 2000.

(d) Furnishing of list of records to Range Officer [Rule 22(2)]**:** Every assessee, ***an importer who issues an invoice on which CENVAT credit can be taken*** and first stage and second stage dealer shall furnish to the Range Officer, a list in duplicate, of -

(i) all the records prepared and maintained for accounting of transaction in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods, as the case may be;

(ii) all the records prepared and maintained for accounting of transaction in regard to payment for input services and their receipt or procurement; and

(iii) all the financial records and statements (including trial balance or its equivalent).

(e) Furnishing of records on demand [Rule 22(3)]: Every assessee, ***an importer who issues an invoice on which CENVAT credit can be taken*** and first stage and second stage dealer shall, on demand make available to the officer empowered under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India or Cost Accountant/ Chartered Accountant as nominated under section 14A/14AA of the Act, -

(i) the records maintained or prepared by him in terms of sub-rule (2);

(ii) the cost audit reports, if any, under section 233B of the Companies Act, 1956[1]; and

(iii) the Income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961

for the scrutiny of the officer or the audit party or the cost accountant or chartered accountant, within the time limit specified by the said officer or the audit party or the cost accountant or chartered accountant, as the case may be.

(f) Every assessee who is having more than one factory, and maintains separate records in respect of every factory for the purpose of audit, shall produce the said records for audit purposes.

5.7.2 Non-maintenance of daily stock account: Non-maintenance of daily stock account as contemplated under rules or other information mentioned in other rules mentioned above by the assessee in his private records will mean contravention of specified rules attracting appropriate penal action. If such non-maintenance of records is with intent to evade payment of Central Excise duty, the more stringent penal provisions of the Central Excise Act and Central Excise Rules shall be attracted.

The private records relevant for Central excise including the Daily Stock Account maintained in compliance with the provisions of the said rules shall necessarily be kept in the factory to which they pertain.

[1] Section 148 of the Companies Act, 2013

5.8 Electronic maintenance of records and preparation of returns and documents

Any person may electronically maintain or generate all or any of the records, returns, invoices and other documents prescribed under the rules made under Central Excise Act, 1944, using a computer, in electronically readable format. No specific permission from the Central Excise Department is required for this purpose. Such person is also not required to give any intimation to the Department.

However, the Department will record in "Scrutiny Register" or any other record indicating a person's profile the fact that such person is electronically maintaining records or generating returns, invoices or other documents, using computer.

The records can be kept on any electronic media, such as hard disk of computers, floppies, CDs or tapes and preserved.

The records, returns and documents should be in electronically readable format. This also means that a person who uses computerized system to generate records/books of accounts, returns etc., must keep the electronic record, even when a hard copy is kept.

It is suggested to take the printouts (hard copies) of records and documents at the end of each month and kept in bound folders, separately for each type of record, return, documents etc.

The person should ensure that proper back-up records are also maintained and preserved so that in the event of destruction due to unavoidable accidents or natural causes, the information can be restored within reasonable period of time. All such records, returns, invoices and other documents (both electronic and hard copy, including back-ups) shall be preserved for a period of five years (counted from the first day of the financial year following the financial year to which a record, return, invoice or document pertains).

It shall be incumbent upon a person (who maintains electronic records, returns, documents etc.) to produce, on demand, the relevant records, returns or documents, in hard copy and/or in the form of tapes or floppies or cartridges or compact disk or any other media in an electronically readable format (duly authenticated by the assessee), documentation including policy and procedure manuals, instructions to record the flow and treatment of transactions through accounting system, from the stage of initiation to closure and storage to the Central Excise Officers, or the audit parties deputed by the Commissioner or the Comptroller and Auditor General of India. Such records, returns, invoices or other documents will be produced pertaining to such period (subject to the period of preservation) as may be requested including the daily entries in electronic format relating to the current month for which the printouts are not taken out.

He shall also provide account of the audit trail and inter-linkages including the source document, whether paper or electronic, and the financial accounts record layout, data dictionary and explanation for codes used and total number of records in each field alongwith sample copies of documents. Whenever changes are made in the aforesaid systems adopted by the assessee, he shall inform the Central Excise Officers and submit the relevant document.

In case any person is found to be misusing this facility or not providing access to the information or if there are any other cogent reasons, the Assistant Commissioner or the

Deputy Commissioner of Central Excise may, after recording such reasons and after taking into consideration the explanation tendered by the person regarding the discrepancies, if any, prohibit a person from electronically maintaining or generating any records, returns, invoices or other documents using computer and inform the immediate superior officer.

5.9 Invoicing [Rule 11]

An invoice is the document under cover of which the excisable goods are to be cleared by the manufacturer. This is also the document which indicates the assessment of the goods to duty. No excisable goods can be cleared except under an invoice. The invoice is the manufacturer's own document and though the Department has specified the entries thereon, the format etc. is left to the manufacturer's choice. The provisions of this rule shall apply *mutatis mutandis* to goods supplied by ***an importer who issues an invoice on which CENVAT credit can be taken***, or a first stage dealer or a second stage dealer.

However, where a first stage dealer receives imported goods under an invoice bearing an indication that the credit of additional duty of customs levied on the said goods under section 3(5) of the Customs Tariff Act, 1975 shall not be admissible, the said dealer shall on the resale of the said imported goods, indicate on the invoice issued by him that no credit of the additional duty levied under 3(5) of the Customs Tariff Act, 1975 shall be admissible.

The second stage dealer shall also make the similar indication on the invoice issued by him when he resells the imported goods on which credit of additional duty of customs levied under section 3(5) of the Customs Tariff Act, 1975 is not admissible.

5.9.1 Removals only on invoice: Rule 11 of the Central Excise Rules, 2002 provides that no excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorised agent.

However, textile yarns, fabrics and readymade garments can be cleared on proforma invoice. No duty is payable on such invoice but the manufacturer should prepare the final invoice within five days after making adjustments of goods rejected and returned by the buyer. Such a period of five days can be extended to 21 days with the permission of Commissioner. The final invoice and proforma invoice should have cross reference to each other.

In case of cigarettes, which are under physical control, the Factory Officers are posted by rotation in the factory. If the factory is operational 24 hours, the officers are posted 24 hours. They check the operations of the assessee as per instructions. Each invoice has to be countersigned by the Inspector of Central Excise or the Superintendent of Central Excise before the cigarettes are removed from the factory.

5.9.2 Serially numbered invoice: As per rule 11(2), the invoice shall be serially numbered and shall contain the registration number, address of the jurisdictional Central Excise Division, name of consignee, description, classification, time and date of removal, rate of duty, quantity, mode of transport, vehicle registration number and value of goods and the duty payable thereon. In case of a proprietary concern or a business owned by Hindu Undivided Family, the name of the proprietor or Hindu Undivided Family (HUF), as the case may be, shall also be mentioned in the invoice.

The serial number shall commence from 1st April every year [beginning of a financial year]. The serial number can be given at the time of printing or by using franking machine. However, when the invoice book is authenticated in the manner specified in sub-rule (5) of rule 11, each leaf should contain serial number. Hand written serial number shall not be accepted.

In case of computer-generated invoice, the serial number may be allowed to be generated and printed by computer at the time of preparation of invoice only if the software is such that computer automatically generates the number and same number cannot be generated more than once. For this purpose, the Central Excise Officers may check the system/software from time to time.

If goods are directly sent to a job worker on the direction of a manufacturer or the provider of output service, the invoice will also contain the details of the manufacturer or the provider of output service, as the case may be, as buyer and contain the details of job worker as the consignee.

If goods are directly sent to any person on the direction of the registered dealer, the invoice will also contain the details of the registered dealer as the buyer and the person as the consignee, and that person will take CENVAT credit on the basis of the registered dealer's invoice.

Further, if the goods imported under the cover of a bill of entry are sent directly to buyer's premises, the invoice issued by the importer should mention that goods are sent directly from the place or port of import to the buyer's premises.

5.9.3 Number of invoice copies: The invoice shall be prepared in triplicate in the following manner, namely:-

i. the original copy being marked as ORIGINAL FOR BUYER;

ii. the duplicate copy being marked as DUPLICATE FOR TRANSPORTER;

iii. the triplicate copy being marked as TRIPLICATE FOR ASSESSEE.

However, the assessee may make more than three copies for his other requirements. But it is suggested by the Board to mark on them prominently "NOT FOR CENVAT PURPOSES'.

5.9.4 Number of Invoice book: Rule 11 of the said Rules provides that only one invoice book shall be in use at a time, unless otherwise allowed by the Deputy/Assistant Commissioner of Central Excise in the special facts and circumstances of each case. But if assessee requires two different invoice books for the purposes of removals for home-consumption, and removals for export they may do so by intimating the jurisdictional Deputy/Assistant Commissioner of Central Excise. No permission is required to use two different invoice books for home consumption and export.

Wherever an assessee is allowed to keep more than one invoice book, he should be asked to keep different numerical serial numbers for the different sets. In case of running stationary used in computers, the bound book shall not be insisted upon provided the stationary is pre-printed with distinctive names and marks of the assessee. After the invoices are prepared, the triplicate copy shall be retained in bound-book form. Where invoices are to be type

written, the leaves have to be first taken out from the book for typing. In such cases also the triplicate copy shall be retained in bound-book form.

5.9.5 Intimation of serial numbers: Before making use of the invoice book, the serial numbers of the same shall be intimated to the Superintendent of Central Excise having jurisdiction over the factory of the assessee. This can be done in writing by post/e-mail/fax/hand delivery or any other similar means.

5.9.6 Rounding off of duty in invoice: The amount of duty being shown in invoices issued under rule 11 of the said Rules should be rounded off to the nearest rupee as provided for under section 37D of the Central Excise Act, 1944 and the duty amount so rounded off should be indicated both in words as well as in figures.

5.9.7 Authentication of invoices by means of digital signatures: An invoice issued under this rule by a manufacturer may be authenticated by means of a digital signature. However, where the duplicate copy of the invoice meant for transporter is digitally signed, a hard copy of the duplicate copy of the invoice meant for transporter and self attested by the manufacturer would be used for transport of goods.

Board may notify the conditions, safeguards and procedure to be followed by an assessee issuing digitally signed invoices.

For the purposes of this rule, the expressions, "authenticate", "digital signature" and "electronic form" shall have the respective meanings as assigned to them in the Information Technology Act, 2000.

5.9.8 Cancellation of invoices: As per the Board's guidelines, when an assessee is compelled to cancel invoice, the following actions should be taken:

i. Intimation of a cancelled invoice should be sent to the Range Superintendent on the same date, whenever possible. However, in case of exceptional circumstances beyond the control of the assessee, should this not be possible, the intimation should be sent on the next working day;

ii. Along with the intimation of the cancelled invoice sent to the Range Superintendent the original copy of the cancelled invoice should also be sent.

iii. Triplicate copy of the cancelled invoice may be retained by the assessee in the invoice book so that the same can be produced whenever required by audit parties, preventive parties and other visiting officers.

However the new rules do not speak of any procedure to be adopted for the cancellation of invoices as in the case of old rules. Therefore the question arises as to whether the Board can issue a method not warranted either by the Act or Rules.

5.9.9 Procedure of transshipment of goods *en route* final destination: The transshipment of goods from one vehicle to other vehicle(s) *en route* the destination(s) can be of two categories:-

(a) Where the entire quantity is transhipped from one vehicle to another vehicle, which may be on account of—

(i) Breakdowns;

(ii) Non-availability of inter-state transport permit.

(b) Where the consignment originally cleared on an invoice issued under Rule 11, is required to be split up *en route* for transport by different vehicles on account of -

i. breakdown of the original vehicle and non-availability of the substitute vehicle of the appropriate capacity, or

ii. requirement of splitting up of the consignment and loading in vehicle other than the vehicle on which goods were cleared from the factory, or

iii. part consignment/package(s) misplaced during transhipment, but recovered later on.

Regarding category (a) and (b), the owner of goods or his agent or the person in charge of the vehicle, at the material time, acting as his agent, shall make a suitable endorsement at the back of the transport's copy of the invoice accompanying the consignment indicating the date and time of breakdown of the vehicle and the registration number of the new vehicle in which the consignment is re-loaded.

In cases of splitting up and transhipment on account of any other reason, including pre-determined distribution of goods from an intermediate point, the assessee should be prepared separate invoice for each lot. At the intermediate point, the owner of goods or his agent or the person in charge of the original vehicle shall endorse the registration number of the new vehicle. Upon receipt of goods in the factory, the assessee shall confirm by endorsing on the invoice that the goods were received in the factory in the specified vehicle.

Note: Under customs law where there is an import of goods, duty at the rate of 4% is payable under Section 3(5) of the Customs Tariff Act. This is called as additional duty in lieu of VAT. The Government has issued a *Notification No.102/2007 dated 14.9.2007* as per which a person that pays this duty can seek a refund provided he produces proof that he has sold the goods and VAT/sales tax has been paid. One of the conditions is that the invoice must show that the buyer cannot avail cenvat credit of 4% duty.

5.10 Returns

Rule 12 of the Central Excise Rules, 2002 contains the provisions for filing of returns by central excise assessees. Further, section 15A of the Central Excise Act, 1944 prescribes filing of an Information Return by specified persons.

5.10.1 Monthly return [ER-1]: Every assessee shall submit to the Superintendent of Central Excise a **monthly** return of production and removal of goods and other relevant particulars electronically within 10 days after the close of the month to which the return relates. The return shall be filed in the prescribed Form **(ER-1)** [Rule 12(1)].

5.10.2 Monthly statement for pan masala manufacturers: An assessee, manufacturing pan masala falling under tariff item 2106 90 20 or pan masala containing tobacco falling under tariff item 2403 99 90, shall also file a statement along with the monthly return. The statement shall contain the monthly summary of-

(i) the purchase invoices for the month with the names and addresses of the suppliers of betel nut, tobacco and packing material along with the quantity of the said goods purchased; and

(ii) the sales invoices for the month with the names and addresses of the buyers, description, quantity and value of goods sold by the assessee.

In cases where the goods are not sold from the factory, the address of the premises to which the goods are dispatched from the factory shall also be provided [First proviso to Rule 12(1)].

5.10.3 Quarterly return

(a) Return required to be filed within 20 days after the close of the relevant quarter: As per the second proviso to rule 12(1), the following assesses shall file a **quarterly** return of production and removal of goods **within 20 days** after the close of the quarter to which the return relates:

(i) assessee manufacturing processed yarn, unprocessed fabrics falling under Chapter 50, 51, 52, 53, 54, 55, 58 or 60 of First Schedule to the Tariff Act; or

(ii) assessee manufacturing readymade garments falling under Chapter 61 or 62 of First Schedule to the Tariff Act, which prior to 1st day of April, 2003 were eligible for an exemption under a notification based on value of clearances in a financial year.

The return shall be filed electronically in the prescribed form **[ER-3]**. The due dates for quarterly return are given in the following table:

Clearances for textile articles	Due date
First Quarter of the year	20th of July
Second Quarter of the year	20th of October
Third Quarter of the year	20th of January
Fourth Quarter of the year	20th of April

(b) Return required to be filed within 10 days after the close of the relevant quarter by SSI [Third proviso to rule 12(1)]: An assessee eligible to avail the exemption under a notification based on value of clearances in a financial year (SSI) shall file a quarterly return of production and removal of goods within 10 days after the close of the quarter to which the return relates.

The return shall be filed electronically in the prescribed form **[ER-3].**

Applicability of the provision: Above provision is applicable to a unit who is **"eligible"** to claim SSI exemption regardless of whether he actually claims it or opts to pay duty. Further, the said provision is applicable to an "eligible" unit for the entire financial year even if it crosses the limit of ₹ 400 lakh (aggregate value of clearances) in the current financial year.

Meaning of eligible : An "eligible" unit is one whose aggregate value of clearances did not exceed ₹ 400 lakh in the preceding financial year.

(c) Return required to be filed by an assessee availing exemption under specified notifications [Fourth proviso to rule 12(1)]: Where an assessee is availing the

exemption:-

(i) under *Notification No. 1/2011-CE dated 01.03.2011*

(ii) in respect of goods falling under Sl.No.67, 128, 199(I) and 200(I) [mentioned below], of *Notification No. 12/2012-CE dated 17.03.2012*

and does not manufacture any other excisable goods other than those specified in the said notification, he shall file a quarterly return in Form **ER-8**, of production and removal of goods and other relevant particulars, within 10 days after the close of the quarter to which the return relates.

S. No.	Particulars
67	Coal, briquettes, ovoids and similar solid fuels manufactured from coal
128	All goods mentioned in Chapter 31 (fertilizers), other than those which are clearly not to be used as fertilisers
199(I)	Articles of jewellery under heading 7113
200(I)	Articles of goldsmiths' or silversmiths' wares of precious metal or of metal clad with precious metal, bearing a brand name under heading 7114

Steps to be taken by assessee for filing of returns are as under:

(i) The manufacturer shall ensure that his registers – Daily Stock Account for finished goods, cenvat account for details of the credits claimed for the period, register of inputs and capital goods cleared as such, personal ledger account for cash payments, register for goods rejected and repaired/processed and the register for job work (goods sent for job work and details of credits reversed) are ready for the purpose of filing the returns. Where they are not ready, the same are to be filled up by gathering the required details from the invoices/challans as the case may be.

(ii) Once the registers are filled up, the figures are to be totaled and checked for accuracy and correctness by comparing the monthly totals with the figures as per the financial ledgers which could sometimes indicate entries missed out.

(iii) The manufacturer should ascertain the balance of credit on hand at the end of the month and if the same is insufficient to pay off the liability, the shortage should be met through cash payment in the designated bank. If he has not paid the amount already, the same is to be paid with interest at 13% p.a. for the delayed period.

(iv) The figures as per the registers should then be carried on to the Excise returns in the relevant columns and boxes. The details that are to be normally entered are – item description, tariff heading, details of nature of clearance (whether export or under notification), duty payable, duty paid through cenvat credit and in cash, details of cenvat credit giving break up of the cenvat credit on inputs, capital goods and input services and utilization of the same etc.

(v) The returns after being filled up should be compared with the registers for errors in posting if any and then filed with the Department with a covering letter and dated acknowledgement obtained. Where it is filed electronically, the procedure laid down in the departmental website is to be followed.

5.10.4 Annual financial information statement [Rule 12(2)]: Every assessee shall submit to the Superintendent of Central Excise, an Annual Financial Information Statement for the preceding financial year to which the statement relates in **Form ER 4** electronically by 30th day of November of the succeeding year [Clause (a)].

Assessees exempt from submission of Annual Installed Information Statement [Sub-rule (2)(b)]: The Central Government may, by notification, and subject to such conditions or limitations as may be specified in such notification, specify assessee or class of assessees who may not require to submit such an Annual Financial Information Statement.

The following have been exempted by the Central Government from filing of such annual information return:

(i) assesses who pay less than ₹ 100 lakhs as excise duty during the financial year to which the Annual Financial Information Statement relates;

(ii) Indian Ordnance Factories, Department of Defence Production and Ministry of Defence.

5.10.5 Annual Installed Capacity Statement: Every assessee shall submit to the Superintendent of Central Excise, an Annual Installed Capacity Statement electronically declaring the annual production capacity of the factory for the financial year to which the statement relates by the 30th April of the succeeding financial year. The statement shall be filed in **Form ER-7** [Rule 12(2A)(a)].

Manufacturers exempt from submission of Annual Installed Capacity Statement [Sub-rule (2A)(b)]: Central Government may specify assessee or class of assessees who may not require to submit such an Annual Installed Capacity Statement. In this regard, the Central Government has exempted the assessees, from the submission of the Annual Installed Capacity Statement, who manufacture the following goods, namely,-

(i) biris, manufactured without the aid of machines falling under tariff item 2403 10 31.

(ii) matches manufactured without the aid of power falling under heading 3605.

(iii) reinforced cement concrete pipes falling under heading 6810.

5.10.6 Late fee for belated filing of returns/ Annual Financial Information Statement/ Annual Installed Capacity Statement [Sub-rule (6)]*: *Where any return or Annual Financial Information Statement or Annual Installed Capacity Statement referred to in this rule is submitted by the assessee after due date as specified for every return or statements, the assessee shall pay to the credit of the Central Government, an amount calculated at the rate ₹100 per day subject to a maximum of ₹20,000 for the period of delay in submission of each such return or statement.

5.10.7 Scrutiny of return: The proper officer may on the basis of information contained in the return filed by the assessee under sub-rule (1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee on the goods removed, in the manner to be prescribed by the Board [Rule 12(3)]. Sub-rule 4 casts a responsibility on every assessee to make available to the proper officer all the documents and records for verification as and when required by such officer.

5.10.8 Documents accompanying the return: The assessee has to submit alongwith the E.R.-1 and E.R.-3 returns for the month/quarter, as the case may be, copies of the PLA and relevant GAR-7 challans. The PLA extracts will give details of all the credits made through GAR-7 challans during the month and upto the 5th of the following month upto which the duty liability can be discharged for the month. A summary could also be put at the end of the PLA extracts indicating the following:

a. opening balance, after discharging the duty liability of the previous month;

b. the credits made during the month and upto the 5th of the following month;

c. total duty discharged during the month;

d. closing balance in the PLA after discharging the duty liability.

Above summary could be suitably modified for the units in the SSI sector as they are required to pay duty on quarterly basis.

5.10.9 Mandatory electronic filing of returns: With effect from 01.10.2011, every assessee has to electronically file the return or the statement, as the case may be, specified in this rule.

Assessees exempt from e-filing of return: Assessees availing exemption with respect to certain specified goods cleared from:-

- a unit in the State of Uttarakhand or Himachal Pradesh *[Notification No. 49/2003 CE dated 10.06.2003].*
- a unit located in the specified areas meant for industrial development and growth namely, Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, in the above two States *[Notification No. 50/2003 CE dated 10.06.2003].*

5.10.10 Returns by EOU/SEZ Units: Return to be filed by Hundred per cent Export Oriented Undertaking/Units in Special Economic Zones is the E.R.2 Return, notified by *Notification No. 49/2001-Central Excise (N.T.) dated 26.6.2001 [Refer rule 17 discussed in subsequent pages for more details].*

The various returns to be filed by different categories of central excise assessees and their respective due dates are given in the following table:

Form of Return	Category of assessee	Periodicity	Due date
ER-1 [**Return** under rule 12(1)]	All assessees except SSI	Monthly	By 10th day of the following month
ER-2 [**Return** under rule 17(3)]	EOUs	Monthly	By 10th day of the following month
ER-3 [**Return** under proviso to Rule 12(1)]	Assessees **eligible** for SSI concession (even if he does not avail the concession)	Quarterly	By 10th day of the month following the respective quarter

ER-4 [**Annual Financial Information Statement** under rule 12(2)]	Assessees paying duty of ₹ 1 crore or more per annum either through PLA or CENVAT or both together	Annually	By 30th November of the succeeding year
ER-5 [**Declaration** with regard to principal inputs under rule 9A(1) and 9A(2) of the CENVAT Credit Rules, 2004 (CCR)]	Assesses paying duty of ₹ 1 crore or more per annum (either through PLA or CENVAT or both together) and manufacturing goods under specified tariff headings	Annually	By 30th April of the current year (e.g. declaration for 2013-14 is to be filed by 30.4.2013).
ER-6 [**Return** of principal inputs under rule 9A(3) of CCR]	Assessees required to submit ER-5 declaration	Monthly	By 10th day of the following month
ER-7 [**Annual Installed Capacity Statement** under Rule 12(2A)]	All assessees, except manufacturers of biris without aid of machines, matches without aid of power and reinforced cement concrete pipes	Annually	By 30th April of the succeeding financial year (e.g. statement for 2013-14 should be submitted by 30.4.2014)
ER-8 [**Return** under fourth proviso to Rule 12(1)]	(i) Assessees paying 1%/2% excise duty (ii) Assessees availing exemption in respect of goods like coal, fertilizers, jewellery etc. under *Notification No. 12/2012 CE dated 17.03.2012* and not manufacturing any other goods	Quarterly	By 10th day of the month following the respective quarter
Form as per *Notification No. 73/2003 CE(NT)* [**Return** of CENVATABLE invoices issued under rule 9(8) of CCR]	Registered dealers	Quarterly	By 15th day of the month following the respective quarter

Note: All the above returns have to be filed electronically.

5.10.10 Information return to be submitted to prescribed authority by assessee or specified authorities [Section 15A]

(1) Section 15A of Central Excise Act, 1944 empowers the Central Government to prescribe

an authority or agency with whom an Information Return shall be filed by the specified persons. Information can be collected for the purposes of the Act, such as, to identify tax evaders or recover confirmed dues. The specified persons required to file the said return are

(a) an assessee; or

(b) a local authority or other public body or association; or

(c) any authority of the State Government responsible for the collection of value added tax or sales tax; or

(d) an income tax authority appointed under the provisions of the Income-tax Act, 1961; or

(e) a banking company within the meaning of section 45A(a) of the Reserve Bank of India Act, 1934; or

(f) a State Electricity Board; or an electricity distribution or transmission licensee under the Electricity Act, 2003, or any other entity entrusted, as the case may be, with such functions by the Central Government or the State Government; or

(g) the Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908; or

(h) a Registrar within the meaning of the Companies Act, 2013; or

(i) the registering authority empowered to register motor vehicles under Chapter IV of the Motor Vehicles Act, 1988; or

(j) the Collector referred to in section 3(c) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; or

(k) the recognised stock exchange referred to in section 2(f) of the Securities Contracts (Regulation) Act, 1956; or

(l) a depository referred to in section 2(e)(1) of the Depositories Act,1996; or

(m) an officer of the Reserve Bank of India, constituted under section 3 of the Reserve Bank of India Act, 1934,

who is responsible for maintaining record of registration or statement of accounts or any periodic return or document containing details of payment of tax and other details or transaction of goods or services or transactions related to a bank account or consumption of electricity or transaction of purchase, sale or exchange of goods or property or right or interest in a property, under any law for the time being in force.

(2) Such persons shall furnish an information return of the details given above in respect of such periods, within such time, form (including electronic form) and manner as may be prescribed, to the prescribed authority or agency.

(3) Any defect found in the return by the prescribed authority can be rectified within a period of 30 days from the date of intimation of such defect to the said person. The period of 30 days can be extended further by the prescribed authority on request.

(4) However, if the defect is not rectified within 30 days or the extended period, such

information return shall be treated as not submitted and the provisions of this Act shall apply.

(5) If the return, including return after rectification of defect, is not submitted within the specified time, the prescribed authority may issue a notice requiring furnishing of such information return within a period not exceeding 90 days from the date of service of the notice.

Penalty for failure to furnish information return [Section 15B]: If a person who is required to furnish an information return under section 15A of Central Excise Act, 1944 fails to do so within the period specified in the notice issued thereunder, the prescribed authority may levy a penalty of ₹ 100 for each day of the default.

5.11 Job work in article of jewellery [Rule 12AA]

(1) Every person (except an export-oriented unit or a unit located in special economic zone) who gets article of jewellery or other articles of precious metals falling under heading 7113 or 7114 as the case may be of the First Schedule to the Central Excise Tariff Act, 1985 produced or manufactured on his behalf, on job work basis, (hereinafter referred to as '"the said person") shall obtain registration, maintain accounts, pay duty leviable on such goods and comply with all the relevant provisions of these rules, as if he is an assessee.

(2) If the said person desires clearance of excisable goods for home consumption or for exports from the premises of the job worker, he shall pay duty on such excisable goods and prepare an invoice, in the manner referred to in rules 8 and 11 respectively except for mentioning the date and time of removal of goods on such invoice.

(3) The original and the duplicate copy of the invoice so prepared shall be sent by him to the job worker from whose premises the excisable goods after completion of job work are intended to be cleared, before the goods are cleared from the premises of the job worker.

(4) The job worker shall fill up the particulars of date and time of removal of goods before the clearance of goods and after such clearance the job worker shall intimate to the said person, the date and time of the clearance of goods for completion of the particulars by the said person in the triplicate copy of the invoice.

(5) The said person may supply or cause to supply to a job worker, the following goods following procedure as given hereunder, namely:-

(i) inputs in respect of which he may or may not have availed CENVAT credit in terms of the CENVAT Credit Rules. 2004, without reversal of the credit thereon; or

(ii) goods manufactured in the factory of the said person without payment of duty; under a challan, consignment note or any other document (herein referred to as 'document") with such information as specified in sub-rule (2) of rule 11 of the Central Excise Rules, 2002, duly signed by him or his authorised agent.

(iii) The goods to be sent should be sent under a challan, consignment note or any other document with the following information:

   i. Serial number;

   ii. The registration number,

iii. Name of the consignee,

iv. Description of goods,

v. Classification of goods,

vi. Time and date of removal,

vii. Mode of transport and vehicle registration number,

viii. Rate of duty,

ix. Quantity and value of goods,

x. Duty payable thereon (with a note that not payable in terms of Rule 12AA(5).

(iv) The Job work register has to be maintained wherein the details of goods sent for job work, corresponding receipt from the job worker and in case of removal from the job worker's place details of such removal correlating to the goods sent.

(v) The waste and scrap generated at the job worker's place has to be received back and co-related. If not duty on such waste and scrap has to be discharged if the credit has been availed on the same.

(6) The responsibility in respect of accountability of the goods, referred to in sub-rule (5) shall lie on the said person.

(7) The job worker shall not be required to get himself registered or shall not be required to maintain any record evidencing the processes undertaken for the sole purposes of undertaking job work under these rules unless he has exercised his option to do the same. In case he does not exercise the option he can follow the procedure as given hereunder:

(i) The job worker has to maintain a register setting out the details as to the goods received for job work on a supplier wise basis as well as other basis like challan or order or monthly.

(ii) After processing the goods, the goods are to be returned under a cover of challan, which gives reference to the document or order no. under which the same was received so as to assist the principal to co-relating the same.

(iii) Further such register maintained should also set out the details of subsequent return of the processed goods to the principal referring to the document under which such goods were sent.

(iv) If the goods are removed directly from his premises, then the details as to the goods removed, corresponding waste, scrap generated, or returned details has to be maintained.

(8) The job worker, with or without completing the job work may,-

(i) return the goods without payment of duty to the said person; or

(ii) clear the goods for home consumption or for exports, subject to receipt of an invoice from the said person, as mentioned in sub-rule (4).

(9) The job worker shall clear the goods after filling in invoice the time and date of removal

and authentication of such details. The rate of duty on such goods shall be the rate in force on date of removal of such goods from the premises of the job worker and no excisable goods shall be removed except under the invoice.

For the purpose of this rule, "job worker" means a person engaged in manufacture or processing on behalf and under the instructions of the said person from any inputs or goods supplied by the said person or by any other person authorized by the said person, so as to complete a part or whole of the process resulting ultimately in manufacture of articles of jewellery falling under heading 7113 of the First Schedule to the Central Excise Tariff Act, 1985, and the term "job work" shall be construed accordingly.

(i) The job worker should agree in writing that he would get registered under central excise and comply with the provisions therein to the supplier of the precious metal and gems.

(ii) The job worker being the registered assessee should maintain the production record.

(iii) The finished items are to be sent under cover of an excise invoice issued under Rule 11.

(iv) The job worker should value the goods appropriately. The products would be ad valorem i.e., (material cost + conversion charges) (see Chapter on Valuation).

(v) The job worker has to ensure that he is availing the admissible and eligible credit so as to be competitive.

(vi) The duty payment may be made after adjusting the cenvat credit on a timely basis.

(vii) The returns in ER-1 are to be submitted by the job worker once in a month/quarter as the case may be.

(viii) The job worker would be responsible to account for the materials and if any were lost he would be liable to the same and have to pay the duty as if the same were for home consumption.

It has been clarified that if any goods or part thereof is lost, destroyed, found short at any time before the clearance of articles of jewellery falling under heading 7113 of the First Schedule to the Tariff Act or waste, by-products or like goods arising during the course of manufacture of such goods, the said person shall be liable to pay duty thereon as if such goods were cleared for home consumption.

5.12 Maintenance of records and payment of duty by the independent weaver of unprocessed fabrics [Rule 12C]

An independent weaver of unprocessed fabrics falling under Chapter 50, 51, 52, 53, 54, 55, 58,or 60 of the First Schedule to the Central Excise Tariff Act can authorise another person to maintain accounts, pay duty, prepare invoice and comply with other provisions of these rules except Rule 9. However, the primary responsibility of complying with the provisions of these rules shall be with the independent weaver. In case of short payment or non-payment of duty on such unprocessed fabrics, the independent weaver and the authorised agent will bear the

consequences and penalty.

Independent weaver is defined as a weaver who works on his own, purchases the yarn himself and sells the grey fabrics manufacture by him.

5.13 Power to impose restrictions in certain types of cases [Rule 12CCC]

Rule 12CCC empowers the Central Government to provide for certain measures including restrictions on a manufacturer, ***a registered importer***, first stage and second stage dealer or an exporter. The Central Government can exercise such powers where having regard to the extent of evasion of duty, nature and type of offences or any other relevant factors, it is of the opinion that in order to prevent evasion of or default in payment of excise duty, it is necessary in the public interest to impose restrictions. The nature of restrictions, (e.g. suspension of registration in case of a dealer) types of facilities to be withdrawn and procedure for issue of such order by Chief Commissioner of Central Excise may be specified by a notification in the Official Gazette.

Notification No. 16/2014 CE (NT) dated 21.03.2012 specifies that Chief Commissioner of Central Excise may order for withdrawal of facilities or impose restrictions where a manufacturer, ***a registered importer***, first stage or second stage dealer, or an exporter including a merchant exporter is *prima facie* found to be knowingly involved in any of the specified offences.

(1) Specified offences: The specified offences are:

(a) removal of goods without the cover of an invoice and without payment of duty;

(b) removal of goods without declaring the correct value for payment of duty, where a portion of sale price, in excess of invoice price, is received by him or on his behalf but not accounted for in the books of account;

(c) taking of CENVAT credit without the receipt of goods specified in the document based on which the said credit has been taken;

(d) taking of CENVAT credit on invoices or other documents which a person has reasons to believe as not genuine;

(e) issue of excise duty invoice without delivery of goods specified in the said invoice;

(f) claiming of refund or rebate based on the excise duty paid invoice or other documents which a person has reason to believe as not genuine;

(g) removal of inputs as such on which CENVAT credit has been taken, without paying an amount equal to credit availed on such inputs in terms of rule 3(5) of the CENVAT Credit Rules, 2004.

(2) Facilities to be withdrawn and imposition of restrictions: The Chief Commissioner of Central Excise may impose following restrictions if a manufacturer is knowingly involved in committing any of the specified offences:

(i) the facility of monthly payment of duties may be withdrawn and the assessee shall be required to pay excise duty for each consignment at the time of removal of goods;

(ii) payment of duty by utilisation of CENVAT credit may be restricted and the assessee shall be required to pay excise duty without utilising the CENVAT credit;

(iii) the assessee may be required to maintain records of receipt, disposal, consumption and inventory of the principal inputs on which CENVAT credit has not been taken;

(iv) the assessee may be required to intimate the Superintendent of Central Excise regarding receipt of principal inputs in the factory on which CENVAT credit has or has not been taken, within a period specified in the order and the said inputs shall be made available for verification upto the period specified in the order.

(3) Removal to be under invoice signed by Inspector/Superintendent in case of subsequent offence: If a person is found to be knowingly involved in committing any one or more type of the specified offences for the second time or subsequently, every removal of goods from his factory may be ordered to be under an invoice which shall be countersigned by the Inspector/Superintendent of Central Excise before the said goods are removed from the factory or warehouse.

Points to note:

(i) The person against whom the order for withdrawal of facilities or imposition of restrictions has been passed may continue to take CENVAT credit but he would not be able to utilize the credit for payment of duty during the period specified in the said order.

(ii) **Principal inputs** means any input which is used in the manufacture of final products where the cost of such input constitutes not less that 10% of the total cost of raw materials for the manufacture of unit quantity of a given final products.

(4) Term of imposition of restrictions: If the assessee commits any of the above-mentioned offences for the first time, the period of imposition of restriction may not be more than 6 months. If the assessee commits any of the above-mentioned offences subsequently, the period of imposition of restrictions shall not be more than 1 year.

(5) Suspension of registration on availing CENVAT credit on fake invoices or issuing of invoice without delivery of goods: Where a first stage or second stage dealer is found to be knowingly involved in committing the type of offence specified at clauses (d) or (e), the Chief Commissioner of Central Excise may order suspension of the registration granted under rule 9 of the Central Excise Rules 2002 for a specified period. During the period of suspension, the said dealer shall not issue any central excise invoice. However, he may continue his business and issue sales invoices without showing excise duty in the invoice and no CENVAT credit shall be admissible to the recipient of goods under such invoice.

(6) Self-sealing facility of export consignment to be withdrawn on claiming refund/rebate on fake invoices: Where a merchant exporter is found to be knowingly involved in committing the type of offence specified at clause (f), the Chief Commissioner of Central Excise may order withdrawal of the self sealing facility for export consignment and

each export consignment shall be examined and sealed by the jurisdictional Central Excise Officer.

(7) Monetary limit: The provisions of this notification shall be applicable only in a case where the duty or CENVAT credit alleged to be involved in any of the specified offences is more than ₹ 10 lakh.

(8) Procedure: The Commissioner of Central Excise or Additional Director General of Central Excise Intelligence, as the case may be, after examination of records and other evidence, and after satisfying himself that the person has knowingly committed the specified offences, may forward a proposal to the Chief Commissioner of Central Excise, to withdraw the facilities and impose restriction during or for such period, within 30 days of the detection of the case, as far as possible.

The Chief Commissioner of Central Excise shall examine the said proposal and after satisfying himself that the records and evidence relied upon in the said proposal are sufficient to form a reasonable belief that the person has knowingly done or contravened any of the specified offences, may issue an order specifying the type of facilities to be withdrawn or type of restrictions to be imposed, along with the period for which the said facilities will not be available or the period for which the restrictions shall be operative.

Before issuing the said order, the Chief Commissioner of Central Excise shall give an opportunity of being heard to the person against whom the proceedings have been initiated and shall take into account any representation made by such person.

5.14 Liability of the merchant manufacturer to comply with the central excise procedures [Rule 12D]

The provisions of the Central Excise Rules, 2002 shall apply to a merchant manufacturer (person on whose behalf the goods are manufactured by the job-workers) of the following goods as if such goods have been manufactured by him:-

(a) Articles of apparel and clothing accessories, knitted or crocheted [Chapter 61 of the First Schedule to the Tariff Act]

(b) Articles of apparel and clothing accessories, not knitted or crocheted [Chapter 62 of the First Schedule to the Tariff Act]

(c) Other made up textile articles; sets; worn clothing and worn textile articles; rags [Chapter 63 of the First Schedule to the Tariff Act].

5.15 Special procedure for payment of duty [Rule 15]

Rule 15(1) gives power to the Central Government to generally specify the goods in respect of which an assessee shall have the option to pay the duty of excise on the basis of such factors as may be relevant to production of such goods and at such rate as may be notified for this purpose by issuing the notification. Rule 15(2) also gives power to the Central Government to specify the procedure for making an application for availing of the special procedure for payment of duty, the abatement, if any, that may be allowed on account of closure of a factory during any period, and any other matter incidental thereto.

5.16 Return of duty paid goods to the factory [Rule 16]

Rule 16 of the Central Excise Rules, 2002 deals with return of duty paid goods. The said rule is wide enough to cover all the purposes including the goods received for being re-made, refined, re-conditioned.

The rule provides that the assessee shall state the particulars of such return in his records and shall be entitled to have CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilise this credit according to the said rules. The narrow proposition of this rule implies the applicability of this rule only to the factory where the goods were manufactured or produced.

Once the goods are returned, two propositions would follow:

1. Where the returned goods are put through a process not amounting to manufacture;
2. Where the returned goods are put through a process amounting to manufacture

In the first situation i.e. the process not amounting to manufacture, the amount equal to the CENVAT credit availed on such goods has to be debited on removal. The manufacturer shall thereby pay an amount equal to the CENVAT credit taken. In the second situation i.e. the process conducted on such goods amounts to manufacture, duty at the rate applicable on the date of removal and on the value determined under section 4 or section 4A or 3(2) of the Act, as the case may be, has to be paid on removal of such goods. The amount paid as such shall be allowed as CENVAT credit as if it was a duty paid by the manufacturer who removes the goods.

Sub-rule (3) of Rule 16 says in the event the assessee has any difficulty, the Commissioner is empowered to resolve the same and permit the entry of the goods into the factory and the availment of CENVAT credit thereon. For this the Commissioner may , either on case to case basis by special order or to be applied to "particular type of case" by general order, impose such conditions as may be necessary for safeguarding interest of revenue.

The process can be summed up as under:

Process Amounting To Manufacture	Process Not Amounting To Manufacture
(a) The goods received under rule 16 shall be issued to production under separate series of issue slips.	(a) The goods shall be issued to production under special series of issue slips clearly identifiable.
(b) The processed items shall be accounted in the Production Register/Daily Stock Account and then removed under the cover of an invoice under Rule 11 of Central Excise Rules.	(b) The details of the goods shall be recorded in the repairs register.
(c) The duty on the removals will be at the rates applicable on the date of removal on the value to be arrived on the basis of section 4,4A or 3(2) as the case may be.	(c) When the goods are removed, the duty equal to the amount of credit availed initially shall be paid under invoice.

5.17 Removal of goods for job work etc. [Rule 16A]

Rule 16A provides that any inputs received in a factory may be removed as such or after being partially processed to a job-worker for further processing, testing, repair, re-conditioning or any other purpose subject to the fulfillment of conditions specified in this behalf by the Commissioner of Central Excise having jurisdiction.

5.18 Special procedure for removal of semi-finished goods for certain purposes [Rule 16B]

The Commissioner of Central Excise may by special order and subject to conditions as may be specified by the Commissioner of Central Excise, permit a manufacturer to remove excisable goods which are in the nature of semi-finished goods, for carrying out certain manufacturing processes, to some other premises and to bring back such goods to his factory, without payment of duty, or to some other registered premises and allow these goods to be removed on payment of duty or without payment of duty for export from such other registered premises.

5.19 Special procedure for removal of excisable goods for carrying out certain processes [Rule 16C]

Rule 16C provides that the Commissioner may allow a manufacturer to remove excisable goods manufactured by him for carrying out test or any process not amounting to manufacture to any other premises without payment of duty. The said other premises may be registered or unregistered. After such tests or any such other process are carried out, the Commissioner may allow-

(a) bringing back of such goods to the said factory without payment of duty, for subsequent clearance for home consumption or export, as the case may be, or

(b) removal of such goods from the said other premises, for home consumption on payment of duty leviable thereon or without payment of duty for export, as the case may be:

However, this rule shall not apply to the goods known as "prototypes" which are sent out for trial or development test.

In order to ensure uniformity in the conditions to be imposed by the Commissioner, it has been clarified vide *Circular No. 844/02/2007-CX dated 31.01.2007* that the procedure prescribed under sub-rules (2),(3),(4) & (9) of rule 12AA of the Central Excise Rules, 2002 should broadly be followed in such cases. However, proper records of receipt of goods, its use, nature of activities carried out, goods processed and cleared by the said other premises should be maintained. Further, any waste/scrap arising at such other premises while carrying out the test/other processes should either be cleared on payment of duties or it should be returned back.

The Kerala High Court in case of *Indian Aluminium Co Ltd v. CCE 2009 (233) E.L.T. 190 (Ker.)*, with regard to availment of credit on goods returned to factory for being re-made, refined or reconditioned, held that Sub-rules (1) and (2) of Rule 16 of Central Excise Rules, 2002 operate differently and therefore in order to avail Cenvat credit under sub-rule (1) there

is no requirement for the manufacturer to clear the returned goods to same party who returned the goods.

5.20 Removal of goods by a 100% Export Oriented Undertaking for Domestic Tariff Area [Rule 17]

5.20.1 Duty payment as per rule 8: Where any goods are removed from a 100% EOU to domestic tariff area, such removal shall be made under an invoice in the procedure specified under rule 11. The duty leviable on such goods shall be paid by utilizing the CENVAT credit or by crediting the duty payable to the account of the Central Government in the manner specified in rule 8 [Sub-rule (1)].

5.20.2 Maintenance of appropriate accounts: A 100% EOU is required to maintain appropriate accounts related to production in the prescribed form giving the following details:

(i) description of goods

(ii) quantity removed

(iii) duty paid [Sub-rule (2)].

To sum up rule 17 provides that where any goods are removed from a 100% EOU to DTA removal should be under the cover of an invoice and on payment of duty as is applicable before removal of goods by debiting PLA/account current or through utilisation of cenvat credit as the case maybe. The EOU has to keep records relating to production, quantity manufactured, removed and duty that is paid.

5.20.3 Monthly return (ER-2): Such unit is further required to submit a monthly return electronically in the specified form (E.R.–2) in respect of the excisable goods manufactured in, and receipt of inputs and capital goods, in the unit. The return is to be submitted to the Superintendent of Central Excise within 10 days from the close of the month to which the return relates [Sub-rule (3)].

5.20.4 Scrutiny by the proper officer: The proper officer may on the basis of information contained in the return filed by the unit under rule 17(3), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee on the goods removed, in the manner to be prescribed by the Board [Sub-rule (4)].

5.20.5 Furnishing of documents and records by assessee: Every assessee shall make available to the proper officer all the documents and records for verification as and when required by such officer [Sub-rule 5].

5.20.6 Late fee for belated filing of return: Where the return is submitted under sub-rule (3) by the assessee after the due date [i.e. 10 days from the close of the month to which the return relates], the assessee shall pay to the credit of the Central Government, an amount calculated at the rate of ₹ 100 per day for each day of default subject to a maximum of ₹ 20,000 [Sub-rule (6)].

5.21 Powers of Central Excise Officers

Central Excise Act and Central Excise Rules, 2002 provide certain powers to the Central

Excise Officers. As per section 12E, a Central Excise Officer may exercise the powers and discharge the duties conferred or imposed on any other Central Excise Officer who is subordinate to him. However, Commissioner (Appeals) can not exercise the powers and discharge the duties conferred or imposed on a Central Excise Officer other than those specified in section 14 or Chapter VIA (Appeals).

5.21.1 Access to a registered premises [Rule 22]

(1) An officer empowered by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

(2) Every assessee***, an importer who issues an invoice on which CENVAT credit can be taken*** and first stage and second stage dealer shall furnish to the officer empowered under sub-rule (1), a list in duplicate, of-

(i) all the records prepared and maintained for accounting of transaction in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods, as the case may be;

(ii) all the records prepared and maintained for accounting of transaction in regard to payment for input services and their receipt or procurement; and

(iii) all the financial records and statements including trial balance or its equivalent.

(3) Every assessee*, **an importer who issues an invoice on which CENVAT credit can be taken*** and first stage and second stage dealer shall, on demand make available to the officer empowered under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India or Cost Accountant/ Chartered Accountant as nominated under section 14A/14AA of the Act, -

(i) the records maintained or prepared by him in terms of sub-rule (2);

(ii) the cost audit reports, if any, under section 233B of the Companies Act, 1956 ; and

(iii) the Income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961

for the scrutiny of the officer or the audit party or the cost accountant or chartered accountant, within the time limit specified by the said officer or the audit party or the cost accountant or chartered accountant, as the case may be.

It has been clarified that for the purposes of this rule, "first stage dealer" and "second stage dealer" shall have the meanings assigned to them in CENVAT Credit Rules, 2004.

5.21.2 Power to stop and search [Rule 23]: Any Central Excise Officer may search any conveyance carrying excisable goods in respect of which he has reason to believe that the goods are being carried with the intention of evading duty *[Refer Chapter 8 for detailed discussion].*

5.21.3 Power to detain or seize goods [Rule 24]: If a Central Excise Officer has reason to believe that any goods, which are liable to excise duty but no duty has been paid thereon or the said goods were removed with the intention of evading the duty payable thereon, the Central

Excise Officer may detain or seize such goods *[Refer Chapter 8 for detailed discussion].*

5.21.4 Power to arrest [Section 13]: Any Central Excise Officer not below the rank of Inspector of Central Excise may, with prior approval of the Commissioner of Central Excise, arrest any person whom he has reason to believe to be liable to punishment under the Central Excise Act or the rules made thereunder *[Refer Chapter 8 for detailed discussion].*

5.21.5 Power to summon persons to give evidence and produce documents in inquiries under this Act [Section 14]: Any Central Excise Officer may summon any person whose attendance he considers necessary either:

(a) to give evidence; or

(b) or to produce a document; or

(c) any other thing in any inquiry which he is making for any of the purposes of the Central Excise Act.

Such Central Excise Officer should be duly empowered by the Central Government for this purpose. A summons to produce documents or other things may be

(a) for the production of certain specified documents or things; or

(b) for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

All persons so summoned shall be bound to attend, either in person or by an authorized agent, as such officer may direct. Further, all persons so summoned shall be bound to state the truth upon any subject in respect of which they are examined or making statements. They shall also be bound to produce such documents and other things as may be required:

Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code, 1860.

5.21.6 Power of search and seizure [Section 12F]: Where the Joint Commissioner/Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any Central Excise Officer to search and seize or may himself search and seize such documents or books or things [Sub-section (1)].

The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure shall, so far as may be, apply to search and seizure under this section. However, the police officer would have to submit the copies of any record made, to the Principal Commissioner of Central Excise or Commissioner of Central Excise* [Sub-section (2)].

**Note: Section 165(5) of the Code of Criminal Procedure, 1973, inter alia provides that the police officer would have to submit the copies of any record made during search and seizure, to nearest Magistrate empowered to take cognizance of the offence. However, sub-section (2) of section 12F specifically requires the police officer to submit the copies of the records made, to the Principal Commissioner of Central Excise or Commissioner of Central Excise.*

5.22 Samples

There is no specific provision in Central Excise Rules, 2002 (hereinafter referred to as the 'said Rules') governing drawal and testing of 'samples' of manufactured goods or inputs to ascertain their correct identity or classification or eligibility of any exemption. However, under various procedures, such as relating to exports, assessment etc. drawal of samples is required. The Board vide its instructions issued on 17.05.2005 has dealt with samples separately. On the clearance of samples also the excise duty is payable. *Refer QH Talbros Vs. CCE 2002 (146) ELT 471.*

5.23 Large Tax Payer Units

The Finance Minister in his Budget Speech 2005-06 announced the proposal to set up Large Taxpayer Units (hereinafter referred to as LTUs) in the country in line with the international practice to service large taxpayers paying excise duty, corporate tax/income-tax and service tax under a single window. LTU is a trade facilitative measure seeking to address and deliver appropriate solutions to the unique compliance issues that may arise.

The first Large Taxpayer Unit was set up at Bangalore. The Chief Commissioner, Central Excise and Service Tax heads the LTU in Bangalore. Currently, LTUs are functioning from Chennai, Delhi and Mumbai also.

Conceptually, LTU is a self-contained tax office that provides single point interface with the tax administration to the large taxpayers who pay direct and indirect taxes above a specified threshold limit. It is a single office that deals with central excise/service tax/ income tax/ corporate tax issues of all units holding a single PAN. Once a taxpayer acquires the status of LTU, the entire jurisdiction of central excise, service tax and income tax matters stand transferred to the said LTU in respect of all his manufacturing units, service providing premises, and other registered premises located throughout the country. Some of such activities are as given below: -

(a) Filing of returns

(b) Filing of refund/rebate claims

(c) Audit, Adjudication and Appeals

(d) Filing of intimation, permissions

(e) Visit to units

(f) Acceptance of proof of export

A LTU is headed by a Chief Commissioner (either from CBDT or from CBEC). The Chief Commissioner, LTU is expected to undertake following functions-

(a) overall administration of LTU;

(b) co-ordination between the direct tax and the indirect tax wings of LTU;

(c) distribution of work amongst the LTU officers;

(d) monitoring of revenue collection;

(e) quality Assurance Checks/ taxpayer feedback system;

(f) devising effective taxpayer assistance system;

(g) review of the orders passed by the Commissioners as adjudicating authority (as a member of Review Committee);

(h) issuance of trade notices/ circulars to bring about uniformity in tax administration as well as determination of amount of tax payable;

(i) coordination with the Boards (CBEC and CBDT), Directorates and with other field formations in the matters such as audit verification, revenue recoveries, etc.

The Chief Commissioner, LTU intimates the jurisdictional Central Excise, Service Tax and Income Tax Commissioners regarding the transfer of the specified units from their jurisdiction to the LTU. The Commissioners posted in LTU hold executive and appellate charges. The powers and duties are similar to that of other field Commissioners. However, they are required to play a pro-active role in ensuring the fulfilment of objectives of a LTU. The Commissioners of Direct and Indirect Taxes are expected to work in a coordinated manner. Other Group 'A', 'B', 'C' officers along with supporting staff are posted by CBDT and CBEC. The Chief Commissioner, LTU assigns a Client Executive for each taxpayer from among the Additional/Joint/Deputy/Asstt. Commissioner posted in LTU, and the said Client Executive becomes the single point interface with the large taxpayer for all purposes.

The officers posted in LTU have all India jurisdiction in respect of all registered premises of a large taxpayer registered in that particular LTU. The erstwhile Central Excise or Service Tax Commissionerate Officers have concurrent jurisdiction. However, the interaction with these units is limited to specific functions requiring physical presence of the officers for purposes such as warehousing, sealing or any other work as assigned by the LTU.

5.23.1 Definition of large tax payer: Rule 2(ea) of the Central Excise Rules, 2002, defines "large taxpayer" as a person who-

(i) has one or more registered premises under the Central Excise Act, 1944; or

(ii) has one or more registered premises under Chapter V of the Finance Act, 1994;

and is an assessee under the Income Tax Act, 1961, who holds a Permanent Account Number issued under section 139A of the said Act, and satisfies the conditions and observes the procedures as notified by the Central Government in this regard.

Notified persons to be eligible to opt as large taxpayer:

(i) Any person engaged in the manufacture or production of goods, except the goods falling under chapter 24 or Pan Masala falling under chapter 21 of the First schedule of the Central Excise Tariff Act, 1985, or

(ii) a provider of taxable service,

who has paid during the financial year 2004-05 or during the financial year preceding the year of filing of application for large tax payer-

(a) duties of excise of more than ₹500 lakhs in cash or through account current; or

(b) service tax of more than ₹500 lakhs in cash or through account current; or

(c) advance tax of more than ₹1000 lakhs, under the Income Tax Act, 1961,

and is presently assessed to income tax or corporate tax under the Income Tax Act, 1961, under the jurisdiction of prescribed income tax authorities.

Notified procedures to be followed to be eligible to opt as large tax payer:

(i) A large taxpayer who satisfies the conditions mentioned above may file an application in the prescribed form duly completed in all respects to the Chief Commissioner of Central Excise, Large Taxpayer Unit for the city where the large taxpayer is presently assessed to income tax or corporate tax indicating his willingness to be a large taxpayer.

(ii) A person willing to operate as large taxpayer shall furnish details of each of the premises already registered under the Central Excise Act, 1944 including the premises of first and second stage dealers and each of the premises registered under Chapter V of the Finance Act, 1994 including the premises of input service distributor.

(iii) The Chief Commissioner of Central Excise, Large Taxpayer Unit may after due verification of the application form, grant the acceptance in writing. The process of acceptance would not normally take more than 7 days.

(iv) Existing registrations under the Central Excise Act, 1944 or Chapter V of the Finance Act, 1994 shall continue. However, in case a new factory or service provider, input service distributor or first or second stage dealer which becomes liable to be registered, after opting as large taxpayer, the application for such new registration shall be made before the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, Large Taxpayer Unit, in case of registration under the Central Excise Act, 1944 and the Superintendent, Large Taxpayer Unit, in case of registration under the Finance Act, 1994, as the case may be.

(v) After registration for each Large Tax Payer, the Chief Commissioner of LTU shall appoint an Officer (Additional/Joint/Deputy/Assistant Commissioner) who shall facilitate these units for any clarification, assistance or grievance redressal. The officer appointed as client executive can either be from Income Tax Department or Central Excise Department. The main purpose of appointing client executive is to enable the large taxpayer to have a single point interface.

5.23.2 Procedure and facilities for the large taxpayer [Rule 12BB]: (1) A large taxpayer may remove excisable goods (intermediate goods), except motor spirit, commonly known as petrol, high speed diesel and light diesel oil without payment of duties of excise under the cover of a transfer challan or invoice from any of his registered premises (sender premises) where such goods are produced, manufactured or warehoused to his other registered premises (recipient premises) for further use in the manufacture or production of such other excisable goods (subject goods). However, the large taxpayer cannot remove the intermediate goods without payment of duty to the premises of a first or second stage dealer.

The removal of intermediate goods without payment of duty from the sender premises to recipient premises shall be subject to the conditions that-

(a) the subject goods are manufactured using the said intermediate goods and cleared on payment of appropriate duties of excise leviable thereon within a period of 6 months, from the date of receipt of the intermediate goods in the recipient premises; or

(b) the subject goods are manufactured using the said intermediate goods and exported out of India, under bond or letter of undertaking within a period of 6 months, from the date of receipt of the intermediate goods in the recipient premises,

and that any other conditions prescribed by the Commissioner of Central Excise, Large Taxpayer Unit in this regard are satisfied.

The transfer challan or invoice shall be serially numbered and shall contain the registration number, name, address of the large taxpayer, description, classification, time and date of removal, mode of transport and vehicle registration number, quantity of the goods and registration number and name of the consignee.

However, if the subject goods manufactured or produced using the said intermediate goods are not cleared on payment of appropriate duties of excise leviable thereon or are not exported out of India within the said period of 6 months, duties of excise payable on such intermediate goods shall be paid by the recipient premises with interest in the manner and rate specified under section 11AA. The duty payable shall be the duty payable on the date and time of removal of the intermediate goods from the sender's premises. If the large taxpayer fails to pay such amount, it shall be recovered along with interest in the same manner as provided under section 11A and section 11AA.

Illustration 1

Excise duty is payable on intermediate goods, namely, electronics goods, manufactured by factory A which are removed without payment of duties of excise for use in the manufacture of subject goods, namely, machines, in factory B of the large taxpayer. In case such machines are not exported or are removed without payment of duties of excise, then factory B shall pay duties of excise payable on the electronic goods so cleared along with interest.

Further, if any duty of excise is payable on such intermediate goods and if the said duty is not payable on such subject goods, the said duty of excise as equivalent to the total amount payable on such intermediate goods along with interest under section 11AA of the Act shall be paid by the recipient premises. The duty payable shall be the duty payable on the date and time of removal of the intermediate goods from the sender's premises. If the large taxpayer fails to pay such amount, it shall be recovered along with interest in the same manner as provided under section 11A and section 11AA respectively of the Act.

Illustration 2

National Calamity Contingent duty is payable on intermediate goods namely, polyester yarn manufactured by factory A. Such yarn is removed without payment of duty of excise for use

in the manufacture of subject goods, namely, grey fabrics in factory B of a large taxpayer, (on which such National Calamity Contingent duty is not payable), then factory B shall pay an amount equivalent to the National Calamity Contingent duty that would have been payable on the polyester yarn along with interest under section 11AA of the Act.

It may be noted that the provisions of this sub-rule will not apply if the recipient premised is availing area-based exemptions in North Eastern States, Jammu Kashmir, Sikkim or Kutch district.

Also, the provisions of this sub-rule shall not apply in respect of a EOU or a unit located in a EHTP or STP.

(2) Where a registered premises of a large taxpayer manufacturing excisable goods has paid to the credit of Central Government any duty of excise in excess of duty of excise payable on account of arithmetical error, the said large taxpayer may adjust the excess duty so paid by him, against his duty liability for the subsequent period subject to the limitations prescribed under rule 3(7)(b) of the CENVAT Credit Rules, 2004.

However, such adjustment shall be admissible only if the said registered premises has not passed on the incidence of such excess duty so paid to any other person, and the consignee does not avail credit of such duty under the CENVAT Credit Rules, 2004.

(3) Any notice issued but not adjudged by any of the Central Excise Officer immediately before the date of grant of acceptance by the Chief Commissioner of Central Excise, Large Taxpayer Unit, shall be deemed to have been issued by Central Excise officers of the said Unit.

(4) A large taxpayer shall submit the monthly returns, as prescribed under these rules, for each of the registered premises. However the Central Government has prescribed a format for monthly returns that are to be submitted. The return covers information such as details of manufacture, clearance, duty payable, exemption notification if any availed, provisional assessment number, registration number of recipient unit as applicable to large tax payers, receipt details of intermediate goods applicable to large tax payers, details of duty paid through cenvat credit or PLA, abstract of account credit, details of credit taken and utilised, details of other payments made under self assessment.

(5) A large taxpayer, on demand, may be required to make available the financial, production, stores and CENVAT credit records in electronic media, such as, compact disc or for the purposes of carrying out any scrutiny and verification as may be necessary.

(6) A large taxpayer may, with intimation of at least 30 days in advance, opt out to be a large taxpayer from the first day of the following financial year.

(7) The provisions of other rules of Central Excise Rules, 2002 in so far as they are not inconsistent with the provisions of this rule shall mutatis mutandis apply in case of a large taxpayer.

It may be noted that concepts of large tax payer has also been incorporated in the CENVAT Credit Rules, 2004 by inserting rule 12A, which provides for the procedure and facilities for the large taxpayer (discussed in previous Chapter).

5.23.3 Export Procedures: Large Tax payers have been provided with the facility to self seal the export cargo and this facility is only recommendatory and not mandatory, The LTU's can also avail the services of departmental officers (Central Excise or Customs) for sealing their export cargo. The unit availing the services of departmental officer for sealing has to apply for the same to LTU and who will in turn request the Jurisdictional Commissionerate to provide the staff for sealing. The processing of accepting the proof of export shall be carried out in LTU. If the manufacturer finds any difficulty in following the present export procedure, the Chief Commissioner, LTU shall prescribe a modified procedure for facilitating smooth processing of export documents. However the export consignment shall not be held for non compliance of any procedural formalities.

5.23.4 Audit: The selection of Large Tax Payer for audit would be based on risk assessment considering various parameters. The audit of the head office and all the units shall be taken simultaneously as far as possible. The other relaxation provided to LTU is that the dates of the audit shall be scheduled only after consultation with the respective LTU.

5.23.5 Adjudication: All the show cause notices along with the papers shall be forwarded to LTU from the Jurisdictional officers on receipt of acceptance letter from LTU. Only those cases shall be forwarded where the adjudication is pending and in cases where adjudication has been conducted then the same shall be decided by the jurisdictional adjudicating authority only.

5.23.6 Investigations: The investigation cases pending as on the date of acceptance shall be completed by the jurisdictional commissioner on priority basis and SCN's if necessary shall be issued by the jurisdictional authorities and further adjudication shall be undertaken by the officer of LTU.

5.23.7 Arrears of revenue & cases pending with Appellate Authorities: The Commissionerate are obligated not only to forward the cases but also provide the history of the case. Apart from the above, the Commissionerates shall also forward a copy of the revenues recoverable from the LTU. The cases pending before the Commissioner (Appeals), CESTAT, High Court and Supreme Court shall be forwarded to LTU with a self contained note in each file. The jurisdictional Commissionerates provide only the logistical support whereas any action with respect to these cases would be undertaken by LTU.

6

Export Procedures

6.1 Introduction

A study of the provisions with regard to exports would assume significance considering the fact that exports out of the country are to be zero rated. Apart from this principle, the exporters are also entitled to certain additional benefits like sourcing inputs required for production of goods to be exported without payment of applicable duties. The benefits that are available to exporters are not provided under any one single law and include the Central Excise Act, 1944 and Rules, Customs Act, 1962, Foreign Trade Policy of the Government considering the fact that most of the manufacturers who export goods have to comply with the provisions of both Central Excise and Customs laws apart from adhering to the basic guidelines laid down by the government under the Foreign Trade Policy for promotion of exports.

To sum up the procedures relating to export can be classified into two. Firstly export of goods without payment of duty and secondly export of goods on payment of duty under rebate. The conditions and procedure relating to export without payment of duty are contained in *Notification Nos. 42/2001-Central Excise (N.T.) to 45/2001-Central Excise (N.T.), all dated 26th June, 2001* issued under rule 19 of the Central Excise 2002.

Export can be made directly by the manufacturer-exporter or through merchant exporter. Merchant exporter means the person engaged in the trading activity and exporting the goods.

6.2 Export without payment of duty [Rule 19]

(1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

(2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.

(3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

Rule 19 of Central Excise Rules 2002 governing export under bond/Letter of Undertaking states that any excisable goods may be cleared for export without payment of duty from either the factory of manufacture or warehouse or any other premises approved by the Commissioner of Central Excise. Materials can also be cleared for use in the manufacture or processing of goods which would be exported.

Export without payment of duty under Bond/Letter of Undertaking: Export without payment of duty is further classified into the export to the countries other than Bhutan for which there is a different procedure. Exports to Bhutan is subject to more stringent safeguards which have been notified separately and would also be subject to restrictions in terms of remittance.

6.2.1 Export to all countries except Bhutan: Procedures and conditions for export to all countries except Bhutan are specified in *Notification No. 42/2001-CE (N.T.) dated 26.6.2001*. The details are mentioned in this part.

Bond and CT-1 by the merchant exporter: **Merchant exporter** shall furnish a bond in Form B-1 so that goods can be cleared by supplier-manufacturer (from whom the goods are being procured by him for export) without payment of duty and obtain certificate in Form CT-1 from excise office. Such certificates need not be obtained for each consignment but will be given in lots of 25.

He would then send the Form CT-1 to the supplier manufacturer for export without payment of duty. On the basis of Form CT-1, the manufacturer-exporter can clear the goods for export without payment of duty.

Though any exporter (manufacturer-exporter or merchant-exporter) can furnish bond, the merchant-exporters are necessarily required to furnish bond in the B-1 Form specified in *Notification No. 42/2001-Central Excise (N.T.),* with such security or surety as may be specified by the concerned bond accepting authority. The bond shall be in a sum equal at least to the duty chargeable on the goods for the due arrival of export goods at the place of export and their export therefrom under Customs or as the case may be postal supervision. The officer who will accept the bond, will also be responsible for discharging that bond upon furnishing proof of export by the exporter.

The bond shall not be discharged unless the goods are duly exported, to the satisfaction of the Deputy/Assistant Commissioner of Central Excise or Maritime Commissioner or such other officer as may be authorised by the Board on this behalf within the time allowed for such export or are otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted so, and interest, if any, has been paid.

Letter of undertaking by the manufacturer-exporter: **Manufacturer-exporter** may furnish annual Letter of Undertaking in Form UT-1. The manufacturer-exporter need not necessarily execute a bond. The Letter of Undertaking (LUT) is to be furnished in the Form UT-1 specified in the *Notification No. 42/2001-Central Excise (N.T.)*. Any manufacturer, who is an assessee for the purposes of the Central Excise Rules, 2002, shall furnish a Letter of Undertaking only to the Deputy/Assistant Commissioner of Central Excise having jurisdiction over his factory from which he intends to export.

The Letter of Undertaking should not be furnished to the Maritime Commissioner or any other officer authorised by the Board.

A 'Letter of Undertaking' shall be valid for twelve calendar months provided the exporter complies with the conditions of the Letter of Undertaking, especially the prescribed procedure for 'acceptance of proof of export'. In case of persistent defaults or non-compliance causing

threat to revenue, the manufacturer-exporter may be asked to furnish bond with security/surety. For the sake of clarification, it is mentioned that this Letter of Undertaking should not be taken for each consignment of export. In case of *CCE v. Nemlaxmi India Pvt Ltd 2009 (236) E.L.T. 260 (Tri*), it was held that the letter of undertaking (LUT) has to be executed even for the exempted goods on which no duty is payable and therefore it was held that it can be validly issued for excisable as well as exempted goods.

The obligation of the manufacturer flows from statutory requirement of exporting the goods within six months or such extended period as the Deputy/Assistant Commissioner of Central Excise may allow. Failing this, the exporter is required to deposit the requisite sum (duty and interest) *suo motu,* considering that the manufacturer has to do 'self-assessment'. Any non-payment within 15 days of expiry of the stipulated time period, shall be treated as arrears of revenue and the Department will proceed to recover the same as 'sum due to Government'. *Suo motu* payment within 15 days of expiry of the stipulated time period will not be treated as 'default'.

On repeated failure of the manufacturer-exporter to comply with the conditions of the Letter of Undertaking or the prescribed procedure for 'acceptance of proof of export', the Deputy/Assistant Commissioner of Central Excise may direct him in writing that the Letter of Undertaking is not valid and he should furnish B-1 Bond with sufficient security/surety.

The Letter of Undertaking shall not be discharged unless the goods are duly exported, to the satisfaction of the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise within the time allowed for such export or are otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted so, and interest, if any, has been paid.

1. Conditions: The export shall be subject to the following conditions:

(i) The goods shall be exported within six months from the date on which these were cleared for export from the factory of the production or the manufacture or warehouse or other approved premises within such extended period as the Deputy/Assistant Commissioner of Central Excise or Maritime Commissioner may in any particular case allow;

(ii) When the export is from a place other than registered factory or warehouse, the excisable goods are in original packed condition and identifiable as to their origin;

(iii) Export of excisable goods which are chargeable to nil rate of duty or are wholly exempted from payment of duty, other than goods cleared by a hundred per cent export oriented undertaking, shall not be allowed under this notification.

Clarification: The rationale behind third condition mentioned above is explained via *Circular No. 928/18/2010-CX dated 28.06.2010* as follows:-

For exempted goods, Department has prescribed a detailed procedure for refund of input taxes through *Notification No. 21/2004-CE (NT) dated 06.09.2004*, wherein a detailed procedure requiring verification of details like manufacturing process, input-output ratio, wastages etc., by the Departmental officer is prescribed. The reason for the same is that in

case of exempted goods, the Department does not exercise control.

In order to avoid such detailed verification and scrutiny by the Department for claiming of refund of input taxes, some of the exporters were exporting the exempted goods under bond and claiming refund under rule 5 of the CENVAT Credit Rules, 2004, **though a bond is executed only when goods are liable for payment of excise duty**. Hence, if there is no excise duty then there is no question of exporting under bond.

2. Forms/documents to be used:

(i) ARE. 1: ARE.1 is the export document for export clearance which shall be prepared in quintuplicate (5 copies). This document shall bear running serial number beginning from the first day of the financial year. On A.R.E.1, certain declarations are required to be given by the exporter. These should be signed by the exporter or his authorised agent. If the export is under bond executed by merchant exporter, the form should be signed by both manufacturer as well as merchant exporter. The different copies of ARE.1 forms should be of different colours indicated below:

Original	White
Duplicate	Buff
Triplicate	Pink
Quadruplicate	Green
Quintuplicate	Blue

It will be sufficient if the copies of ARE.1 contain a color band on the top or right hand corner in accordance with above color scheme.

(ii) Invoice: An invoice shall also be prepared in terms of rule 11 of the said Rules. It should be prominently mentioned on top **"FOR EXPORT WITHOUT PAYMENT OF DUTY"**.

3. Procedure for clearance from the factory or warehouse: A manufacturer-exporter who has furnished a Letter of Undertaking will prepare the export documents (A.R.E.1 and invoice under rule 11) for clearance from his factory of production.

A merchant-exporter who has furnished a bond shall be provided sufficient number of certificates (CT-1), duly signed/certified, in multiples of 25 copies, normally covering a period of one to three months, depending upon the track record of compliance by the exporter. The 'bond accepting authority' shall be responsible for verifying and accepting the proof of export and in case of any defaults by the exporter, to recover the sum and enforcing the bond. The certificate should be provided according to the volume of exports projected by the exporter (which should also reflect in the amount of bond). The compliance of the exporter in submitting the requisite documents towards 'proof of export' shall be another criterion.

Part-II of CT-1 is very important. The exporter shall determine the description of goods for procurement from a particular factory or warehouse or an approved place of storage, quantum, value of procurement (provisional figures) and duty involved therein (provisional figures – but based on correct rate of duty and contracted transaction value). This 'duty' element will be debited provisionally. The exporter shall ensure that at the time of debit, sufficient credit is

available at that point of time to cover the said debit. The provisional debit shall be converted into final debit within a period of 7 days from the date of removal of goods on A.R.E.1, based on the 'duty payable' in goods cleared for export reflected in the said A.R.E.1 and invoice.

The manufacturer shall record the clearance in his Daily Stock Account indicating, *inter alia,* the invoice number/date, A.R.E.1 number/date and duty payable but foregone under rule 19.

The exporter has two optional procedures regarding the manner in which he may clear the export consignments from the factory or warehouse or any other approved premises, namely:

(i) Examination and sealing of goods at the place of despatch by a Central Excise Officer

(ii) Self-sealing and self-certification

4. Sealing of goods and examination at place of despatch: In this method, export goods are examined before despatch by the Central Excise officers. Then the goods are not examined by Customs authorities at the port/airport unless seals are found tampered/any specific information is there.

The exporter is required to prepare five copies** of application in the Form ARE-1. The Form is specified in Annexure-I to *Notification No. 42/2001-Central Excise (N.T.) dated 26.6.2001*. The goods shall be assessed to duty in the same manner as the goods for home consumption, though duty is not required to be paid considering clearance is meant for export without payment of duty. The classification and rate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification and/or the said Rules. The value shall be the "transaction value" and should conform to section 4 or section 4A, as the case may be, of the Central Excise Act, 1944. It is clarified that this value may be less than, equal to or more than the F.O.B. value indicated by the exporter on the Shipping Bill.

****Quintuplicate A.R.E. 1 (fifth copy)** is the Export Promotion Copy and is optional for the exporter. Exporter shall use this copy for the purposes of claiming any other export incentive.

The duty payable shall be determined on the ARE.1 and invoice and recorded in the Daily Stock Account as "duty foregone on account of export under rule 19".

The exporter may request the Superintendent or Inspector of Central Excise having jurisdiction over the factory of production or manufacture, warehouse or approved premises for examination and sealing at the place of despatch 24 hours in advance, or such shorter period as may be mutually agreed upon, about the intended time of removal so that arrangements can be made for necessary examination and sealing.

In case of exports under Duty Exemption Entitlement Certificate Scheme (DEEC), Duty Exemption Pass Book Scheme (DEPB) and claim for Drawback, the Superintendent of Central Excise shall also examine and seal the consignment and sign the documents in token of having done so. In exceptional cases, where the exporter has unblemished track record of compliance (Central Excise) and where there is non-availability of Superintendent of Central Excise due to leave, vacant post or other reasonable causes, the jurisdictional Deputy/Assistant Commissioner of Central Excise may permit examination and sealing by Inspector. All other types of export may be examined and sealed by the Inspector of Central Excise.

The Superintendent or Inspector of Central Excise, as the case may be, will verify the identity of goods mentioned in the application and also verify whether the duty self-assessed is appropriate and that the particulars of the duty payable has been has recorded in the Daily Stock Account. If he finds that the declaration in ARE.1 and the invoices are correct from the point of view of identity of goods and its assessment to duty, he shall seal each package or the container ensuring that the goods cannot be tampered with after the examination. Normally, individual packages should be sealed by using wire and lead seals and an all-sides-closed container by using numbered one time Lock/Bottle seals or in such other manner as may be specified by the Commissioner of Central Excise by a special or general written order. Thereafter, the said officer shall endorse and sign each copy of the application in token of having such examination done and put his stamp with his name and designation below his signature.

Distribution of ARE.1 in the case of export from the factory or warehouse:

Original (First Copy)	The said Superintendent or Inspector of Central Excise shall return to the exporter immediately after endorsements and signature.
Duplicate (Second Copy)	The said Superintendent or Inspector of Central Excise shall return to the exporter immediately after endorsements and signature.
Triplicate (Third Copy)	Sent to the bond sanctioning authority, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in official records.
Quadruplicate (Fourth Copy)	Retain for official records.
Quintuplicate (Fifth Copy)	**Optional copy** - The said Superintendent or Inspector of Central Excise shall return to the exporter immediately after endorsements and signature.

Distribution of ARE.1 in the case of export from other than factory or warehouse: Where goods are not exported directly from the factory of manufacture or warehouse, the distribution of A.R.E.1 will be the same as above except that the triplicate copy of application shall be sent to the Superintendent having jurisdiction over the factory of manufacture or warehouse who shall, after verification forward the triplicate copy in the manner specified above.

5. Despatch of goods by self-sealing and self-certification: Self-sealing and self-certification is a procedure by which the exporter who is a manufacturer or owner of a warehouse, may remove the goods for export from his factory or warehouse without examination by a Central Excise Officer. This procedure will also be permitted in the cases where a merchant-exporter procures the goods directly from a factory or warehouse. In both cases, the manufacturer of the export goods or owner of the warehouse shall take the responsibility of sealing and certification.

For this purpose the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit of the goods or the owner of warehouse or a person (who should be permanent employee of the said manufacturer or owner of the warehouse holding reasonably high position) duly authorised by such owner, working partner or the Board of Directors of such company, as the case may be, shall certify on all the copies of the application (A.R.E. 1) that the goods have been sealed in his presence.

It may be noted that such self-sealing and self-certification is NOT permissible for exports to Bhutan.

The exporter shall distribute the copies of A.R.E. 1 in the following manner:

Original (First copy) and Duplicate (Second copy)	Send to the place of export along with the goods
Triplicate (Third copy) and Quadruplicate (Fourth copy)	Superintendent or Inspector of Central Excise having jurisdiction over the factory or warehouse within twenty four hours of removal of the goods
Quintuplicate (Fifth copy)	Optional copy - Send to the place of export along with the goods

The said Superintendent or Inspector of Central Excise shall verify the particulars of assessment, the correctness of the amount of duty paid or duty payable, its entry in the Daily Stock Account maintained under Rule 10 of the Central Excise Rules, 2002 (the manufacturer or warehouse owner will be required to present proof in this regard), corresponding invoice issued under Rule 11. If he is satisfied with the particulars, he will endorse the relevant A.R.E. 1 and append his signatures at specified places in token of having done the verification. In case of any discrepancy, he will take up the matter with the assessee for rectification and also inform the jurisdictional Assistant/Deputy Commissioner. Once verification is complete and the A.R.E. 1 is in order, he shall distribute the documents (A.R.E. 1) in the following manner:

Triplicate (Third copy)	Send to the bond accepting authority, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in official records. Where manufacturer has given LUT, triplicate shall be retained and will be forwarded to the Deputy/Assistant Commissioner of the Division along with Statement, after matching them with original copies of A.R.E.1s.
Quadruplicate (Fourth copy)	Retain for Range records (The notification does not specify this distribution of this copy)

6. Export by parcel post: In case of export by parcel post after the goods intended for export has been sealed, the exporter shall affix to the duplicate application sufficient postage stamps to cover postal charges and shall present the documents, together with the package or packages to which it refers, to the postmaster at the office of booking.

7. Examination of goods at the place of export: The place of export may be a port, airport, Inland Container Depot, Customs Freight Station or Land Customs Station.

The exporter shall present together with original, duplicate and quintuplicate (optional) copies of the application (A.R.E. 1) to the Commissioner of Customs or other duly appointed officer – normally goods are presented in the designated export shed.

The goods are examined by the Custom officers for the purposes of Central Excise to establish the identity and quantity, i.e. the goods brought in the Customs area for export on an A.R.E. 1 are the same which were cleared from the factory. The Customs authorities also examine the goods for Customs purposes such as verifying for certain export incentives such as drawback, DEEC, DEPB or for determining exportability of the goods.

For Central Excise purposes, the Officers of Customs at the place of export shall examine the consignments with the particulars as cited in the application (A.R.E. 1) and if he finds that the same are correct and the goods are exportable in accordance with the laws for the time being in force (for example, they are not prohibited or restricted from being exported), shall allow export thereof. Thereafter, he will certify on the copies of the A.R.E. 1 that the goods have been duly exported citing the shipping bill number and date and other particulars of export and distribute in the following manner:

The officer of customs shall return the original and quintuplicate (optional copy for exporter) copies of application to the exporter and forward the duplicate copy of application either by post or by handing over to the exporter in a tamper proof sealed cover to the officer specified in the application, from whom exporter wants to claim rebate.

8. Procedure relating to proof of export and re-credit against such proof: The procedure relating to acceptance of proof of export or the 'validation' of actual export has been simplified. The original and duplicate copies of A.R.E. 1 are presented to the Customs authorities at the place of export [with option for exporter to also present quintuplicate copy]. The Customs authority certifies the actual export on these documents and distributes the copies as specified.

The exporter shall submit a Statement, at least once in a month, in specified form along with the original copies of A.R.E. 1 with due certification of export (Pass for Shipment Order) by Customs authorities at the place of export to the Divisional office (through Range) or in the office of the bond-accepting authority. Other supporting documents shall also be furnished, namely, self-attested photocopy of Bill of Lading and self-attested photocopy of Shipping Bill (Export Promotion Copy). The Range office or the Office of the bond-accepting authority immediately on receipt shall acknowledge the Statement.

The exporter is permitted to take credit in his running bond account on the basis of copy of the Statement referred to above, duly acknowledged by the Range office or the office of the bond-accepting authority

It shall be the responsibility of the Range Office and Division Office or the other bond-accepting authority to verify the correctness of Statement and A.R.E.1 furnished by the exporter within the shortest possible time. The Statement and A.R.E.1 will be tallied by the Range Officers with the triplicate copies of A.R.E.1 already with them and the A.R.E.1 or its

summary received directly from the place of export (hard copies or electronic summary or e-mail) within 15 days of the receipt. The Divisional Officer shall accept the proof of export or initiate necessary action in case of any discrepancy.

In case of other bond-accepting authority, their office will do this work. The bond-accepting authority shall accept the proof of export or initiate necessary action in case of any discrepancy. He will also intimate about the acceptance of proof of export or any other action to the Deputy/Assistant Commissioner of Central Excise from whose jurisdiction goods were cleared for export.

In case of non-export within six months from the date of clearance for export (or such extended period, if any, as may be permitted by the Deputy/Assistant Commissioner of Central Excise or the bond-accepting authority) or discrepancy, the exporter shall himself deposit the excise duties along with interest on his own immediately on completion of the statutory time period or within ten days of the Memorandum given to him by the Range/Division office or the Office of the bond-accepting authority. On failure to do so necessary action can be initiated to recover the excise duties along with interest and fine/penalty. Failing this, the amount shall be recovered from the manufacturer-exporter along with interest in terms of the Letter of Undertaking furnished by the manufacturer. In cases where the exporter has furnished bond, the said bond shall be enforced and proceedings to recover duty and interest shall be initiated against the exporter.

In case of any loss of document, the Divisional Officer or the bond accepting authority may get the matter verified from the Customs authorities at the place of export or may call for collateral evidences such as remittance certificate, Mate's receipt etc. to satisfy himself that the goods have actually been exported.

Synopsis of procedure for export to countries other than Bhutan by a merchant-exporter

1. **B1 Bond:** The exporter should first of all submit a general bond in Form B-1 annexed to the said notification for an amount equal to the duty chargeable on the goods, to the ACCE/DCCE having jurisdiction over the factory/warehouse or such other approved premises from where the goods are cleared for export. The bond will be with adequate surety or security as may be approved by the concerned officer. The security is normally 25% of the bond amount and surety is for the full bond amount. The bond shall be on non-judicial stamp paper of the value as applicable to the state in which it is being furnished.
2. **CT-1 Certificate:** The exporter shall then obtain certificates in form CT-1 from the jurisdictional SCE for the purpose of procuring excisable goods without payment of duty.
3. **Export Goods details**: The exporter shall issue CT-1 to the manufacturer from whom the excisable goods are to be procured without payment of duty for the purposes of export. The CT-1 should be clear in terms of the description of goods sought, the quantities, value and duty involved.
4. **Running Bond Register:** The exporter shall maintain a running bond register wherein the duty amount on the excisable goods received under CT-1 would be debited. The

debit cannot exceed the credits in the bond account at any point of time and where it is about to happen, another bond for additional amount is to be furnished. (The concept here is of self debit and self credit and one need not go the bond accepting authority for making the entries in the register)

5. **Sealing:** The exporter shall take steps to get the goods ready for despatch. He shall examine the packages and seal them himself in the presence of either the owner/partner/Managing Director of the entity or a person who has been duly authorized in this regard.

6. **Export Invoice and Certification:** He shall raise his invoice and in addition to the invoice, a specified form (Form ARE 1) in quadruplicate (a quintuplicate copy can be raised to claim any other export incentive desired). Each of the copies of ARE 1 will have to be certified by the owner/Managing Director/partner of the entity or the person duly authorized to oversee the self-sealing and self-certification process. The certification should be to the effect that the sealing of the goods has been done in his presence. The ARE 1 shall also be signed by the person authorized by the manufacturer (as required by Chapter 7 of CBEC Manual).

7. **Procedure at Place of Export:** The Original and Duplicate copies of ARE1 would accompany the goods to the place of export and the Triplicate and Quadruplicate copies would be sent to the jurisdictional SCE within 24 hours of the removal. (Where a quintuplicate copy is maintained, the same may be sent with the Original and can be used for claiming any other export incentive). (Where the goods are to be exported by post, the duplicate copy is to be affixed with stamps of adequate value and the copy with the goods is to be delivered to the post master for booking). At the place of export, the Customs officer authorized would examine the goods and documents and certify on the copies that the goods have been exported by citing the Shipping Bill reference and other details of export.

8. **Disposal of ARE 1 Copies:** The said officer would return the original and quintuplicate (if filed) to the exporter and the duplicate may be sent either directly to the ACCE/DCCE with whom the LUT is filed or given in a tamper proof cover to the exporter to be given to such officer.

9. **Proof of Export:** The exporter shall file a statement in the prescribed format at least once in a month giving details of exports made and the proof of shipment received for earlier clearances as well as the cases where the proof is pending along with the copies of ARE 1 form as specified above.

10. Once the proof of export as stated above is submitted and acknowledged by the ACCE/DCCE, the exporter shall claim the credit in the bond register maintained which had been debited at the time of procurement of materials for the sake of export.

Synopsis of Procedure for export to countries other than Bhutan by a manufacturer exporter

1. **Submission of Letter of Undertaking:** The exporter should submit a Letter of Undertaking in Form UT-1 to the ACCE/DCCE having jurisdiction over the factory/

warehouse or such other approved premises from where the goods are cleared for export. The LUT is normally valid for a period of twelve calendar months.

2. **Sealing of Goods:** The exporter shall take steps to get the goods ready for despatch. He shall examine the packages and seal them himself in the presence of either the owner/partner/Managing Director of the entity or a person who has been duly authorized in this regard.

3. **Export Invoice and ARE1:** He shall raise an Excise invoice which shall state prominently "FOR EXPORT WITHOUT PAYMENT OF DUTY" and in addition to the invoice, a specified form (Form ARE 1) in quadruplicate (a quintuplicate copy can be raised to claim any other export incentive desired). The details of the clearance to be made are to be entered in the Daily Stock Account.

4. **Certification:** Each of the copies of ARE 1 will have to be certified by the owner/Managing Director/partner of the entity or the person duly authorized to oversee the self-sealing and self-certification process. The certification should be to the effect that the sealing of the goods has been done in his presence.

5. **Distribution of ARE1:** The Original and Duplicate copies of ARE 1 would accompany the goods to the place of export and the Triplicate and Quadruplicate copies would be sent to the jurisdictional SCE within 24 hours of the removal. (Where a quintuplicate copy is maintained, the same may be sent with the Original and can be used for claiming any other export incentive). (Where the goods are to be exported by post, the duplicate copy is to be affixed with stamps of adequate value and the copy with the goods is to be delivered to the post master for booking).

6. **Procedure at Place of export:** At the place of export, the Customs officer authorized would examine the goods and documents and certify on the copies that the goods have been exported by citing the Shipping Bill reference and other details of export.

7. **Disposal of ARE1:** The said officer would return the original and quintuplicate (if filed) to the exporter and the duplicate may be sent either directly to the ACCE/DCCE with whom the LUT is filed or given in a tamper proof cover to the exporter to be given to such officer.

8. **Proof of Export:** The exporter shall file a statement in the prescribed format at least once in a month giving details of exports made and the proof of shipment received for earlier clearances as well as the cases where the proof is pending along with the copies of ARE 1 form as specified above.

6.3 Export to Bhutan without payment of duty

The conditions and procedure for export to Bhutan without payment of duty (under bond) have been given by the Board in *Notification No. 45/2001-Central Excise (N.T.) dated 26.6.2001*.

1. Places from where goods can be exported: Under the said notification, export can be made from any of the following places: -

(i) the factory of production or manufacture

(ii) warehouse, or

(iii) any other premises as may be approved by the Commissioner of Central Excise.

2. Forms to be used: The export shall be required to file a general bond in the Form specified in the said notification with such security or surety as may be specified by the concerned bond accepting authority. The bond shall be in a sum equal at least to the duty chargeable on the goods for the due arrival of export goods at the place of export (Land Customs Station) and their export there from under Customs supervision. The officer who will accept the bond, will also be responsible for discharging that bond upon furnishing proof of export by the exporter.

The bond shall not be discharged unless the goods are duly exported, to the satisfaction of the Deputy/Assistant Commissioner of Central Excise or Maritime Commissioner or such other officer as may be authorised by the Board on this behalf within the time allowed for such export or are otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted so, and interest, if any, has been paid.

Invoice in the Form specified in the said notification shall be used for export clearances. Six copies of invoice shall be prepared. This document shall bear running serial number beginning from the first day of the financial year. On the invoice, certain declarations are required to be given by the exporter. They should be signed by the exporter or his authorised agent.

Certificate shall be required in the Form specified in the said notification from the Reserve Bank of India or any other bank authorised to deal in foreign exchange by the Reserve Bank of India, for the receipt of full payment in freely convertible currency. Certificate may also be required where remittance is received in Indian rupee.

6.3.1 Export under bond to Bhutan where payment is in freely convertible currency: Export under bond to Bhutan where payment is in freely convertible currency, shall be subject to following conditions, namely: -

(i) the importer of the goods in Bhutan, as the case may be, shall make full payment for said goods to the exporter thereof by furnishing Foreign Inward Remittance Certificate for such payment from any bank authorized to deal with foreign exchange by Reserve Bank of India or shall open an irrevocable letter of credit in favour of such exporter in India, before the export of such goods takes place.

(ii) condition (i) shall not apply if the excisable goods other than consumer goods, but excluding motor vehicles, are exported without payment of duty as:-

  (a) supplies to projects financed by any United Nations agency, the International Bank for Reconstruction and Development, International Development Association, the Asian Development Bank or any other multilateral agency of like nature;

  (b) to all diplomatic missions in Bhutan provided the Indian Embassy or the Ministry of External Affairs certifies that the import is for the personnel of the diplomatic community;

(iii) the exporter shall furnish a bond in the prescribed form before the Assistant/Deputy Commissioner of Central Excise having jurisdiction over the factory, warehouse, or the approved premises or such other officer as authorized by the Board on this behalf, from where the goods are removed for export to Bhutan;

(iv) where the export is against an irrevocable letter of credit, the exporter shall furnish a certificate in the prescribed form from the Reserve Bank of India or any other bank authorized to deal in foreign exchange by the Reserve Bank of India, showing that full payment for the goods has been duly received in freely convertible currency. On receipt of such a certificate and on the satisfaction that the goods have been exported in terms of the bond, the Assistant/Deputy Commissioner of Central Excise or such other officer as authorized by the Board on this behalf shall discharge the exporter of his liabilities under the bond.

(v) Raw materials can be procured without the payment of duty for the manufacture of goods which are for export to Bhutan provided the payment is in freely convertible currency.

6.3.2 Export without payment of duty to specified Hydro Electric Projects in Bhutan: Export of all excisable goods without payment of duty to specified Hydro Electric Projects in Bhutan shall be subject to the following conditions, namely: -

(i) The exporter shall furnish a bond in specified Form before the Deputy/Assistant Commissioner of Central Excise having jurisdiction over the factory or warehouse from which the goods have to be cleared.

(ii) The goods are supplied against one or more specified contract which have been registered with the Directorate General of Inspection, Customs and Central Excise in the following manner:

(a) Every Project Authority specified in the notification *[Notification No. 45/2001-CE(N.T.)]*, supra, desirous of obtaining supplies under benefits of this notification shall apply in writing to the Director General, Directorate General of Inspection (Customs and Central Excise) [hereinafter referred to as DGICCE], 5th Floor, Drum Shape Building, I.P. Estate, New Delhi for registration of the contract through Ministry of External Affairs as soon as the contract has been concluded with the suppliers.

(b) The application shall be accompanied by the original deed of contract and list of items duly approved by the Ministry of External Affairs.

(c) The Project Authority shall also furnish such other documents or other particulars as may be required by the DGICCE in connection with the project.

(d) DGICCE, on being satisfied, shall register the contract by entering the particulars in a Register maintained separately for each project and shall assign a number in token of registration and communicate the same to the Project Authority and shall also return to the project authority all original documents which are no longer required. This number shall be indicated on all the invoices and other related documents.

(e) A copy of the contract so registered along with the approved list of items shall be forwarded to the Commissioner of Central Excise having jurisdiction over the factory/warehouse to which the contract pertains for extending benefits under this notification and consequent benefits under the CENVAT Credit Rules, 2002 to the supplier.

Amendment of Contract: If any contract referred to hereinabove is amended, whether before or after registration, the Project Authority shall make an application for registration of amendments to the said contract to the DGICCE.

The application shall be accompanied by the original deed of contract relating to the amendment and a list of items pertaining to amendment, if any, duly approved by the Ministry of External Affairs.

On being satisfied that the application is in order the DGICCE shall make note of the amendments in the relevant entries.

The DGICCE shall forward a copy of the amended contract and the amended list of items, if any, to the concerned Commissioner of Central Excise.

Finalisation of Contract

(a) Each Project Authority shall submit a statement of supplies received on quarterly basis along with relevant invoices and other documents to the DGICCE within one month from the last date of the quarter.

(b) The Commissioner of Central Excise to whom a registered contract has been forwarded shall forward a statement, after all the items covered under the contract have been exported, to the DGICCE.

(c) The DGICCE shall, on receipt of the statement, reconcile both and, if satisfied, finalise the contract and close the entry in the register.

There should be a release order from the officer authorised by the General Manager of the concerned project authority covering the goods.

The exporter shall furnish a bond in the specified Form to the Deputy/Assistant Commissioner of Central Excise having jurisdiction over the factory or warehouse or the approved premises or from where the goods are removed for export to the specified project.

Export in bond of petroleum oil, liquified petroleum gas and lubricant products to Nepal: The export in bond without payment of duty of excise of petroleum oil, liquified petroleum gas and lubricant products to Nepal is permitted through the agency of Nepal Oil Corporation from calibrated stocks of M/s Indian Oil Corporation registered as a warehouse in accordance with the provisions of Rule 20 of the said Rules, and situated at places notified for the purpose or purchased without payment of duty from tanks of other Oil companies or undertakings. For this facility, the Indian Oil Corporation shall be required to furnish a bond in the specified Form to the Deputy/Assistant Commissioner of Central Excise having jurisdiction over the installation from which the petroleum oil, liquified petroleum gas and lubricant products are to be exported.

Export in bond for supplies to Government of India Aided Projects in Nepal and the Embassy Co-operative Store and Embassy Petrol Pump located in Nepal for the bonafide use of officers and staff of the Embassy in Nepal: Export in bond for supplies to Government of India Aided Projects in Nepal and the Embassy Co-operative Store and Embassy Petrol Pump located in Nepal for the *bonafide* use of officers and staff of the

Embassy in Nepal shall be subject to the following conditions, namely: -

(i) the exporter shall furnish a bond in specified Form to the Deputy/Assistant Commissioner of Central Excise; and

(ii) the First Secretary (Economic), Embassy of India, Nepal, certifies the signature and stamp or seal of the person authorised to place the order for supply of excisable goods to the specified Government of India Aided Projects in Nepal.

6.4 Export procedure

6.4.1 Procedure at the place of despatch: Six copies of invoice shall be presented to the Superintendent or Inspector of Central Excise having jurisdiction over the factory, warehouse or any other approved premises along with the export goods.

In case of export for supplies to Government of India Aided Projects in Nepal and the Embassy Co-operative Store and Embassy Petrol Pump located in Nepal for the *bonafide* use of officers and staff of the Embassy in Nepal, the order from Project Implementation Authority shall also be presented.

The Superintendent or Inspector of Central Excise having jurisdiction over the factory, warehouse or any other approved premises shall verify the identity of goods with reference to description mentioned in the invoice and the particulars of the duty payable but for export, and if found in order, he shall seal the consignment, tank or container with Central Excise seal or in such other manner as may be specified by the Commissioner of Central Excise and endorse each copy of the export invoice in token of having such verification and examination done by him.

The said Superintendent or Inspector will allow export and distribute invoices in the following manner:

Original (First copy)	Hand over to the exporter
Duplicate, triplicate and quadruplicate (second, third and fourth copies)	Hand over to the exporter or his agent in a sealed cover for delivery to the Customs officer in-charge of the Land Customs Station through which the goods are intended to be exported.
Quintuplicate (Fifth copy)	Forwarded to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise who has accepted the bond
Sixtuplicate (Sixth copy)	Retain for official record

6.4.2 Procedure at the Land Customs Station: The exporter or his agent shall present the goods to the officer of customs in-charge of the land customs station along with the original copy of the invoice and the sealed cover containing duplicate, triplicate and quadruplicate copies and obtain acknowledgement;

Where the contents of all the copies of invoices tally and the packages, goods or container are satisfactorily identified with their seals intact, the officer of customs in-charge of the land

customs station shall make necessary entries in the register maintained at the land customs station and allow the goods to cross into the territory of Bhutan and certify accordingly on each of the four copies of the invoice and indicate the running serial number in red ink prominently visible and encircled. In case the seals are not found intact, the officer of customs in charge of the land customs station may re-seal the containers with his own seal after satisfying himself as to the identity of the containers and the goods from the particulars shown on the invoice by opening and examining the goods, if necessary;

Distribution of invoices by Customs Officer

Original (First copy)	Hand over to the exporter or his agent alongwith the goods for presentation to the Customs Officer of Bhutan.
Duplicate and triplicate (Second and third copy)	Send to the Bhutanese Customs Officer in-charge of the check post through which the goods are to be imported into Bhutan, as the case may be.

Presentation of goods to Bhutanese Customs Officers: The goods are then to be produced before the Bhutanese Customs Officer, as the case may be, at the corresponding border check-post alongwith the original copies of the invoice. The Bhutanese Customs Officer shall deal with the original and triplicate copies of the invoice as directed by His Majesty's Government of Bhutan and return the duplicate copy, after endorsing his certificate of receipt of goods in Bhutan, as the case may be, directly to the officer of customs-in-charge of the land customs station in India.

Further distribution of invoices: The officer of customs in-charge of the land customs station shall forward the duplicate copy to the Central Excise Officer in charge of the factory or warehouse from which the goods were removed for export without payment of duty. For this purpose, the said officer in charge of the land customs station should keep a note of the return of duplicate copies from the Customs Officer of Bhutan and remind the exporter for such copies as have not been received, failing which the exporter may be liable to pay full duty on such consignments.

The customs officers, at the land customs station shall also maintain a **separate** record of all such in-bond exports of the goods without payment of duty and shall assign running serial number on the invoice at the time of export as indicated earlier.

6.5 Procedure for discharge of bond or the duty liability

Essential ingredients for discharge of bond have already been mentioned under each category of exports.

The general procedure would be - the exporter shall submit the quadruplicate copy duly endorsed by the officer of customs in-charge of land customs station to the Central Excise officer who has accepted the bond along with bank, certificate evidencing receipt of payment in freely convertible currency (in Indian Rupee in particular category), within six months from the date of removal of the goods. It may be noticed that earlier, the above mentioned period has been extended from 'three' months to 'six' months, as compared to erstwhile notification.

The Central Excise officer will tally the particulars with quintuplicate copy of the invoice received from the Central Excise officer who has allowed clearance from the factory or warehouse or any other approved premises and make suitable entries in Bond Account of the exporter, giving provisional credit or discharging the bond provisionally.

On receipt of the duplicate copy of invoice, duly endorsed by customs officer of Bhutan from the customs officer in charge of land customs station, certifying export of the goods and after tallying the particulars with those in quadruplicate copy of the invoice make suitable entries in Bond Account and the obligation under the said bond will then be discharged.

In case of failure to export within six months from the date of removal from the factory or warehouse or any other approved premises, or shortages noticed, the exporter shall discharge the duty liability on the goods not so exported or shortage noticed along with twenty four per cent interest thereon from the date of removal for export without payment of duty till the date of payment of duty in terms of the bond.

6.6 Cancellation of export documents

If the excisable goods cleared under A.R.E.1 are not exported for any reason and the exporter intends to divert the goods for home consumption, he may request in writing the authority who accepted the bond or letter of undertaking to allow cancellation of application, and diversion of goods for consumption in India. He will be permitted to do so if he pays the duty as specified in the application along with interest on such duty from the date of removal for export from the factory or warehouse till the date of payment of duty. The permission shall be granted within 3 working days. Since duty assessment on A.R.E 1 has to be done in normal course, there will not be any need for re-assessment by the Department or the assessee unless there are reasons to believe that the assessment was not correct. After the duty is discharged, the exporter may take credit in his running bond (where bond is furnished) on the basis of letter of permission, invoice and GAR-7 Challans on which duty is paid. He shall record these facts in the Daily Stock Account.

If the exporter, after clearing the goods for export without payment of duty, intends to change the destination or buyer or port/place of export, he may do so provided he informs the bond/LUT accepting authority in writing about the changes and makes necessary changes in all the copies of A.R.E.1 and the invoices. If he intends to cancel the original export documents and issue fresh ones, the same may be done under permission and authentication by bond/LUT accepting authority who will ensure that the serial no. and date of the initial documents are endorsed on the fresh documents. In such cases, if bond was furnished for single consignment, fresh bond may not be asked.

6.7 Re-entry of the goods cleared for export under bond but not actually exported, in the factory of manufacture

The excisable goods cleared for export under bond or undertaking but not actually exported for any genuine reasons may be returned to the same factory provided –

(i) such goods are returned to the factory within six months along with original documents

(invoice and A.R.E.1);

(ii) the assessee shall give intimation of the re-entry of each consignment in Form D-3 within twenty-four hours of such re-entry;

(iii) such goods are to be stored separately for at least for 48 hours from the time intimation is furnished to Range Office or shorter period if verification is done by the Superintendent of Central Excise in the manner mentioned subsequently ; and

(iv) the assessee shall record details of such goods in the daily stock account and taken in the stock in the factory.

The Superintendent of Central Excise will verify himself or though Inspector in charge of the factory, about the identity of such goods with reference to invoice, A.R.E.1 and the daily stock account in respect of 5% of intimations, within another 24 hours of receipt of intimation.

6.8 Re-import of exported goods for repairs etc. and subsequent re-export

It has been provided in the *Notification 42/2001-Central Excise (N.T.)*, *supra*, that the exported excisable goods which are re-imported for carrying out repairs, re-conditioning, refining, re-making or subject to any similar process may be returned to the factory of manufacture for carrying out the said processes and subsequent re-export. It may be noted that 're-import and re-export' shall be governed by the provisions of the Customs Act, 1962.

So far Central Excise is concerned, the manufacturer shall maintain separate account for return of such goods in a daily stock account and make suitable entry on the said account after goods are processed, repaired, re-conditioned, refined or re-made. When such goods are exported, the usual export procedure shall be followed.

Any waste or refuse arising as a result of the said processes shall be removed from the factory on payment of appropriate duty or destroyed after informing the proper officer in writing at least 7 days in advance and after observing such conditions and procedure as may be specified by the Commissioner of Central Excise and thereupon the duty payable on such waste or refuse may be remitted by the said Commissioner of Central Excise.

6.9 Entry of goods in another factory of the same manufacturer for consolidation and loading of consignment for export

Goods removed without payment of duty for export on A.R.E.1 from one factory (hereinafter referred to as 'the first factory') of a manufacturer are allowed to enter in another factory of the said manufacturer (hereinafter referred to as the 'subsequent factory') only for the purpose of consolidation and loading of goods manufactured in subsequent factory and export therefrom subject to following conditions: -

(i) The exporter shall be required to get his goods examined and sealed at each factory (the places of despatch) by a Central Excise Officer.

(ii) The export goods shall be brought under cover on invoice and A.R.E.1 in the subsequent

factory in original packing and duly sealed by Central Excise Officers. In case goods are stuffed in a container, Central Excise Officer shall duly seal the container in the first factory and the sealing of each package shall not be insisted upon. The Central Excise Officer having jurisdiction over the subsequent factory shall supervise the opening of the seal of container, loading of goods (duly sealed if these goods are to be loaded in open truck/vehicle) belonging to the subsequent factory in vehicle or container and sealing of the container.

(iii) The exporter or the manufacturer shall pay the supervision charges.

6.10 Samples of export goods

The Central Excise Officer examining the consignment shall draw representative samples wherever necessary in triplicate. He shall hand over two sets of samples, duly sealed, to the exporter or his authorized agent, for delivering to the Customs Officer at the point of export. He shall retain the third set for his records. The instructions and procedure for drawaldrawal of samples specified by the Board should be followed.

6.11 Export under claim for rebate [Rule 18]

Where any goods are exported, the Central Government can grant rebate of the duty paid on such excisable goods or the rebate of duty paid on materials used in the manufacture or processing of such goods exported. The rebate is available on materials and not on capital goods used in manufacturing/processing.

The conditions and procedures relating to export under claim of rebate are contained in *Notification No. 19/2004 -Central Excise (N.T.) dated 6th September, 2004* issued under rule 18 of the Central Excise Rules, 2002.

It is worth mentioning that as per the definition of the term 'refund' in section 11B of the Central Excise Act, 1944, refund includes 'rebate' of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India. Thus, the procedure specified in the said Rules and the notification issued thereunder are subject to section 11B of the said Act.

"Explanation. – For the purposes of this rule, "export", with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India and includes shipment of goods as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft."

Thus, rebate of excise duty will not be available on supply of goods to 100% EOU. As regards supply of goods to SEZ, it has been clarified by CBEC that since SEZ is deemed to be outside the Customs territory of India, any licit clearances of goods to an SEZ from the DTA will continue to be export. Therefore, such clearances will be entitled to the benefit of rebate under rule 18 and of refund of accumulated CENVAT credit under rule 5 of CCR, 2004, as the case may be [Circular No.1001/8/2015-CX.8 dated 28.04.2015].

6.11.1 Export of excisable goods to all countries except Bhutan

1. Conditions relating to the said export are as follows:

(a) The excisable goods shall be exported after payment of duty, directly from a factory or warehouse. The condition of "payment of duty" is satisfied once the exporter records the details of removals in the Daily Stock Account maintained under Rule 10 of the said Rules, whereas the duty may be discharged in the manner specified under Rule 8 of the said Rules, i.e. on monthly basis.

(b) In certain cases, the Board may issue instructions/procedures for exporting the duty paid goods from a place other than the factory or the warehouse. In this regard, a general permission has been granted in respect of goods where it is possible to correlate the goods and their duty paid character.

(c) The excisable goods shall be exported within 6 months from the date on which they were cleared for export from the factory of manufacture or warehouse. This date will be indicated on the ARE.1 and invoice issued for the purpose. However, the Commissioner of Central Excise has powers to extend this period, for reasons to be recorded in writing in any particular case. The exporter will be required to submit written request to the Commissioner specifying the reasons why they could not export within the stipulated 6 months' period. The Commissioner should give his decision within 7 working days of the receipt of the request. It should also be noted that such permissions should not given in a routine manner.

(d) The excisable goods supplied as ship's stores for consumption on board a vessel bound for any foreign port are in such quantities as the Commissioner of Customs at the port of shipment may consider reasonable.

(e) The rebate claim by filing electronic declaration shall be allowed from such place of export and such date, as may be specified by the Board in this behalf.

(f) The market price of the excisable goods at the time of exportation is not less than the amount of rebate of duty claimed.

(g) The amount of rebate of duty admissible is not less than ₹500.

(h) The rebate of duty paid on those excisable goods, export of which is prohibited under any law for the time being in force, shall not be made.

(i) The rebate shall not be admissible in case of export of goods which are manufactured by a manufacturer availing any of the following notifications:

(i) Notification No. 32/99- CE dated 08.07.1999 or

(ii) Notification No. 33/99- CE dated 08.07.1999 or

(iii) Notification No. 39/2001-CE dated 31.07.2001 or

(iv) Notification No. 56/2002-CE dated 14.11.2002 or

(v) Notification No. 57/2002-CE dated 14.11.2002 or

(vi) Notification No. 56/2003-CE dated 25.06.2003 or

(vii) Notification No. 71/2003-CE dated 09.09.2003 or

(viii) Notification No. 20/2007- CE dated 25.04.2007

It should be noted that the rebate of excise duty would be only equal to the excise duty paid on the goods *[Siddhartha Tubes v. CCE 1999 (114) ELT 1000]*

2. Forms to be used: ARE.1 is the export document which shall be prepared in quadruplicate. The assesee can optionally have quintuplicate copy (5th copy) which can be used for claiming other export incentives. This document shall bear running serial number beginning from the first day of the financial year. On A.R.E.1, certain declarations are required to be given by the exporter. They should be read carefully and signed by the exporter or his authorised agent. The different copies of ARE.1 forms should be of different colours indicated below:

Original-	White
Duplicate	Buff
Triplicate	Pink
Quadruplicate	Green
Quintuplicate	Blue

It will be sufficient if the copies of ARE.1 contain a color band on the top or right hand corner in accordance with above color scheme. An invoice shall also be prepared in terms of Rule 11 of the said Rules.

For filing rebate claim: There is no specified form for filing claim of rebate. The same may be done by the exporter on their letterhead and filed with the requisite documents.

3. Procedure for clearance for export: The exporter has two optional procedures regarding the manner in which he may clear the export consignments from the factory or warehouse, namely: -

(i) Examination and sealing of goods at the place of despatch by a Central Excise Officer.

(ii) Under self-sealing and self-certification

4. Sealing of goods and examination at place of despatch: The exporter is required to prepare five copies of application in the Form ARE-1, as per format specified in Annexure-I to Notification No. 19/2004-Central Excise (N.T.) dated 06.9.2004. The goods shall be assessed to duty in the same manner as the goods for home consumption. The classification and rate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification and/or Central Excise Rules, 2002. The value shall be the "transaction value" and should conform to section 4 or section 4A, as the case may be, of the Central Excise Act, 1944. It is clarified that this value may be less than, equal to or more than the F.O.B. value indicated by the exporter on the Shipping Bill.

The duty payable shall be determined on the ARE.1 and invoice and recorded in the Daily Stock Account. It should be paid in the manner specified in Rule 8 of the said Rules.

The exporter may request the Superintendent or Inspector of Central Excise having jurisdiction

over the factory of production or manufacture, warehouse or approved premises for examination and sealing at the place of despatch 24 hours in advance, or such shorter period as may be mutually agreed upon, about the intended time of removal so that arrangements can be made for necessary examination and sealing.

In case of exports under Duty Exemption Entitlement Certificate Scheme (DEEC), Duty Exemption Pass Book Scheme (DEPB) and claim for Drawback, the Superintendent of Central Excise shall also examine and seal the consignment and sign the documents in token of having done so. In exceptional cases, where the exporter has unblemished track record of compliance (Central Excise) and where there is non-availability of Superintendent of Central Excise due to leave, vacant post or other reasonable causes, the jurisdictional Deputy/Assistant Commissioner of Central Excise may permit examination and sealing by Inspector. Other types of export may be examined and sealed by the Inspector of Central Excise.

The Superintendent or Inspector of Central Excise, as the case may be, will verify the identity of goods mentioned in the application and the particulars of the duty paid or payable. If he finds that the declaration in ARE.1 and the invoices are correct from the point of view of identity of goods and its assessment to duty, and that the exporter has recorded the duty payable in Daily Stock Account, he shall seal each package or the container ensuring that the goods cannot be tampered with after the examination. Normally, individual packages should be sealed by using wire and lead seals and an all-sides-closed container by using numbered One time Lock/Bottle seals or in such other manner as may be specified by the Commissioner of Central Excise by a special or general written order. Thereafter, the said officer shall endorse and sign each copy of the application in token of having such examination done and such examination report must accompany the export goods to the port/airport of export.

5. Distribution of documents (ARE.1)

Export from the factory or warehouse: In the case when export takes place from the factory of warehouse, the distribution of ARE.1 shall be, as follows:

Original (First Copy)	The said Superintendent or Inspector of Central Excise shall return to the exporter immediately after endorsements and signature
Duplicate (Second Copy)	The said Superintendent or Inspector of Central Excise shall return to the exporter immediately after endorsements and signature.
Triplicate (Third Copy)	Sent to the officer with whom rebate claim is to be filed, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in official records.
Quadruplicate (Fourth Copy)	Retain for official records
Quintuplicate (Fifth Copy)	Optional copy - The said Superintendent or Inspector of Central Excise shall return to the exporter immediately after endorsements and signature.

Export from place other than factory or warehouse (including diversion of duty paid goods for export): Where goods are not exported directly from the factory of manufacture or warehouse, the distribution of A.R.E.1 will be same as above except that the triplicate copy of application shall be sent by the Superintendent having jurisdiction over the factory of manufacture or warehouse who shall, after verification forward the triplicate copy in the manner specified above.

6. Despatch of goods by self-sealing and self-certification: Self-sealing and self-certification is a scheme where the exporter who is a manufacturer or owner of a warehouse, may remove the goods for export from his factory or warehouse without examination by a Central Excise Officer. This procedure will also be permitted in the cases where a merchant-exporter procures the goods directly from a factory or warehouse. In both cases, the manufacturer of the export goods or owner of the warehouse shall take the responsibility of sealing and certification. For this purpose the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit of the goods or the owner of warehouse or a person (who should be permanent employee of the said manufacturer or owner of the warehouse holding reasonably high position) duly authorised by such owner, working partner or the Board of Directors of such company, as the case may be, shall certify on all the copies of the application (A.R.E. 1) that the goods have been sealed in his presence.

The exporter shall distribute the copies of A.R.E. 1 in the following manner:

Original (First copy) and **Duplicate** (Second copy)	Send to the place of export along with the goods
Triplicate (Third copy) and **Quadruplicate** (Fourth copy)	Superintendent or Inspector of Central Excise having jurisdiction over the factory or warehouse within twenty four hours of removal of the goods
Quintuplicate (Fifth copy)	Optional copy - Send to the place of export along with the goods

The said Superintendent and Inspector of Central Excise shall verify the particulars of assessment, the correctness of the amount of duty paid or duty payable, its entry in the Daily Stock Account maintained under Rule 10 of the said Rules (the manufacturer or warehouse owner will be required to present proof in this regard), corresponding invoice issued under Rule 11. If he is satisfied with the particulars, he will endorse the relevant A.R.E. 1 and append their signatures at specified places in token of having done the verification. In case of any discrepancy, he will take up the matter with the assessee for rectification and also inform the jurisdictional Deputy/Assistant Commissioner. Once verification is complete and the A.R.E. 1 is in order, he shall distribute the documents (A.R.E. 1) in the following manner:

Triplicate (Third copy)	Send to the officer with whom rebate claim is to be filed, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in official records
Quadruplicate (Fourth copy)	Send to the officer with whom rebate claim is to be filed, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in official records

7. Examination of goods at the place of export: The place of export may be a port, airport, Inland Container Depot, Customs Freight Station or Land Customs Station.

The exporter shall present together with original, duplicate and quintuplicate (optional) copies of the application (A.R.E. 1) to the Commissioner of Customs or other duly appointed officer – normally goods are presented in the designated export shed.

The goods are examined by the Customs for the purposes of Central Excise to establish the identity and quantity, i.e. the goods brought in the Customs area for export on an A.R.E. 1 are the same which were cleared from the factory. The Customs authorities also examine the goods for Customs purposes such as verifying for certain export incentives such as drawback, DEEC, DEPB or for determining exportability of the goods.

For Central Excise purposes, the Officers of Customs at the place of export shall examine the consignments with the particulars as cited in the application (A.R.E. 1) and if he finds that the same are correct and the goods are exportable in accordance with the laws for the time being in force (for example, they are not prohibited or restricted from being exported), shall allow export thereof. Thereafter, he will certify on the copies of the A.R.E. 1 that the goods have been duly exported citing the shipping bill number and date and other particulars of export.

The officer of customs shall return the original and quintuplicate (optional copy for exporter) copies of application to the exporter and forward the duplicate copy of application either by post or by handing over to the exporter in a tamper proof sealed cover to the officer specified in the application, from whom exporter wants to claim rebate. However, where exporter claims rebate by electronic declaration on Electronic Data Inter-change system of Customs, the duplicate shall be sent to the Excise Rebate Audit Section at the place of export.

The exporter shall use the quintuplicate copy for the purposes of claiming any other export incentive.

The rebate can be claimed on inputs even if final goods are exempt from excise duty. Material shall include raw materials, components, intermediaries, assemblies, parts and packaging material. Rebate is not available on capital goods that are used for manufacturing or processing.

8. Rebate is available on excise duty under Central Excise Act 1944 (including National Calamity Contingent duty and Additional Duty under Section 3 of Customs Tariff Act equal to such duty of excise).

9. Sanction of claim for rebate by Central Excise: The rebate claim can be sanctioned by any of the following officers of Central Excise:-

(i) Deputy/Assistant Commissioner of Central Excise having jurisdiction over the factory of production of export goods or the warehouse; or

(ii) Maritime Commissioner.

It shall be essential for the exporter to indicate on the A.R.E. 1 at the time of removal of export goods the office and its complete address with which they intend to file claim of rebate.

The following documents shall be required for filing claim of rebate:

(i) A request on the letterhead of the exporter containing claim of rebate, A.R.E. 1 numbers and dates , corresponding invoice numbers and dates amount of rebate on each A.R.E. 1 and its calculations,

(ii) original copy of the A.R.E.1,

(iii) invoice issued under rule 11,

(iv) self attested copy of shipping Bill, and

(v) self attested copy of Bill of Lading.

(vi) Disclaimer Certificate (in case where claimant is other than exporter).

After satisfying himself that the goods cleared for export under the relevant A.R.E. 1 applications mentioned in the claim were actually exported, as evident by the original and duplicate copies of A.R.E.1 duly certified by Customs, and that the goods are of 'duty –paid' character as certified on the triplicate copy of A.R.E. 1 received from the jurisdictional Superintendent of Central Excise (Range Office), the rebate sanctioning authority will sanction the rebate, in part or full. In case of any reduction or rejection of the claim, an opportunity shall be provided to the exporter to explain the case and a reasoned order shall be issued.

Where the individual rebate claim exceeds 5 lakh rupees, they shall be pre-audited before these are disbursed.

The procedure for export under rebate claim is as under:

(i) The goods must be removed under cover of invoice.

(ii) ARE1 is the prescribed form which is made in sets of five with different colors.(original-white, duplicate-buff, 3rd –pink, 4th-green, 5th-blue). Color bands can also be used at top or at right hand bottom.

(iii) The examination and sealing of goods can be done at place of dispatch. The examination can be done either by officer or exporter himself can remove goods under self-sealing and self certification method.

(iv) When goods are removed for the purpose of export they shall be assessed to duty as per the provisions of Central Excise Act 1944 and duty payable shall be specified in ARE-1 and in invoice.

(v) The officer shall satisfy himself that declaration is correct and make endorsements.

(vi) Where export is done from factory or warehouse ARE1 is disposed as follows: original, duplicate and fifth copy is given back to exporter after endorsing, third copy is sent to rebate sanctioning officer. The fourth copy is retained by the Superintendent for his records.

(vii) Where the examination is not done by officer exporter himself has to seal goods and certify that goods have been so sealed in presence of managing director, working partner or owner as case maybe. Further the exporter shall send the third copy to the superintendent within 24 hours. The superintendent shall send it to the rebate sanctioning authority.

(viii) The customs officer shall verify goods to see that the identity and quantity is correct and also verify the documents in terms of customs law requirements.

(ix) If everything is in order officer shall allow export and certify in the ARE1 that the goods are exported.

(x) The shipping bill number, date should also be mentioned in ARE1.

(xi) The customs officer shall return original and fifth copy to exporter and forward duplicate to rebate sanctioning authority. The duplicate could also be handed over to the exporter in a sealed cover.

(xii) An application for rebate must be made to rebate sanctioning authority which is Assistant or deputy Commissioner of Central Excise having jurisdiction over the factory or the Maritime Commissioner. The authority shall compare the original filed by the exporter with the duplicate from customs and triplicate from excise. If everything is in order he will sanction the claim of rebate.

(xiii) Rebate could be claimed on inputs that are used in final exported goods. The declaration has to be filed with Assistant Commissioner or Deputy Commissioner specifying finished goods, rate of duty, manufacturing formula, quantity and inputs used. The authorities could verify the authenticity of input-output ratio by calling for the samples of the material that is used. The same could be obtained under cover of invoice from manufacturer. ARE2 is the prescribed form and procedure to get rebate is same as that applicable to rebate on finished goods.

Note:—Where the rebate is claimed by EDI system, the duplicate copy of ARE 1 is sent to the Excise Rebate Audit Section at the place of export. The officer for rebate claim could ACCE/DCCE or Maritime Commissioner. The exporter can even opt for sealing by the excise authorities and in such a case the SCE shall do the examination of goods and sealing.

10. Export by parcel post: In case of export by parcel post, after the goods intended for export have been sealed, the exporter shall affix to the duplicate application sufficient postage stamps to cover postal charges and shall present the documents, together with the package or packages to which it refers, to the postmaster at the office of booking.

11. Filing of rebate claims by electronic declaration and sanction thereof through Electronic Data Inter-change (EDI): The new concept of filing of rebate claim and its sanction through EDI established by the Customs formations at different ports/airports/ICDs/CFSs has been incorporated in the new procedure. However, its implementation is dependent upon development of software and formats of electronic forms, administrative set-up at the places of exports for auditing such claims and putting in place the necessary hardware. The new process will also require to be tested. This may take some time. Accordingly, the provision has been made that this facility will be available at such places and from such time as may be specified by the Board. The exporter may enter the required information in shipping bill filed at such place of export as specified by the Board for claiming rebate by electronic declaration on electronic data interchange system of customs. The details would be entered in the electronic data interchange and rebate sanctioned or disbursed by the Assistant Commissioner or Deputy Commissioner of Customs.

For this purpose, the expression 'electronic declaration" has been defined as the declaration of the particulars relating to the export goods, lodged in the Customs Computer System, through the data-entry facility provided at the Service Centre or the date communication networking facility provided by the Indian Customs and Central Excise Gateway (called ICEGATE), from the authorised person's computer.

It is important to note that rebate is available on all exports except exports to Bhutan.

6.12 Miscellaneous matters

6.12.1 Time limit for disposal: The rebate sanctioning authority should point out deficiency, if any, in the claim within 15 days of lodging the same and ask the exporter to rectify the same within 15 days. Queries/ deficiencies shall be pointed out at one of and piecemeal queries should be avoided. The claim of rebate of duty on export of goods should be disposed of within a period of two months.

6.12.2 Supplementary Rebate Claim: The Supplementary Rebate Claim, if any, should be filed within the stipulated time provided under section 11B of the Central Excises Act, 1944.

6.12.3 Entry of goods in another factory of the same manufacturer for consolidation and loading of consignment for export: Goods removed on A.R.E.1 from one factory of a manufacturer may be allowed to enter in another factory of the said manufacturer ONLY for the purpose of consolidation and loading of goods in second or subsequent factory(ies) and export therefrom. For this facility the exporter shall be required to get his goods examined and sealed at each factory (the places of despatch) by a Central Excise Officer. The packages loaded in the vehicle shall be in sealed condition in their original packing. Where goods are stuffed in a container, the container shall be sealed. The Central Excise Officer having jurisdiction over the second or subsequent factory(ies) shall supervise the opening of the seal of container, loading of goods (duly sealed if these goods are to be loaded in open truck/vehicle) belonging to the subsequent factory in vehicle or container and sealing of the container.

6.12.4 Cancellation of documents: After the goods are cleared for export on payment of appropriate duties of excise under claim of rebate but are not exported for any reason, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory or the warehouse, shall, on being requested by the exporter in writing, cancel the export documents and make necessary endorsements. Thereafter, the goods shall be treated as if these were cleared for home consumption. The goods need not be brought back to the factory or warehouse.

7

Bonds

7.1 Bond

Bond is an instrument by which the obligation to pay money is created expressly. It is also a legal agreement whereby a person undertakes to do or not to do anything subject to conditions stipulated in the agreement. The primary purpose of the bond is to secure due compliance with the rules and procedures laid down under the Excise law. A bond is a collateral security, which is secured by the department to ensure payment of appropriate duty in addition to the available statutory provisions.

7.2 Types of bonds

Bonds are basically two types, i.e. surety and security. Under a surety bond another person stands as surety to guarantee the performance on the part of obligor. The surety should be for the full value of the bond and the person standing as surety should be solvent to the extent of the bond amount. Under the Contract Act the liability of the surety is co-extensive with that of the principal debtor and hence the department is at liberty to enforce the recovery of the dues either from the obligor or from the surety.

The following are the types of bonds, which are presently in vogue:

(a) B-1 Surety / Security (General Bond) - for export of goods without payment of duty under Rule 19;

(b) B-2 Bond Surety / Security (General Bond) - for provisional assessment;

(c) B-3 Bond (General Bond) – for due dispatch of excisable goods removed for re-warehousing and export there from without payment of duty.

(d) B-11 Bond - for provisional release of seized goods, and

(e) B-17 Bond (General) Surety / Security -composite bond of EPZ/ 100% EOUs for assessment, export, accounting and disposal of excisable goods obtained free of duty.

(f) In terms of Rule 3(3) and 3(4) of the Central Excise (Removal of goods at concessional rate of duty for manufacture of excisable goods) Rules, 2001, the receiver of the goods is also required to execute a General Bond with the jurisdictional A.C./D.C.

Also, a surety for a bond is to be for the full amount of the bond, and it should be ensured that surety is financially sound.

Further, undertaking owned and managed directly through any Ministry, Directorate/ Directorates by the Central Government or State Government is exempt from furnishing any security or surety or a bond.

7.3 Guidelines for executing bonds

The bond should be executed on the non-judicial stamp paper of appropriate value. The bond amount should be sufficient to cover the duty liability. The bond should be signed by the obligor or by the authorised agent. The surety should be for the full amount and the person standing as surety should be solvent to extent of the amount covered. The security should normally be limited to the 25% of the bond amount.

In case of exporters, certain specific categories i.e. Super Star Trading House, Star Trading House, Exporters registered with Export Promotion Council & Registered Exporters need not furnish any bank guarantee/cash security while executing export bonds. They may furnish sureties only. This is a modification over the previous instruction contained in *Board's Circular No.284/118/96-Cx dated 31.12.96*.

In the case of 100% E.O.Us obtaining indigenous goods without payment of duty under a notification issued under section 5A of the Central Excise Act, 1944, acceptance of surety bond instead of bank guarantee is permissible. In respect of 100% EOUs & EPZ s units may continue to execute bond in the Format given in Form B-17 under the erstwhile Central Excise Rules, 1944. While executing combined B17 Bond security to the extent of 5% of the value of the bond in the form bank guarantee or cash deposit or any other mode of security may be accepted in lieu of surety (Board's letter F.No.305/86/98-FTT dated 19./6/98). Fresh bond may not be taken, where the existing units have already furnished bond in B-17 Form prior to 1.7.2001. The existing bond may be simply re-validated under the new rules.

The export bonds executed under rule 19 of the said Rules should be accepted within 24 Hours or the next working day and communicated to the exporter by the Deputy/Assistant Commissioner of Central Excise or Maritime Commissioner or any other officer authorised by the Board in this behalf.

Bonds should be executed in favour of and in the name of the President of India. They should be properly stamped. The prescribed wordings of the bond form must be copied out on a non judicial stamp paper of the appropriate amount (to be locally ascertained), except where arrangement can be made for embossing printed forms or where the State Government rules require otherwise. The bonds must be executed on stamp paper of the respective State Government in which the registered persons business is situated.

7.4 Bonds for provisional assessment

The amount of the bond in Form B-2 should be fixed on the following basis: -

(i) The amount of the specific bond in Form B-2 should be sufficient to cover the difference between the duty payable on provisional assessment and the probable duty payable if the highest rate / value applicable such goods has to be applied.

(ii) The amount of the general bond in Form B-2(Surety)/(Security) should be equal to the difference between the duty payable on provisional assessment and the probable duty payable applying the highest rate / value applicable to such goods for a period of 3 months. If the provisional assessment cannot be completed within the 3 months and

longer time is required, say a period of one year, in appropriate cases, differential duty likely to arise during such period shall be the basis/ determination of the bond amount. When the security bond is executed, the amount of security will be generally fixed at 25% of the bond amount. However, in appropriate cases, for special reasons to be recorded, the proper officer under Rule 7 of the said Rules may order for a higher security amount. In the event of death or insolvency or insufficiency of the surety / security, the proper officer may demand fresh bond. If the security furnished is found to be inadequate, he may demand additional security also. In the case of provisional assessment, if the assessee fails to make the due adjustment within the period of 15 days after the final assessment is made, the proper officer may proceed to enforce the bond or encash the bank guarantee after due notice to the assessee.

7.5 Stamps on bond

All bonds must bear stamps on the scale prescribed by article 57 of the Schedule I to the Indian Stamp Act 1899, modified as may be, by State Legislation. Commissionerate should circulate to their staff the rate of stamp duty required in each State within Commissionerate for each type of bond.

Whoever affixes an adhesive stamp to any instrument chargeable with duty which has been executed by any person shall when affixing such stamp cancel the same so that it cannot be used again and who so ever has executed any instrument on any paper bearing an adhesive stamp shall at the time of execution unless such stamp has been already been cancelled in the manner aforesaid, cancel the same so that it cannot be used again. Any instrument bearing an adhesive stamp, which has not been cancelled so that it cannot be used again, shall so far as such stamp is concerned be deemed to be un-stamped. The person required to cancel an adhesive stamp may cancel it by writing on or cross the stamp with his name or initials or the name or initial of his firm with the true date of his so writing, or in any other effectual manner.

7.6 Execution of bond by Government Undertakings or Autonomous Corporations

The Board has decided that every undertaking owned and managed directly through any Ministry, Directorate or Directorates by the Central Government is exempt from the execution of any bond; or a State Government is hereby exempt from furnishing any security or surety for bond, where the execution of such bond, or, as the case may be furnishing of security or surety is required by or under any other provision of the rules made under Central Excise Act, 1944.

An undertaking owned or controlled by the Central Government or State Government does not include any undertaking belonging to corporation owned or controlled by the Central Government or State Government and established by or under a Central Provisional or State Act; or any undertaking belonging to Government Company within the meaning of section 617 of the Companies Act, 1956[1].

[1] Companies Act, 2013

7.7 Security

The security to be furnished in respect of the bonds will be as follows:

(i) The security furnished should either be cash, Government promissory notes, post office savings, bank deposits, national savings Certificates, National Defence Bonds, National Defence Gold Bonds, 1980 or similar realisable Government papers. Promissory Notes and stock Certificates of the Central Government or a State Government shall be accepted subject to the conditions laid down in clause (ii) of Rule 274 of GFR.

(ii) Deposit receipt of bank can also be pledged as securities for Central Excise Bonds subject to certain specific conditions under Rule 274 (vi) of G.F.R. The conditions *inter alia* are:

   (a) The deposit receipt shall be made out in the name of the pledgee or if it is made out in the name of the pledger, the bank shall certify on it that the deposit can be withdrawn only on demand or with the sanction of the pledgee.

   (b) The depositors shall agree in writing to undertake any risk involved in the investment and make good the depreciation, if any.

   (c) The depositors shall receive the interest when due, direct from the bank on a letter from the pledgee authorising the bank to pay it to him.

   (d) The responsibility of the pledgee in connection with the deposit and the interest on it will cease when he issues a final withdrawal order to the depositor and sends an intimation to the Bank that he has done so.

   (e) Only the larger scheduled banks are to be considered as recognized banks approved by Government for the purpose of item of Rule 274 of G.F.R.

   (f) Interest on the securities will, however, continue to accrue and will be realised by the holders on discharge of the bond and return of the securities.

   (g) Where the same bond and security continue for over one year, arrangements must be made for credit or payment of the interest on such securities to the bonders.

   (h) On cash securities no interest is payable. In the case of Savings Bank Account, the interest may be paid to the parties on claim preferred by them periodically or can be collected after the amount is returned to them. In respect of other securities, arrangements are to be made for the payment of interest at regular intervals of 6 months.

7.8 Surety

Whenever surety bond is executed it is to be ensured that both the obligor and surety sign the bond. Field officers will ensure that surety is financially sound and have been verified from time to time. Whenever bank guarantee is accepted for security, care should be taken to get the guarantee renewed before expiry from time to time, so as to enable the enforcement of liability as and when such need arises. Execution of B17 Bonds is optional and if the assessee does not wish to avail of this facility, he may execute individual bonds prescribed for different purposes.

A partner or a director of a limited company can also stand as surety in his individual capacity to guarantee the performances of the firm or a company as the case may be. Since, in law, a limited company is a distinct legal entity and the member of the company including directors are distinct from the company, there should be no objection to allow the directors of the limited company to stand as surety for the companies provided they fulfill all the other conditions applicable to sureties. (F. No. 8/10/16/CX II dt 5/8/1960)

7.9 Guarantee bond executed by bank

The provisions governing the execution of bonds by banks are as follows:

(i) When the State Bank of India or a scheduled bank gives a guarantee for a registered person with or without deposit of security, the guarantee bond should provide a period of validity and an extra period during which obligations arising during the period of validity to be enforced. The time limit for enforcement of obligation should be at least two years.

(ii) Where there is a need for extension of the period of validity of bank guarantee furnished by the bank on behalf of a party in pursuant to an order of an original or appellate authority or any other reasons, it should be done by means of supplementary deed of bank guarantee on a stamp paper.

7.10 Preservation of bond and retention of securities

Proper preservation of bonds is to be ensured in the interest of the revenue.

Bonds must be preserved as long as they are valid and should be returned only after all the obligations under the bond had been discharged.

All officers who filled Central Excise bonds must be careful not to enforce the words "cancelled" on the bonds even after the apparent fulfillment of obligation; otherwise it is likely to be argued that persons liable under the bond have been thereby discharged from the liabilities imposed by the bond. The obligations under the bond are not legally extinguished so long as the bond is not returned to the obligor or is not cancelled on execution of a deed of cancellation.

7.11 Verification of sureties

In respect of surety bonds, periodical verification, preferably on an annual basis will be made by the jurisdictional Central Excise Officers so as to ensure the sureties are financially sound, solvent and alive. The enquiry to verify the financial stability of the sureties will be made by any of the following methods:

(i) By reference to the surety's bankers.

(ii) By making personal enquiries and ascertaining whether the surety possesses a house or other immovable property, industrial equipment, shop etc. which would cover the bond amount. Alternatively, the sureties may themselves be asked to furnish a list of their property, which may be verified by the Officer.

(iii) By reference to Revenue Officer not below the rank of Tahsildar or a Mamalakdar.

(iv) The result of enquiry as well as the solvency of the surety should be incorporated in the records of the Department.

7.12 Bond Accepting Authority

Bond may be accepted by any of the following officers: -

The Deputy/Assistant Commissioner of Central Excise having jurisdiction over the factory or warehouse or any other premises approved by the Commissioner for storing non-duty paid goods;

Maritime Commissioners under whose jurisdiction one or more of the port, airport, land customs station or post office of exportation is located.

The Deputy/Assistant Commissioner of Central Excise (Export) as officers authorised by the Board for this purpose.

Exporters are required to clearly indicate on the ARE.1 the complete postal address of the authority before whom the bond is executed and to whom the documents are to be submitted/ transmitted for admission of proof of export.

8

Demand, Adjudication and Offences

8.1 Demand

The word "demand" as per Black's Law Dictionary means assertion of a legal right; an imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act. Demand under any taxation laws arises as tax payer understands/ interprets the provision to his benefit and on the other hand revenue interprets the law to its benefit. It could happen when the assessee short pays the duty or doesn't pay the duty or avails the benefit of notification without satisfying the conditions, avails credit irregularly, misclassifies the products, or undervalues the goods. However, when the valid demands are made due to non payment or short payment, the effect of the same can be quite serious especially as the same is not normally recoverable from the customer. The cost of interest, penalty and legal expenses can also be substantial.

8.1.1 Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded [Section 11A]: In accordance with the principles of natural justice the central excise law rightly provides that before any action is taken against an assessee he must be given reasonable opportunity of presenting his case. One such situation would be that relating to the demand of duty not paid, short paid or erroneously refunded.

The show cause notice is invariably issued if the department contemplates any action prejudicial to the assessee. Thus, if on account of an infraction of the provisions of the central excise law it is considered appropriate to penalise the defaulter, it is necessary to first issue a show cause notice. The show cause notice would detail the provisions of law allegedly violated and ask the noticee to show cause why action should not be initiated against him. Thus, a show cause notice gives the noticee the opportunity to present his case.

The provisions of section 11A are discussed below:

(1) Cases other than fraud, collusion etc.

Where any excise duty:-

(a) has not been levied

(b) has not been paid

(c) has been short-levied

(d) has been short-paid

(e) has been erroneously refunded

for any reason, **other than the reason of**:-

- fraud
- collusion
- any wilful mis-statement
- suppression of facts
- contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

the following provisions become applicable:-

(a) Issuance of SCN within ONE year: Central Excise Officer shall, within **one year from the relevant date**, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice [Clause (a) of sub-section (1)].

Period of stay to be excluded: For this purpose, where the service of the notice is stayed by an order of a court or tribunal, the period of such stay shall be excluded in computing the aforesaid period of one year [Sub-section (8)].

(b) Voluntary payment of excise duty and interest before issue of show cause notice (SCN): The person chargeable with duty may, before service of the show cause notice, pay on the basis of—

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the Central Excise Officer,

the amount of **duty along with interest payable** thereon under section 11AA [Clause (b) of sub-section (1)].

(c) Written intimation to the Central Excise Officer of such voluntary payment: The person, who has so paid the duty voluntarily, shall inform the Central Excise Officer of such payment in writing.

(d) No SCN would be issued if amount paid in full: Central Excise Officer, on receipt of such information, shall not serve any show cause notice in respect of the duty so paid/any penalty leviable under the provisions of this Act or the rules made thereunder [Sub-section (2)].

(e) SCN may be issued for recovery if amount is short paid: Where the Central Excise Officer is of the opinion that the amount so paid falls short of the amount actually payable, then, he shall proceed to issue the show cause notice in respect of such amount which falls short of the amount actually payable in the manner specified under sub-section (1) and the period of one year shall be computed from the date of receipt of information of payment (i.e. written intimation sent by the person making voluntary payment) [Sub-section (3)].

(2) CASES OF FRAUD, COLLUSION ETC.

Where any excise duty:-

(a) has not been levied

(b) has not been paid

(c) has been short-levied

(d) has been short-paid

(e) has been erroneously refunded

by the reason of:-

- fraud
- collusion
- any wilful mis-statement
- suppression of facts
- contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the following provisions become applicable:-

Issuance of show cause notice within FIVE years: Central Excise Officer shall, within **five years** from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and **a penalty equivalent to the duty** specified in the notice [Sub-section (4)].

Period of stay to be excluded: For this purpose, where the service of the notice is stayed by an order of a court or tribunal, the period of such stay shall be excluded in computing the aforesaid period of five years [Sub-section (8)].

(3) Service of a statement containing details of duty not levied/paid, short levied/paid or erroneously refunded to be deemed to be service of show cause notice: Where one show cause notice has been issued, then service of a statement containing details of non/short payment, short/non levy or erroneous refund of duty etc. would be deemed to be a service of show cause notice provided the grounds relied upon for the subsequent period are the same as are mentioned in the earlier notice(s). Therefore, the limitation period of one year or five years, as the case may be, would be computed from the date of service of such statement [Sub-section (7A)].

(4) In case the charges of fraud, collusion etc. are not established against the person to whom the notice was issued, duty to be determined for one year : Where any appellate authority or tribunal or court concludes that the notice issued under sub-section (4) is not sustainable for the reason that the charges of fraud, collusion, any wilful mis-statement, suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty has not been established against the person to whom the notice was issued, the Central Excise Officer shall determine the duty of excise

payable by such person for the period of one year, deeming as if the notice were issued under clause (a) of sub-section (1) [Sub-section (9)].

(5) Determination of amount of excise duty after giving an opportunity of being heard to the concerned person: The Central Excise Officer (CEO) shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice [Sub-section (10)].

(6) Time-limit for determination of amount of excise duty: The Central Excise Officer, where it is possible to do so, determine the amount of duty under sub-section (10) as per the time schedule given below [Sub-section (11)]:

Particulars	Time Limit (from the date of notice)
Cases involving willful suppression etc. [Sub-section (4)]	One year
Cases other than the above [Sub-section (1)]	Six months

(7) In case of modification of duty (determined by CEO) by the appellate authority/tribunal/court, penalties and interest to be modified accordingly: Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10), then the amount of penalties and interest under this section shall stand modified accordingly, taking into account the amount of duty of excise so modified [Sub-section (12)].

In case the modified amount is more than the duty determined by the CEO: Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined under sub-section (10) by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount [Sub-section (13)].

(8) Payment of interest mandatory even if not specified in the order determining duty (passed under this section): Where an order determining the duty of excise is passed by the Central Excise Officer under this section, the person liable to pay the said duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately [Sub-section (14)].

(9) Aforesaid provisions applicable to the recovery of interest also : The provisions of sub-sections (1) to (14) shall apply, mutatis mutandis, to the recovery of interest where interest payable has not been paid or part paid or erroneously refunded [Sub-section (15)].

(10) Provisions of section 11A not applicable for recovery of non/ short-payment of duty declared in the periodic returns: Provisions of section 11A will not apply to cases where the liability of duty not paid or short-paid is self-assessed and declared as duty payable by the assessee in the periodic returns filed by him. In such cases, recovery of non-payment or short-payment of duty shall be made in such manner as may be prescribed [Sub-section (16)].

Rule 8(4) of Central Excise Rules, 2002 provides that provisions of section 11 will be applicable for recovery of non/ short-payment of duty declared in the periodic returns. Section 11 provides for recovery of amount due from assessee by attachment and sale of excisable goods or certification proceedings.

IMPORTANT DEFINITIONS

For the purposes of this section and section 11AC,—

(a) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India.

(b) Meaning of relevant date

Event	Relevant date
(i) Non-levy/non-payment or short levy/short payment of excise duty	
(a) Where prescribed return has not been filed	Last date on which such return is required to be filed
(b) Where return has been filed	Date on which such return has been filed.
(ii) Provisional assessment of excise duty	Date of adjustment of the excise duty after the final assessment thereof
(iii) Erroneous refund of excise duty	Date of such refund
(iv) Interest to be recovered	***Date of payment of duty to which such interest relates***
(v) Any other case	Date on which excise duty is required to be paid

Fraud may be defined as "deceit, imposture, criminal deception done with the intention of gaining an advantage".

Collusion may be defined as "to act in concert especially in fraud; a secret agreement to deceive".

Willful mis-statement may be explained as "stating wrongly or falsely deliberately".

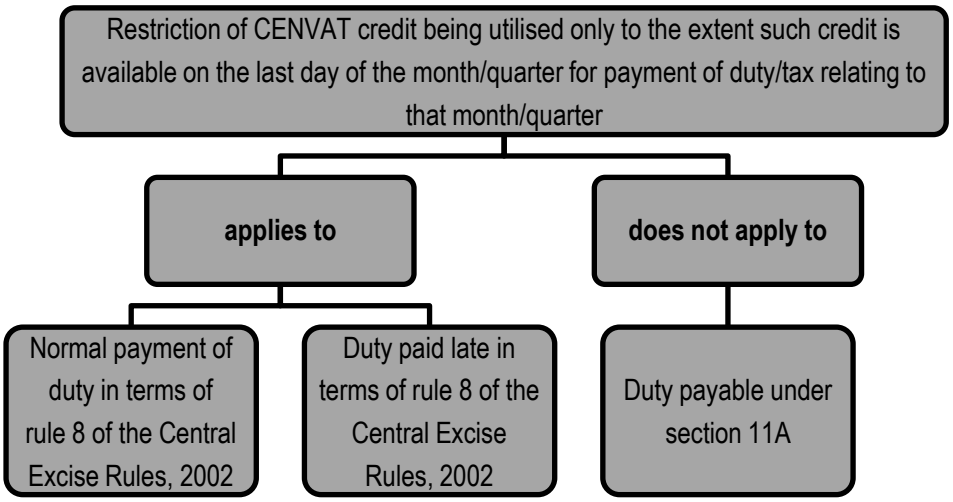
Suppression of facts may also be explained as "to hold back the facts".

Intent of evading the payment of duty may be analysed as the person acting upon to avoid the payment of duty which he was entitled to pay. Intent shows that mens-rea (knowledge) should be present.

Arrears of duty under section 11A can be paid by utilizing the CENVAT credit accrued subsequent to the period to which the arrears pertained: As per rule 3(4) of the CENVAT Credit Rules, 2004, CENVAT credit to the extent available on the last day of the month/quarter

can only be utilized for payment of duty or tax relating to that month or the quarter. This restriction applies only for normal payment of duty in terms of rule 8 of the Central Excise Rules, 2002, where duty for a particular month or quarter is to be discharged by the 5th of the next month or duty paid late in terms of rule 8.

However, the restriction does not apply to the demands confirmed under section 11A of the Central Excise Act, 1944 because unlike rule 8 where the duty is paid after self-determination, under section 11A, duty is determined by the Central Excise Officer and the payment is mandated after such determination. Further, there is no time limit prescribed under section 11A i.e., monthly or quarterly unlike the date prescribed under rule 8. Therefore, the restriction on the utilisation of the CENVAT credit accuring subsequent to the last date of the month/quarter in which the arrears arise, is not applicable to the demands confirmed under section 11A of the Central Excise Act, 1944 *[Circular No. 962/05/2012-CX dated 28.03.2012].*



8.1.2 Interest on delayed payment of duty [Section 11AA]: Interest of duty not paid on time is provided for in the Central Excise statute. It is expected that the interest provision would normally not have to be invoked as the assessee would make the duty payment on time.

Section 11AA contains the provisions in this regard. It provides as follows:-

(a) Interest payable on delayed payment of duty: Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the specified rate, whether such payment is made voluntarily or after determination of the amount of duty under section 11A [Sub-section (1)].

(b) Rate and time period for computation of interest [Sub-section (2)]**:** Interest is payable in terms of section 11A after the due date, by the person liable to pay duty.

Rate of interest: Central Government may, by notification in the Official Gazette, fix the interest ranging between 10% and 36% per annum. With effect from 01.04.2011, the interest at the rate 18% per annum has been notified.

Time period: Interest shall be calculated from the date on which such duty becomes due up to the date of actual payment of the amount due.

(c) Exemption from payment of interest: No interest shall be payable subject to the following conditions:-

(a) the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B.

(b) Full amount of duty is paid voluntarily within 45 days from the date of issue of such order, instruction or direction; and

(c) No right to appeal against such payment at any subsequent stage is reserved.

8.1.3 Obligations of persons who have collected excise duty from buyers [Section 11D]

1. Section 11D(1) makes it obligatory on every person who is liable to pay duty and has collected any amount from the buyer of any goods in any manner as representing duty of excise to pay the amount so collected to the credit of the Central Government. Sec.11D gets attracted only when goods are sold and not otherwise *(Eternit Everest Ltd vs UOI 1996 (89) ELT 28 (Mad)*.

2. Every person, who

   - has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or
   - has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty;

   from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government [Sub-section 1A].

3. Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1A) and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government [Sub-section (2)].

4. The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amounts so determined [Sub-section (3)].

5. The amount paid to the credit of the Central Government under sub-section (1) or sub-section (1A)] or sub-section (3) shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the

duty of excise relating to the excisable goods referred to in sub-section (1) or sub-section (1A) [Sub-section 4].

6. Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount [Sub-section 5].

Note: *Section 11D will operate only if any amount has been collected from the buyer as representing duty of excise. If the duty collected is not deposited it becomes an offence.*

Section 11D does not apply to amount paid under rule 6 of the CENVAT Credit Rules, 2004: Provisions of section 11D do not apply to 'amount' paid under rule 6 of the CENVAT Credit Rules, 2004 even if the amount is recovered from the buyers. This is because section 11D applies to excise duty and what is paid under rule 6 of CCR is not the duty but an 'amount'. For the same reason, the CENVAT credit of the said amount cannot be taken by the buyer. Therefore, the said amount should be shown in the invoice as "amount paid under rule 6 of the CENVAT Credit Rules, 2004" *[Circular No. 870/08/2008-CX dated 16.05.2008].*

8.1.4 Interest on the amounts collected in excess of the duty [Section 11DD]: In the following circumstances, interest shall be payable on the amount determined under sub-section (3) of section 11D:

(a) where the amount of duty collected from the buyer exceeds the amount of duty assessed or determined under this Act or

(b) where the amount of duty collected from any person exceeds the amount of duty assessed or determined under this Act or

(c) where a person has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty

Such interest shall be payable by the person who is liable to pay the amount determined under sub-section (3) of section 11D in addition to the said amount.

Rate and time period for computation of interest: The rate of interest shall be notified by the Central Government which would be in the range of 10% to 36% per annum. The interest shall be payable from the **first day of the month succeeding the month in which the amount ought to have been paid till the date of payment of such amount** [Sub-section (1)]. Currently the rate is **15% p.a.** as notified vide *Notification no. 68/2003 C.E. dated 12.09.2003.*

Exemption from payment of interest: However, in cases where the amount becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within 45 days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole amount, including the amount already paid.

Where the amount determined under section 11D(3) is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, the interest payable thereon shall be on such reduced or increased amount respectively.

8.2 Adjudication

Central Excise law is a self-contained provision. Besides containing the provisions for levy of duty, the law also provides for the adjudication of matters relating to the legal provisions. The central excise officers are required to adjudicate matters in respect of demand of duty short paid/not paid and imposition of penalty and confiscation of goods. Demand of duty can be raised by any central excise officer under section 11A subject to certain restrictions *(Refer point 8.2.1).* Matters relating to penalty and confiscation of goods are adjudicated under section 33 *(Refer point 8.4.6).*

8.2.1 Adjudication and determination of duty: Central Excise Officers have the power to determine duty short paid or not paid, but erroneously refunded under section 11A of the said Act. For this purpose, the Board has decided that the powers of adjudication and determination of duty shall be exercised, based on monetary limit (duty involved in a case) as follows: -

(a) All cases involving fraud, collusion, any willful mis-statement, suppression of facts, or contravention of Central Excise Act/ Rules made thereunder with intent to evade payment of duty and / or where extended period has been invoked in show-cause-notices, (including CENVAT cases), will be adjudicated as follows:-

Central Excise Officers	Powers of Adjudication (Amount of duty involved)
(i) Commissioners (including Principal Commissioners)	Without limit
(ii) Additional Commissioners	Above ₹ 5 lakhs to ₹ 50 lakhs
(iii) Joint Commissioners	
(iv) Deputy/Assistant Commissioners	Upto ₹ 5 lakhs (except the cases where Superintendents are empowered to adjudicate)
(v) Superintendents*	Upto ₹ 1 Lakh (excluding cases involving determination of rate of duty or valuation and cases involving extended period of limitation)

*With regard to the power of adjudication of cases given to Superintendents, the following aspects have been clarified:

1. They would be eligible to decide cases involving duty and/or CENVAT credit upto ₹ 1 Lakh in individual Show Cause Notices (SCNs).
2. They would not be eligible to decide cases which involve excisability of a product, classification, eligibility of exemption, valuation and cases involving suppression of

facts, fraud etc.

3. They would be eligible to decide cases involving wrong availment of CENVAT credit upto a monetary limit of upto ₹ 1 Lakh.

(b) Cases which do not fall under the category (a) above, including all cases relating to determination of classification and valuation of excisable goods and CENVAT credit will be adjudicated as follows:

Central Excise Officers	Powers of Adjudication (Amount of duty involved)
(i) Commissioners (including Principal Commissioners)	Without limit
(ii) Additional Commissioner	Above ₹ 5 lakhs to ₹ 50 lakhs
(iii) Joint Commissioners	
(iv) Deputy/Assistant Commissioners	Upto ₹ 5 lakhs.

(c) Cases related to issues mentioned under first proviso to section 35B(1) where the cases do not go to Tribunal and have to be referred for the revision petition to Central Government under Section 35EE of Central Excise Act, 1944 would be adjudicated by the Additional Commissioners/ Joint Commissioners without any monetary limit.

8.3 Provisional attachment of property pending adjudication [Section 11DDA]

(1) Provisional attachment of property can be resorted to by the Central Excise Officer during the pendency of the following proceedings:

(i) Under section 11A in respect of cases not involving wilfull suppression, collusion etc. as well as in cases involving wilfull suppression, collusion etc.

(ii) Under section 11D in relation to amounts collected from buyers as excise duty but not deposited with the Central Government.

(2) Such an attachment shall be done only when the Central Excise Officer is of the opinion that the attachment is necessary for the purpose of protecting the interests of revenue. However, a previous approval of the Principal Commissioner/ Commissioner of Central Excise, by order in writing, is a prerequisite for such provisional attachment.

(3) Such an attachment can be done for a period of 6 months. This period will commence from the date of the order of the Principal Commissioner/ Commissioner of Central Excise permitting such provisional attachment.

(4) However, this period may be extended by the Principal Chief Commissioner/ Chief Commissioner of Central Excise by such further period or periods as he thinks fit. The reasons for such an extension shall be recorded in writing. It is to be noted that the total period of extension in any case shall not exceed 2 years.

(5) If an application for settlement of a case under section 32E is made to the Settlement Commission, the period commencing from the date on which such an application is made

and ending with the date on which an order under section 32F(1) is made shall be excluded from the extended period mentioned in point (4).

8.3.1 Guidelines for provisional attachment of property: *Circular No. 874/12/2008-CX dated 30.06.2008* has provided the following guidelines to implement section 11DDA of the Act:-

(a) The types of offences which may be considered for provisional attachment of property (resorted only when the duty or CENVAT credit alleged is more than ₹ 25 lakhs) are as follows:

1. When the goods are removed without the cover of an invoice and without payment of duty, or without declaring the correct value.
2. CENVAT credit has been taken without receipt of goods or on the basis of Excise duty invoices or other documents which a person has a reason to believe as not genuine.
3. Excise duty invoice is issued without delivery of goods.
4. Refund or rebate is claimed in a fraudulent manner.

(b) The property which is attached is immovable property/ properties which is/ are used for commercial purpose. If immovable property is not sufficient to protect the interest of revenue then movable property can be attached

(c) The property provisionally attached shall be of value as nearly as may be equivalent to that of the amount demanded in the proceedings under section 11A or section 11D of the Act.

(d) Provisional attachment of the property shall be made only between sunrise and sunset.

(e) After attachment, the proper officer shall prepare an inventory and specify in it the place where it is lodged or kept and shall hand over a copy of the same to the defaulter or the person from whose charge the property is destrained.

(f) All such property as is by the Code of Civil Procedure, 1908 exempted from attachment and sale for execution of a Decree of a Civil Court shall be exempt from provisional attachment. The decision of the Commissioner of Central Excise (including Principal Commissioner) in this regard shall be final.

8.4 Penalty and Confiscation

Penalty and confiscation of offending goods i.e. which have violated the provision of the Central Excise law are an outcome of the adjudication proceedings. These are deterrents aimed at cautioning the dishonest taxpayer.

8.4.1 Penalty: Penalty is imposed under any of the following provisions of the Central Excise Act, 1944 or the rules made thereunder: -

(***i***) ***Mandatory penalty for short/non levy, short/non payment and erroneous refund of excise duty by reason of fraud etc. [Section 11AC]: With effect from 14.05.2015, penalty provisions under section 11AC have been substituted. The penalty provisions under new section 11AC can be broadly classified under two categories:***

(A) penalty provisions where duty has been short/non levied or short/non paid or erroneously refunded for reasons other than fraud etc.

(B) penalty provisions where duty has been short/non levied or short/non paid or erroneously refunded by reason of fraud, collusion etc.

The provisions of section 11AC are explained hereunder:

(A) Duty has been short/non levied or short/non paid or erroneously refunded for reasons other than fraud etc.

(i) Where any excise duty has been short/non levied or short/non paid or erroneously refunded, for any reason other than the reason of fraud/collusion/wilful mis-statement/ suppression of facts/contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under section 11A(10) will also be liable to pay a penalty not exceeding 10% of the duty so determined or ₹ 5,000, whichever is higher [Sub-section 1(a)].

(ii) Nil penalty: If such duty along with interest payable under section 11AA is paid either before the issue of show cause notice or within 30 days of issue of show cause notice (but before adjudication order), no penalty shall be payable by the person liable to pay duty or the person who has paid the duty and all proceedings in respect of said duty and interest will be deemed to be concluded [Proviso to sub-section (1)(a)].

(iii) 25% penalty: However, if the duty and interest is not so paid and the matter is adjudicated and a order determining duty is passed under section 11A(10), the penalty would be reduced to 25% of the penalty imposed if the following amounts are paid within 30 days of the date of communication of the order of the Central Excise Officer who has determined such duty:

- *Duty as determined under sub-section 11A(10);*
- *Interest payable thereon under section 11AA; and*
- *Reduced penalty (25% of the penalty imposed) [Sub-section (1)(b)].*

(B) Duty has been short/non levied or short/non paid or erroneously refunded by reason of fraud, collusion etc.

(i) Where any excise duty has been short/non levied or short/non paid or erroneously refunded, by reason of fraud/collusion/wilful mis-statement/ suppression of facts/contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under section 11A(10) will also be liable to pay a penalty equal to the duty so determined [Sub-section (1)(c)].

(ii) In respect of cases where the details relating to such transactions are recorded in the specified records for the period between 08.04.2011 and 14.05.2015 (date on which the Finance Bill, 2015 received the assent of the President [both days inclusive]), the penalty will be 50% of the duty so determined [Proviso to sub-section (1)(c)]. As per Explanation 2, 'specified records' means records maintained by the person chargeable with the duty in accordance with any law for the time being in force and includes computerized records.

(iii) 15% penalty: However, if the duty in points [B(i) and B(ii)] and the applicable interest is paid within 30 days of the communication of show cause notice, the amount of penalty liable to be paid by such person will be reduced to 15% of the duty demanded, subject to the condition that such reduced penalty is also paid within the period so specified. Further, all proceedings in respect of the said duty, interest and penalty will be deemed to be concluded [Sub-section (1)(d)].

(iv) 25% penalty: If the duty in points [B(i) and B(ii)] and the applicable interest is not so paid and the matter is adjudicated and a order determining duty is passed under section 11A(10), the penalty would be reduced to 25% of the duty so determined if the following amounts are paid within 30 days of the date of communication of the order of the Central Excise Officer who has determined such duty:

- *Duty as determined under sub-section 11A(10);*
- *Interest payable thereon under section 11AA; and*
- *Reduced penalty [25% of the duty determined under section 11A(10)] [Sub-section (1)(e)].*

(C) If the duty amount gets modified in any appellate proceeding, then the penalty amount mentioned in [B)(i)] and [B(ii)] above and interest shall also stand modified accordingly. Where the duty amount or penalty is increased in the appellate proceedings, the benefit of reduced penalty as specified in [A(iii)] and [B(iv)] above will be admissible if duty, interest and reduced penalty in relation to such increased amount of duty is paid within 30 days of the date of such appellate order [Sub-sections (2) and (3)].

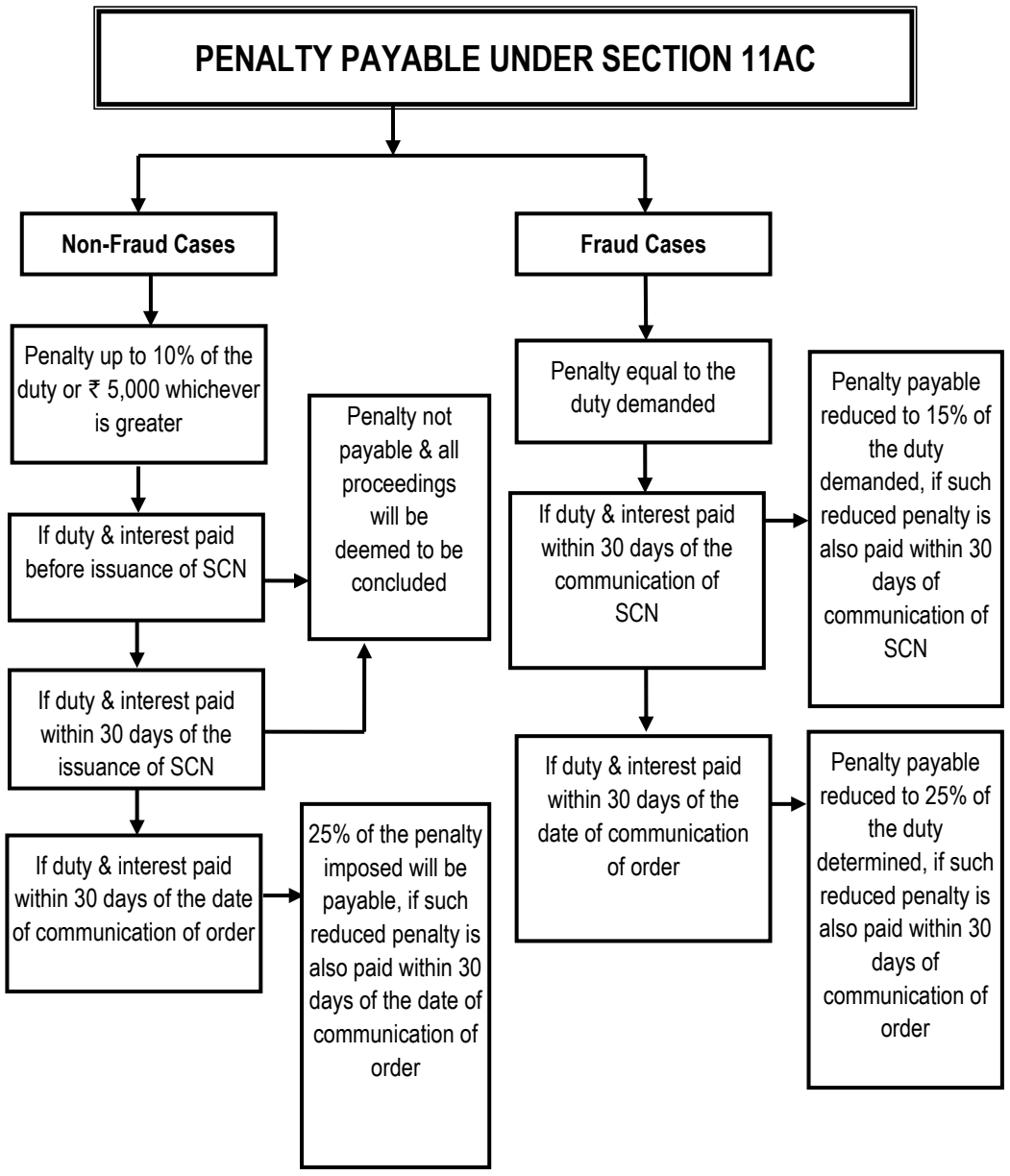
(D) Cases where no show cause notice has been issued prior to 14.05.2015 will be governed by amended provisions of section 11AC [Explanation 1(i)].

(E) Proceedings in the pending show cause notices can be closed – (i) on payment of duty, interest and penalty @ 15% of the duty in fraud cases and (ii) on payment of duty and interest in cases not involving fraud etc., within 30 days of 14.05.2015.

(F) In all cases where show cause notices are adjudicated after 14.05.2015, reduced penalty @ 25% of the duty in fraud cases and 25% of the penalty imposed in cases not involving fraud etc. can be paid within 30 days of

communication of the adjudication order if the duty, interest and penalty is paid within such time.

The provisions of section 11AC have been summarized in the figure below:



(ii) Penalty on manufacturer/producer etc. for violation of Rules [Rule 25]: Rule 25 of the Central Excise Rules 2002 provides for penalty on any producer, manufacturer, registered person of a warehouse, ***an importer who issues an invoice on which***

CENVAT credit can be taken or a registered dealer not exceeding the duty on the excisable goods in respect of which any of the specified contravention have been committed, or ***₹ 5,000***, whichever is greater. The penalty is subject to the provisions of section 11AC of the Central Excise Act, 1944. The offending goods are also liable to confiscation. The specified contraventions are:

(a) Removal of any excisable goods in contravention of any of the provisions of the said rules or the notifications issued under the said rules; or

(b) Non-accountal of any excisable goods produced or manufactured or stored; or

(c) Manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Central Excise Act; or

(d) Contravention of any of the provisions of the said rules or the notifications issued under the said rules with intent to evade payment of duty.

Simultaneous penalty under rule 25 and section 11AC cannot be imposed: If penalty is imposed under section 11AC, penalty under rule 25 will not be imposed. This, however, does not preclude the Department from confiscating the goods, imposing any fine in lieu of confiscation and prosecuting a person.

(iii) Penalty on persons knowingly dealing in goods liable to confiscation [Rule 26] : Under rule 26 of the Central Excise Rules 2002 it is provided that any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or the said Rules, shall be liable to a penalty not exceeding the duty on such goods or ₹ 2000, whichever is greater. It may be noted here that rule 25 is applicable only in respect of manufacturer, registered person of a warehouse etc. Thus, other persons like transporters, person concealing goods etc. shall be liable to penalty under rule 26.

Further, sub-rule (2) of rule 26 provides for penal action against the person who issues:

(i) excise duty invoice without delivery of goods mentioned therein or abets in making such invoice; or

(ii) any other document shipping bill, bill of lading, etc. or abets in making such document,

on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefits like CENVAT credit or refund.

Such person shall be liable to a penalty not exceeding the amount of such benefit or ₹ 5,000 whichever is greater.

(iv) General penalty [Rule 27]: Rule 27 of the Central Excise Rules, 2002 provides for imposition of a general penalty which may extend to five thousand rupees and with confiscation of the goods in respect of which the offence is committed. This is attracted when no other specific penalty is provided for.

8.4.2 Issue of notice before imposing penalty: Rule 26 of the said Rules also provides that before any order of penalty or confiscation is passed the adjudicating authority shall follow the principles of natural justice. In other words a notice explaining the reasons why penalty should not be imposed or goods confiscated has to be given to the person. Thereafter, reasonable opportunity shall be given to such person to explain or defend his case. The adjudicating Officer shall pass a reasoned order, incorporating the defence arguments given by such person or his authorised representative.

8.4.3 Confiscated property to vest in Central Government [Rule 28]: As per rule 28 of the said Rules, when any goods are confiscated under these rules, such thing shall thereupon vest in the Central Government. Accordingly, the Central Excise Officer adjudging confiscation shall take and hold possession of the things confiscated, and every Officer of Police, on the requisition of such Central Excise Officer, shall assist him in taking and holding such possession.

8.4.4 Disposal of confiscated goods [Rule 29]: Provisions for disposal of goods confiscated are contained in Rule 29 of the said Rules. Goods of which confiscation has been adjudged and in respect of which the option of paying a fine in lieu of confiscation has not been exercised, shall be sold, destroyed or otherwise disposed of in such manner as the Commissioner may direct.

8.4.5 Storage charges in respect of goods confiscated and redeemed [Rule 30]: Rule 30 provides that if the owner of the goods, the confiscation of which has been adjudged, exercises his option to pay fine in lieu of confiscation, he may be required to pay such storage charges as may be determined by the adjudicating officer.

8.4.6 Adjudication of confiscation and penalties: Section 33 provides that where anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged —

(a) without limit, by a Principal Commissioner/ Commissioner of Central Excise;

(b) up to confiscation of goods not exceeding ₹500 in value and imposition of penalty not exceeding ₹250 by an Assistant/Deputy Commissioner of Central Excise.

However, the Board, may, in the case of any officer performing the duties of an Assistant/ Deputy Commissioner of Central Excise reduce the limits indicated in clause (b) of this section and may confer on any officer the powers indicated in clause (a) or (b) of this section.

Section 33A states that the adjudicating authority shall give an opportunity of being heard to a party during the adjudication proceeding, if the party so desires. The adjudicating authority may, if sufficient cause is shown, at any stage of such proceeding grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

8.4.7 Option to pay fine in lieu of confiscation [Section 34]: Section 34 provides an option to pay fine in lieu of confiscation. Whenever confiscation is adjudged, the officer adjudging it, shall give the owner of the goods an option to pay, in lieu of confiscation, such fine as the officer thinks fit.

Section 34 makes it clear that confiscation made or penalty imposed under the Central Excise Act or the rules shall not prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law.

Applicability of provisions of Customs Act in respect of confiscation to excise laws: Provisions of section 115, section 118(a), section 119, section 120, section 121, section 124 and section 150 of the Customs Act relating to confiscation of conveyances, confiscation of packages containing goods, confiscation of goods used for concealing goods, confiscation of goods even if form changes, confiscation of sale proceeds of contravening goods, issue of show cause notice before confiscation of goods and procedure for sale of goods and application of sale proceeds respectively are applicable to the Central Excise Act *[Refer Chapter 12 - Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions of Module-III of this Study Material for the above sections of the Customs Act, 1962]*

8.5 Enforcement

The central excise officers not only have powers of adjudication but also have powers of enforcement of law. The powers of enforcement include visits, searches, seizures and arrest. The powers are similar in excise, customs and service tax. However, there are differences depending on nature of each tax. Some provisions of customs relating to enforcement powers of Departmental officers have been made applicable to central excise.

Applicability of some provisions of the Customs Act to the Excise Act [Section 12]: Section 12 empowers the Central Government to apply provisions of the Customs Act, 1962 relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals in regard to like matters in respect of the duties imposed by section 3 and section 3A of the Central Excise Act, 1944. In exercise of such power the Central Government has issued *Notification No. 68/63-CE dated 4th May, 1963* as amended making some provisions of Customs Act applicable to central excise subject to some modifications.

The following provisions of the Customs Act have been made applicable to Central Excise Act:-

S.No.	Section No. of the Customs Act	Provisions of the Customs Act adapted to the Central Excise Act
(i)	Section 105 (1)	Power to search premises
(ii)	Section 110	Seizure of goods, documents and things
(iii)	Section 115 [excluding clauses (a) and (e) of sub-section (1)]	Confiscation of conveyances
(iv)	Section 118 (a)	Confiscation of packages and their contents
(v)	Section 119	Confiscation of goods used for concealing contravening goods
(vi)	Section 120	Confiscation of smuggled notwithstanding any change in form etc.
(vii)	Section 121	Confiscation of sale proceeds of contravening goods

(viii)	Section 124	Issue of show cause notice before confiscation of goods, etc.
(ix)	Section 142(1)(b) and 142(1)(c)(ii)	Recovery of sums due to Government
(x)	Section 150	Procedure for sale of goods and application of sale proceeds

Applicability of some provisions of the Central Excise Act to service tax [Section 14]: Section 14 of Central Excise Act which makes provisions in respect of summons has been made applicable to Service tax. However, provisions relating to search, seizure and arrest are not applicable to service tax.

Certain other officers required to assist Central Excise Officers [Section 15]: Certain other officers are required to assist Central Excise Officers in delivering their duties of enforcement of law. Section 15 empowers and requires all officers of police and customs and all officers of Government engaged in the collection of land revenue, and all village officers to assist the Central Excise Officers in the execution of Central Excise Act.

Protection of Acts done in good faith [Section 40]: Section 40 provides that no suit, prosecution or legal proceedings shall lie against Central Government or any officer of Central/State Government for anything done or intended to be done, in good faith, in pursuance of Central Excise Act or any rule made thereunder. As per section 40(2), if any proceeding (other than a suit) is to be commenced, one month advance notice is required to be given to Central Government.

8.5.1 Search: Provisions of search and seizure are used by the Central Excise Officers to enforce the provision of the Central Excise Law. These provisions are used as an exception when the direct physical intervention becomes necessary. At the same time the search and seizure is to be done in accordance with the laid down law. In this regard reference is to be made to the applicable provisions of other statutes, i.e. Code of Criminal Procedure and section 105(1) of the Customs Act, 1962 *[Refer Chapter 12 - Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions of Module-III of this Study Material for section 105(1)of the Customs Act, 1962].*

The provisions relating to search are given in section 18 of the Central Excise Act which provides that all searches should be made in accordance with the provisions of the Code of Criminal Procedure.

Rules 22 & 23 of the Central Excise Rules, 2002 (hereinafter referred to as the said Rules), empower the authorized officer to enter and search any premises, conveyance or other place. Further, Rule 24 *ibid* specifically empowers such officer to effect a seizure or detention. Moreover, Section 12 of the Central Excise Act, 1944, empowers the Central Government to apply the provisions of the Customs Act to the Central Excise also. In exercise of such powers the Central Government has issued *Notification No.68/63, dated 4.5.1963* modifying and extending the various sections of Customs Act, 1962 to Central Excise matters.

In terms of the said rules, an officer empowered by Commissioner by special or general order, can search at any time, any premises or conveyance where he has reason to believe that excisable goods are manufactured, stored or carried in contravention of the provisions of the

Act or rules. For registered premises or for stopping and searching any conveyance in transit no search warrant is required. However, in other cases, normally search warrants are issued by the Deputy/Assistant Commissioner authorizing the search. The Central Excise Officer is also authorized to stop and search any conveyance as well. The search is to be carried out in the presence of two independent witnesses.

Vexatious search and seizure [Section 22]: Section 22 deals with vexatious searches, seizure etc. by Central Excise Officers. In such case the Central Excise office will be liable to punishment under the law. Similar provision is made applicable to any person willfully and maliciously giving false information leading to vexatious search.

8.5.2 Seizure: Rule 24 of the said rules provides for power to detain goods or seize the excisable goods. Provisions of section 110 of the Customs Act are also applicable in this regard *[Refer Chapter 12 - Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions of Module-III of this Study Material for section 110 of the Customs Act, 1962].*

It must be noted that seizure is an act depriving the owner of the possession of the goods. Confiscation however results in the ownership of the goods getting transferred to the Central Government. If a Central Excise Officer, has reason to believe that any goods, which are liable to excise duty but no duty has been paid thereon or the said goods were removed with the intention of evading the duty payable thereon, the Central Excise Officer may detain or seize such goods.

Provisional release of seized goods: The power to release seized goods emanates from power to seize itself. The goods seized may be released provisionally under bond along with 25% security or surety by the officer who is normally competent to adjudicate the case. The adjudicating officer will also consider the importance of such goods for evidence, and will release the goods provisionally if the bond is furnished. Wherever necessary, sample may also be drawn. The adjudicating officer, however, will ask the owner or in-charge of the goods to whom the goods were released provisionally to produce the goods any time before the issue of adjudication order, if he is of the view that the goods are liable for confiscation. In case the person to whom goods were released provisionally fails to produce the goods at appointed time, the bond may be enforced for recovering.

Return of records [Rule 24A]: Where the books of accounts or other documents, seized by the Central Excise Officer or produced by an assessee or any other person are not relied on for the issue of notice, they should be returned within 30 days of the issue of said notice or within 30 days from the date of expiry of the period for issue of said notice. However, the Commissioner of Central Excise may retain such books of accounts or documents, for reasons to be recorded in writing and the Central Excise Officer shall intimate to the assessee or such person about such retention.

The Central Excise Officer derives its power to seize books of accounts or other documents from section 110 of the Customs Act.

8.5.3 Arrest: Provisions for arrest are contained in sections 13 and 18 of Central Excise Act, 1944. These provisions provide for power to arrest, searches and arrests how to be made, disposal of persons arrested, procedure to be followed.

Any Central Excise Officer not below the rank of Inspector of Central Excise with the prior

approval of Principal Commissioner/ Commissioner of Central Excise can arrest any person under section 13 whom he has reason to believe that he is liable to punishment under the Central Excise Act. In normal circumstances, prior approval of Principal Commissioner/ Commissioner will be taken before arresting a person.

Disposal of persons arrested: Every person arrested under the Central Excise Act has to be forwarded, without delay:-

(i) to the nearest Central Excise Officer (empowered to send persons so arrested to a Magistrate)

or

(ii) to the officer-in-charge of the nearest police station if there is no such Central Excise Officer within a reasonable distance [Section 19].

Grant of Bail: If the accused is forwarded to the officer-in-charge of the nearest police station, such officer shall, where the offence is non-cognizable, either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail, forward him in custody to such Magistrate [Section 20].

If the accused is forwarded to the nearest Central Excise Officer, the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case.

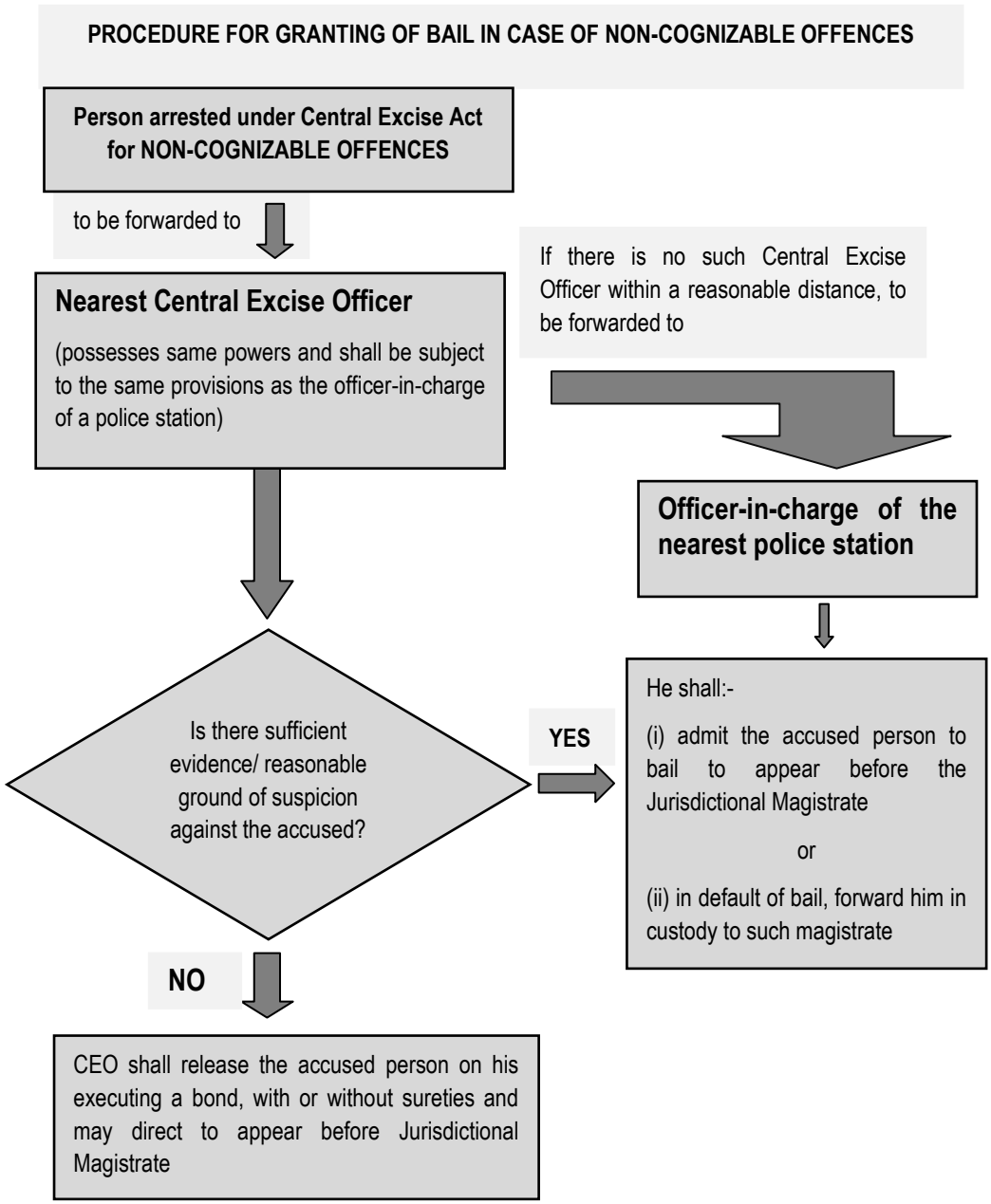
In case there is sufficient evidence or reasonable ground of suspicion against the accused in respect of a non-cognizable offence, the Central Excise Officer shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail, forward him in custody to such Magistrate. Otherwise, he shall release the accused person on his executing a bond, with or without sureties and may direct to appear before Jurisdictional Magistrate [Section 21].

Thus, as seen from above, under Central Excise Act, 1944, bail can be granted only in respect of non-cognizable offences and cognizable offences are non-bailable *[Refer page 8.24 for cognizable, non-cognizable, bailable and non-bailable offences under Code of Criminal Procedure, 1973].*

The procedure for granting the bail in case of non-cognizable offences has been explained with the help of flow diagram in the next page.

8.6 Offences and Prosecution

8.6.1 Meaning of offence: The term **"offence"** is not defined in the Central Excise Act, 1944 (the Act for short). The Constitution of India also does not define the term. According to Article 367 of the Constitution of India, the General Clauses Act, 1897 shall apply for the interpretation of not only the Constitution but also to any enactment of the Legislature in India. However, this is subject to the enactment itself. For example, specific definitions in the Act will override the definition of the same term in the General Clauses Act, 1897. The General Clauses Act, 1897 in 3(38) defines an offence to mean any Act or omission made punishable by any law for the time being in force. Therefore, not only a positive act but also inaction where action is required can constitute an offence.



8.6.2 Prosecution: Besides the Departmental adjudication, prosecution may also be launched under section 9 of the Central Excise Act, 1944 for the offences under section 9(1) of the Act. As per provisions of section 9AA prosecution may be launched against any person, Director, Manager, Secretary or other officers of a company or partner/ proprietor of the firm, who is responsible for the conduct of the business of the company/firm and is found guilty of the offences under the Central Excise Act/Rules *[Refer point 8.7.6 for detailed discussion]* .

Section 9 of the Central Excise Act, 1944, provides for prosecution of offenders in a court of law and prescribes a minimum imprisonment of six months. However, in cases where the duty involved is more than fifty lakh or the offender has been convicted previously under this section, the court can award maximum imprisonment for a term not exceeding seven years.

Prosecution proceedings in a Court of Law are generally initiated after departmental adjudication of an offence has been completed. However, prosecution may be launched even where adjudication is not complete. Generally, the adjudicator should indicate whether a case is fit for prosecution, though this is not a necessary pre-condition.

Confiscation and penalty in departmental adjudication and prosecution in criminal proceedings are independent and do not amount to double jeopardy.

Prosecutions are launched in cases of serious nature and where sufficient evidence to prove fraudulent intention is available. Under executive instructions the Principal Chief Commissioner/ Chief Commissioner of Central Excise or in specified cases the Director General of Central Excise Intelligence, has power to sanction prosecution.

8.6.3 Offences under section 9: The provisions of section 9 of the Act enumerate what will constitute an offence under the Act. The following type of acts will constitute an offence:

(i) contravening any of the provisions of Section 8, dealing with restriction on possession of certain goods specified in the Second Schedule [Section 9(1)(a)]

(ii) contravening any of the provisions of Section 37(2)(iii) which relates to transit of excisable goods to any part of India and Section 37(2)(xxvii) relates to registration of persons [Section 9(1)(a)]

(iii) evading payment of duty [Section 9(1)(b)]

(iv) removing or concerning himself in removing any excisable goods in contravention of the Act or Rules made thereunder [Section 9(1)(bb)]

(v) acquiring possession of or otherwise dealing (includes possession, transporting, storing, keeping, selling purchasing etc.) in excisable goods which he knows or has reason to believe are known to be liable for confiscation [Section 9(1)(bbb)]

(vi) contravening any of the provisions of this Act or the rules in relation to credit of any duty allowed to be utilized towards payment of excise duty on final products [Section 9(1)(bbbb)]

(vii) failing to supply information which is required under the Act or supplying false information [Section 9(1)(c)]

(viii) attempting or abetting the commission of any of the acts mentioned in clauses (a) and (b) of this section [Section 9(1)(d)]

Punishment for the offences: Section 9 provides the following prosecution provisions for the offences mentioned above:-

- **In the case of an offence relating to any excisable goods,** the duty leviable thereon under this Act exceeds ₹ 50 lakh, with imprisonment for a term which may extend to seven years and with fine.

However, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months.

- **In any other case,** with imprisonment for a term which may extend to three years or with fine or with both.

  If any person is convicted of an offence more than once, for the second and subsequent offences, he shall be liable for imprisonment for a term which may extend to seven years and with fine. The Court trying the offence is given powers to restrict the term of imprisonment for not less than six months but while doing so must record the reasons which shall be special and adequate [Section 9(2)].

Section 9(3) lists out following matters which would not constitute to be special and adequate reasons for the purpose sub-section (2) and (3):

(i) the fact that the accused has been convicted for the first time for an offence under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence;

(iv) the age of the accused.

Note:

(a) It is provided that where an offence has been committed by a company (defined as any body corporate and includes a firm or other association of individuals), every person, who at the time of commission of an offence was in charge of, or was responsible for the conduct of the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Director in relation to a firm means a partner in the firm.

(b) The law also provides that in any prosecution for an offence, the Court shall assume existence of culpable mental state, but the accused can deny the existence of such a state.

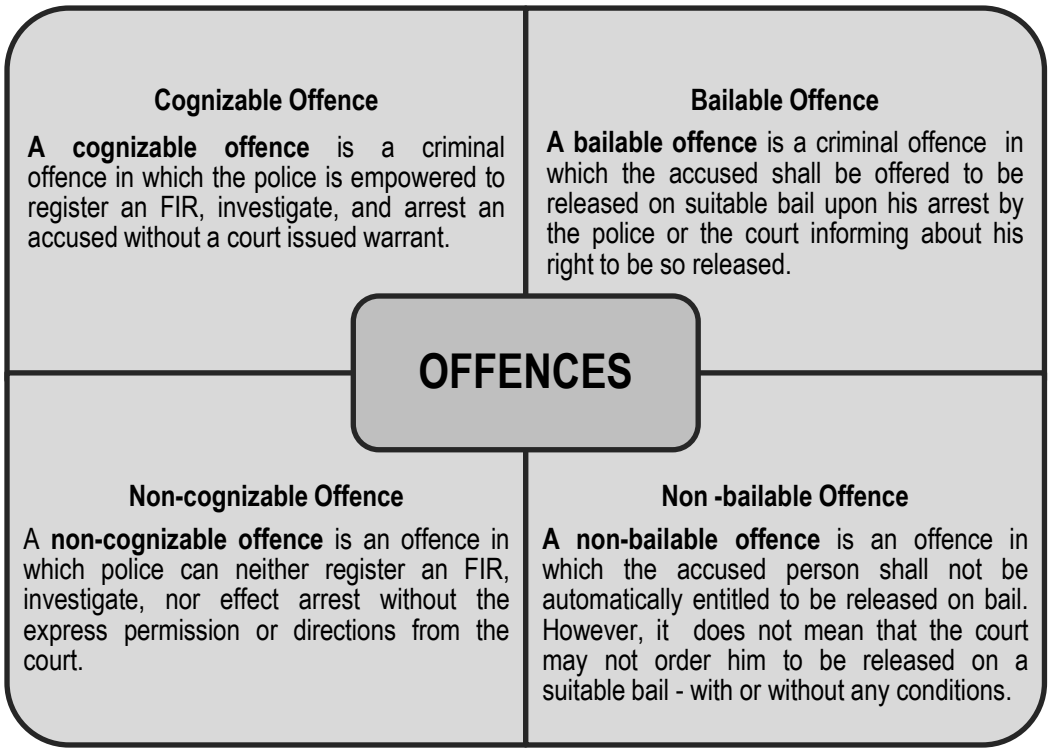
For this purpose **"culpable mental state"** includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact.

(c) Where any person is convicted by the Court for any offence under this Act and if the Court deems it appropriate, may publish the name and place of business or residence of such convicted person along with such other particulars as deemed fit in such newspapers or in such manner as the Court may direct. The expenses of such publication shall be recoverable form the convicted person as if it were a fine imposed by the Court.

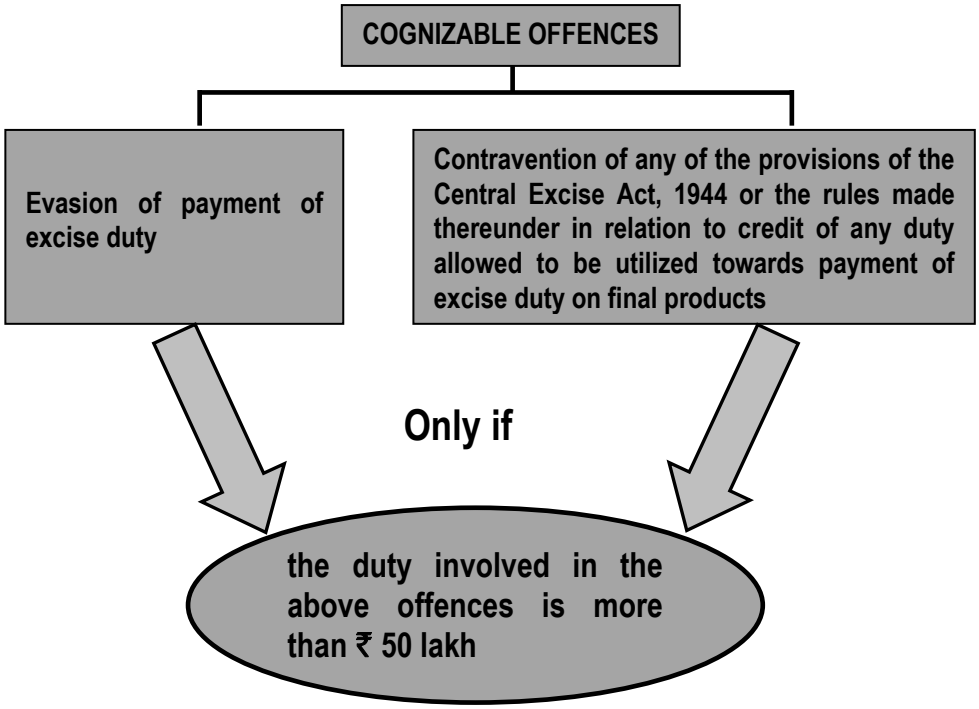
8.6.4 Certain offences to be non-cognizable [Section 9A]: The offences are broadly divided in to two categories under Code of Criminal Procedure,1973 in the following manner:

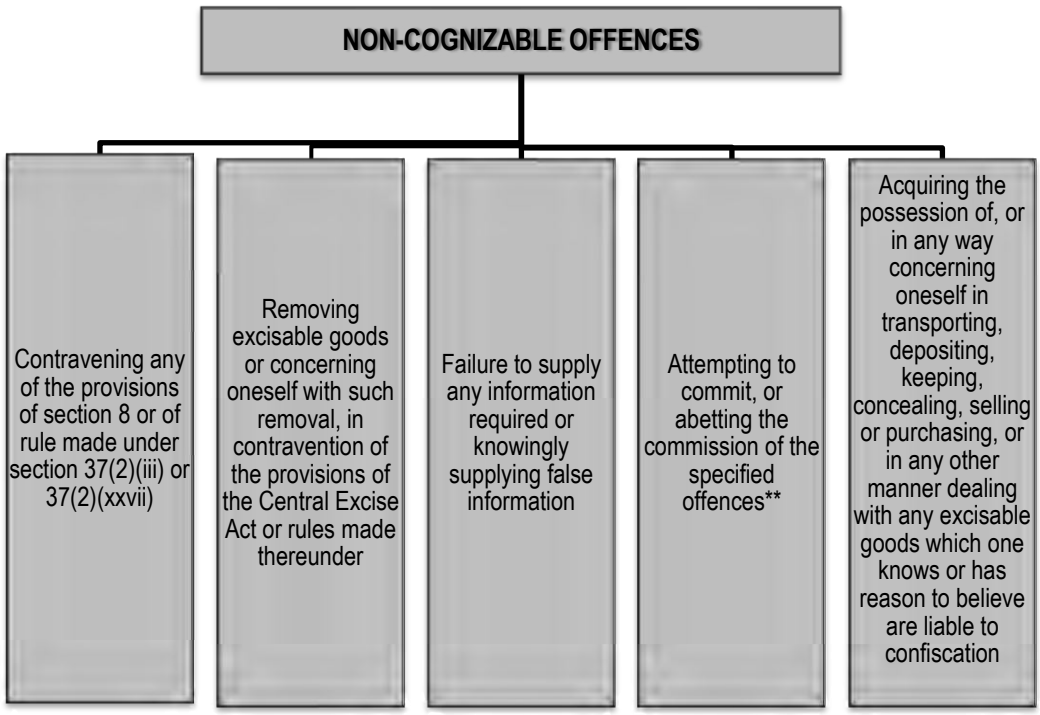
(i) cognizable and non-cognizable offences

(ii) bailable and non-bailable offences.



Cognizability of offences under central excise: The offences relating to excisable goods involving duty liability of more than ₹ 50 lakh and punishable under clause (b) or clause (bbbb) of section 9(1) are cognizable and non-bailable. However, all the remaining offences as specified in section 9 are non-cognizable within the meaning of the Code of Criminal Procedure, 1973. Following diagrams depict the cognizable and non-cognizable offences:-





***Specified offences** are:-

(a) Contravention of any of the provisions of section 8 (dealing with restriction on possession of certain goods specified in the Second Schedule) or of a rule made under section 37(2)(iii) [relating to power of Central Government to restrict transit of excisable goods to any part of India] or section 37(2)(xxvii) [relating to power of Central Government to specify the persons required to get registered],

OR

(b) Evasion of payment of any duty payable under the Central Excise Act.

It is pertinent to note that offences under Central Excise come under what is termed "warrant case". Warrant case according to Section 2(x) of the Code of Criminal Procedure, 1973 means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Other offences are called as "summons case" under Section 2(w) of the Code of Criminal Procedure, 1973.

8.6.5 Compounding of offences: Sub-section (2) of section 9A provides for compounding of offences, either before or after the institution of prosecution, under Chapter II of the Central Excise Act by Principal Chief Commissioner/ Chief Commissioner of Central Excise on payment of the prescribed compounding amount in the prescribed manner. Such amount shall be paid to the Central Government by the person accused of the offence. Section 37 empowers Central Government to make rules for specifying the amount to be paid for compounding and the manner of compounding of offences under section 9A.

Persons in respect of whom the provisions of compounding of offences do not apply:

(a) a person who has been allowed to allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of section 9(1);

(b) a person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985.

(c) a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore.

(d) a person who has been convicted by the court under this Act on or after 30.12.2005.

Immunity from prosecution: The compounding authority may grant immunity from prosecution if –

(i) He is satisfied with the co-operation received from the applicant regarding the compounding of offences,

(ii) Applicant has made full and true disclosure of facts relating to the case,

(iii) Applicant agrees to accept such conditions as may be imposed by compounding authority with respect to the case covered under compounding of offence.

Withdrawal of immunity: The immunity granted to a person can stand withdrawn if —

(i) the person fails to pay the sum specified in the compounding order within the time specified, or

(ii) the person fails to comply with any conditions subject to which the immunity was granted and thereupon the provisions of Central Excise would apply as if no such immunity had been granted.

(iii) the compounding authority is satisfied that such person had concealed any particulars, material or had given false evidence during the compounding proceedings.

Compounding amount: Rule 5 of the said rules provides for compounding of offences along with the compounding amount which is listed below for reference:-

Sl. No.	Offence under section 9	Compounding amount
1.	Contravention of any of the provisions of Section 8 or of rule made under section 37(2)(iii) or 37(2)(xxvii) [Section 9(1)(a)]	₹ 50,000 for the first offence To be increased by 100% for each subsequent offence
2.	Evasion of payment of excise duty [Section 9(1)(b)]	10% to 50% of the duty evaded
3.	Removal of any excisable goods in contravention of any of the provisions of this Act or any rule made thereunder or in any way concerning oneself with such removal [Section 9(1)(bb)]	10% to 50% of the duty evaded
4.	Possession of, or in any way concerning oneself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner dealing with any excisable goods which one knows or has reason to believe are liable to confiscation [Section 9(1)(bbb)]	25% to 50% of the duty evaded
5.	Contravention of any of the provisions in relation to CENVAT credit [Section 9(1)(bbbb)]	10% to 50% of the CENVAT credit wrongly taken or utilized
6.	Failure to supply any information or knowingly supplying false information [Section 9(1)(c)]	₹ 50,000 for the first offence To be increased by 100% for each subsequent offence
7.	Attempt to commit, or abet the commission of, any of the offences mentioned in clauses (a) and (b) of this section [Section 9(1)(d)]	25% to 50% of the duty evaded

8.6.6 Burden of proof: The Supreme Court in *Gian Chand* v. *State of Punjab*, 1983 (13) E.L.T. 1365 has held the burden of proof is on the prosecution to prove that the person is guilty of an offence. That means to say that the person who points the finger must also prove that the other person is guilty.

Further, the Supreme Court in *V.D. Jhingan* v. *State of U.P. AIR 1966 S.C. 1762* had held that the prosecution has to prove its case beyond all reasonable doubt.

8.6.7 Retrospective applicability of offences: A question that arises is whether offences can be made applicable retrospectively. Article 20(1) of the Constitution specifically says that

no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence. Therefore, if at the time of commission of the act, there was no offence, by a subsequent legislative amendment, that very act cannot be made an offence. In *J.K. Spinning and Weaving Mills Ltd. v. UOI - 1987 (32) E.L.T. 234,* the Supreme Court has held that it would be against principles of legal jurisprudence to impose a penalty on a person or to confiscate his goods for an act or omission which was lawful at the time when such act was performed or omission made, but subsequently made unlawful by virtue of any provision of law.

8.7 Civil and Criminal Proceedings

8.7.1 Introduction: One look at the Act and the Rules and we would often wonder whether the person is being charged again and again with the same offences. For example, removal of goods without payment of duty is an offence under Section 9 as well as Rule 25 but it must be understood that the same act can provide for civil as well as criminal proceedings. Central Excise being a taxing statute must necessarily provide for measures to safeguard the revenue. This would mean that the property of persons is going to be affected. Therefore, confiscation and penalty proceedings are proceedings in rem and not in personam. However, arrest of a person is a proceeding in personam since it curtails the individual's freedom of movement. A Central Excise Officer is empowered to confiscate and impose penalty and by virtue of Section 13 also has the power to arrest. However, on arrest, he has to forthwith take the person to the police station or to the designated Central Excise Officer under Section 19 who shall forthwith release him or produce him before a Magistrate. Thereafter, the proceedings in personam can be held only by the court. This is the reason why we find an apparent duplication but in actuality, it is so made to recognise the nature of proceedings. Moreover, section 34A of the Act clearly spells out that confiscation and penalty will not attract other punishments under the act or under any other law. Therefore, we are faced with the question whether we can face different consequences for the same offence.

8.7.2 Principle of "Autrefois convict" or "Double Jeopardy": This concept is enshrined in Article 20(2) of the Constitution of India which reads as under:

"No person shall be prosecuted and punished for the same offence more than once".

Basically, this means that for the same offence, the person must not be put to peril more than once.

The conditions for application of this Article, as enumerated by the Supreme Court in *State of Bombay* v. *Apte* AIR 1961 (SC) 578, *Kalawati* v. *State of HP* (1953) SCR 548, *Thomas Dana v. State of Punjab*, AIR 1959 (SC) 375 are :

(a) there must have been a previous proceeding before a Court of law or judicial Tribunal.

(b) the person must have been prosecuted in such proceeding.

(c) the person must have been punished in such proceeding.

(d) the offence in both the proceeding must be the same.

(e) the subsequent proceeding must be a fresh proceeding and not a mere continuation of the previous proceeding.

Prosecution means an initiation or starting of proceeding of a criminal nature before a court of law or a judicial Tribunal in accordance with the statute.

In *Maqbool Hussain* v. *State of Bombay*, 1983 (13) E.L.T. 1284, the Supreme Court held that customs authorities are not judicial tribunals or courts while adjudging confiscation and penalty. Therefore the principle of double jeopardy cannot be invoked by the person proceeded against. In that case, the prosecution proceeding under the Foreign Exchange Regulation Act consequent to confiscation under the Customs Act, 1962 was held not to constitute double jeopardy. It would be odd to note that the Supreme Court in another case *Sewpujanrai Indrasanarai Ltd.* v. *Collector of Customs,* 1983 (13) E.L.T. 1305 had held that penalty, confiscation and fine were judicial acts and not executive acts but had made a distinction between proceedings *in rem* and *in personam*.

8.7.3 Plea of Limitation: We often take the plea of limitation when issues are time barred and this constitutes a convenient escape route for otherwise legitimate demands made. In fact, Chapter XXXVI of the Code of Criminal Procedure, 1973 talks about limitation for taking cognizance of offences by the Courts trying the offence. The limitation is contained in section 468 of the Code. However, the Parliament has enacted The Economic Offences (Inapplicability of Limitation Act, 1974) which makes the provisions of the Code of Criminal Procedure inapplicable to economic offences. Central Excise Law and Customs law figure in this Act to which the Code will not apply. Therefore, the Parliament has chosen to stick to the maxim *"nullum tempus occurrit regi"* – lapse of time does not bar the right of the Crown. It must also be noted that section 473 of the Code specifically empowers the Court to take cognizance of offence barred by limitation if the delay is properly explained and it is necessary in the interests of justice.

8.7.4 Scope of section 482 of Code of Criminal Procedure, 1973: As can be seen from the above analysis, the proceedings are taken before the Magistrate's Court. However, in certain circumstances the party to the proceeding can approach the High Court under section 482 of the Code of Criminal Procedure, 1973. Section 482 reads as under:

"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

The scope of this provision has been discussed by the Supreme Court in *Madhu Limaye* v. *Maharashtra,* AIR 1978 (SC) 47 wherein it has been held that:

(i) the power is not to be restored to if there is a specific provision in the Code of redressal of the grievance

(ii) it should be used sparingly and for preventing abuse of the process of the Court or to secure the ends of justice.

(iii) It should not be exercised against express bar of the law.

This provision, therefore, enables the prosecution to be quashed at the process stage itself. In *Sharadchandra Shripad Marathe* v. *Gurushant Kamble*, 1989 (44) E.L.T. 11, and *Bhalchandra Keshav Gadre* v. *Gurushant Kamble*, 1989 (43) E.L.T. 617, the Bombay High Court held that if ex-facie reading of the complaint shows that no grounds have been made for

substantiating the complaint, then the process will be quashed. In the latter case, a proceeding against an Ex-Director of the company was quashed since prima facie, a Director who had quit on 29-7-1983 could not have been held responsible for offences arising from 30-9-1983. The Supreme Court has also held in several cases that in invoking Section 482, normally appreciation of evidence cannot be done by the High Court since that would mean going into the merits which has to be done by the lower courts.

Therefore, as can be seen from the above, for the sake of preventing abuse of the process of the Court and for securing the ends of justice, it is possible to approach the High Court directly without undergoing trial before the lower courts.

8.7.5 Presence of culpable mental state [Section 9C]: Section 9C of the Act presumes that a culpable mental state was present at the time the offence was committed unless proved otherwise. The word "Culpable" means "faulty or criminal". It implies that the offence was committed with a criminal state of mind. The section includes within the meaning of culpable mental state the intention, motive, knowledge of a fact and belief or reason to believe a fact. That means when an offence is committed, the law presumes that the person did it intentionally with a motive and he had sufficient knowledge or reason to believe that it was an offence. However, the fact has to be proved beyond reasonable doubt. As held by the Madras High Court in *Lakshmichand* v. *GOI - 1983 (12) E.L.T. 322,* penal proceedings should not be allowed to be proceeded with on vague and camouflaged hypothesis. The Supreme Court in *Asstt. Collector* v. *Sayed Mohammed 1983 (12) E.L.T. 193* held that the accused cannot be convicted on mere conjectures and surmises and the prosecution must prove the guilt beyond reasonable doubt.

One may be tempted to think that while the burden of proof lies on the person accusing, however culpable mental state is presumed. What this means that once the burden of proof is discharged, the onus will be on the accused to prove that he had no culpable mental state.

8.7.6 Offences by companies [Section 9AA]: This concept is known as the principle of vicarious liability. Section 9AA of the Act makes every person responsible to and every person in charge of the business of the company at the time of commission of the offence to be guilty of offence besides the company itself. However it will be a defence for such a person that the offence was committed without his knowledge or that he had exercised due diligence to prevent the commission of the offence.

The section also deems any director, manager, secretary or other officer to be guilty where the offence is attributable to their consent or connivance or neglect. The term "company" includes a firm and association of individuals and the term "director" will mean a partner in relation to a firm.

The Delhi High Court has held in *Vidya Wati* v. *State - 1988 (37) E.L.T.* 341 that the term "incharge of and responsible to the company" would mean that the person was in overall control of the day-to-day affairs of the company. Only if this can be proved, can the person be deemed guilty of offence.

The person-in-charge of a company can be prosecuted as there is nothing unreasonable about it since company usually acts through such person. *[Standard Chartered Bank* v. *Directorate of Enforcement,* 2006 *(197) E.L.T. 18 (S.C.)].*

8.7.7 Attempt/abet to commit an offence: In the earlier paragraph on the scheme of offences under Excise Law, it was pointed that attempting or abetting the commission of certain offences under section 9 also amounts to an offence. Lexically, the term "abet" would mean to assist, to cause and would include a positive act in aid of the commission of an offence. The meaning of the word "attempt" has been brought out by the Supreme Court in *State of Maharashtra* v. *Mohd. Yakub*, 1983 (13) E.L.T. 1637 wherein the Supreme Court has held that to constitute an attempt, there must be an intention to commit an offence and some act must also be done which is having close proximity with and is necessary towards the commission of the offence. The Supreme Court made a thin distinction between preparation and attempt and held that attempt starts where preparation ends. It was also held that to constitute an attempt the act need not be the penultimate act towards the commission of the offence but must be an act during the course of committing the offence. Thus, it will be seen that even an attempt may amount to an offence under the Act.

8.7.8 Offence and age [Section 9E]: Section 9E of the act makes it clear that the provisions of section 562 of the Code of Criminal Procedure, 1989 (section 360 of the new code) shall not be applicable unless the person is under eighteen years of age. Section 360 of the Code of Criminal Procedure allows the court to relax the rigours in certain circumstances for persons below 21 years. Instead of sentencing him, an option is given to prove good conduct and behaviour. However, in central excise cases, only persons below 18 years of age can take shelter under this provision of the code. Moreover, as per section 9E, this provision will form a special circumstance wherein the court under section 9(3) can take cognisance of the fact that the person is below 18 years of age and sentence him to a lesser term of imprisonment or not to sentence him at all.

8.8 Recovery of sums due to Government

8.8.1 Recovery as prescribed in section 11: Recovery of sums due to the Government can be made by the officer empowered by the Central Board of Excise and Customs or a Central Excise Officer or a proper officer authorized in this behalf under section 142 of the Customs Act, 1962 on the direction of the officer empowered by the Central Board of Excise and Customs.

1. Recovery from the person from whom money is due: Sub-section (1) of section 11 provides as under-

(i) Recovery by deducting the amount payable to the defaulter or by attaching and selling excisable goods of the defaulter: Recovery of the sums due to the Government can be made by either of the following two methods-

(a) deducting the amount so payable from any money owing to the person from whom such sums may be recoverable or due which are under his control, or

(b) attachment and sale of excisable goods belonging to such person.

(ii) Recovery as arrears of land revenue: If the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business. The said Collector, on receipt of such certificate, shall proceed to

recover from the said person the amount specified therein as if it were an arrear of land revenue.

(iii) Recovery in case of transfer of business: If a person from whom some recoveries are due, transfers his business in whole or in part to another person, then all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the possession of the transferee can be attached and sold for recovery. An officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Principal Commissioner/ Commissioner of Central Excise, can make such recovery.

2. Recovery from a person other than from whom money is due - Garnishee Proceedings: Sub-section (2) empowers the Central Excise Officer to recover the monies due to the Government from any person other than from whom money is due, if that other person holds money for/on account of the first person. The procedure for the same is as under:-

(i) Issue of notice: for recovery to any person other than from whom money is due: The Central Excise Officer may issue a written recovery notice to the following persons:

- any person from whom money is due to such person
- any person from whom money may become due to such person
- any person who holds money for or on account of such person
- any person who may subsequently hold money for or on account of such person.

The noticee would be required to pay to the credit of the Central Government so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount.

The money would be paid either forthwith upon the same becoming due or being held, or at or within the time specified in the notice. However, in no case the money would be required to be paid before it becomes due or is held.

(ii) Noticee bound to comply with the notice: Every person to whom a notice is issued under this sub-section shall be bound to comply with such notice. In case any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.

(iii) Consequences of default in payment by noticee: In a case where the person to whom a notice under this sub-section has been issued, fails to make the payment, he shall be deemed to be a person from whom duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or the rules made thereunder have become due, in respect of the amount specified in the notice. Therefore, all the consequences prescribed for assessees in default would apply for such other person as well.

8.8.2 Recovery provisions under customs law applicable to recovery of excise duty: For the purpose of recovery of dues, provisions of section 142(1)(b), 142(1)(c)(ii) and section 28AAA of the Customs Act, 1962 have also been made applicable to like matters in central excise [*Notification No. 68/63 CE dated 4.5.1963 and Notification No. 29/2012 CE (NT) dated 10.10.2012] [Refer Chapter 15 – Miscellaneous Provisions and Chapter 9 – Demand and*

Appeals of Module-III of this Study Material for section 142 and section 28AAA of the Customs Act, 1962 respectively].

Section 142 of the Customs Act, 1962 governs the procedure of recovery of customs duty and section 28AAA prescribes the procedure to recover customs duty in case of fraudulent acquisition of instrument issued for the purposes of the Customs Act or the Foreign Trade (Development and Regulation) Act, 1992.

8.8.4 Central excise dues to have the first charge [Section 11E]: This section creates a first charge on the property of a defaulter for recovery of the Central Excise dues subject to the provisions of the Companies Act, Recovery of Debt due to Bank and Financial Institution Act and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act. This implies that after the dues, if any, owing under the provisions of these Acts, dues under the Central Excise Act shall have a first charge.

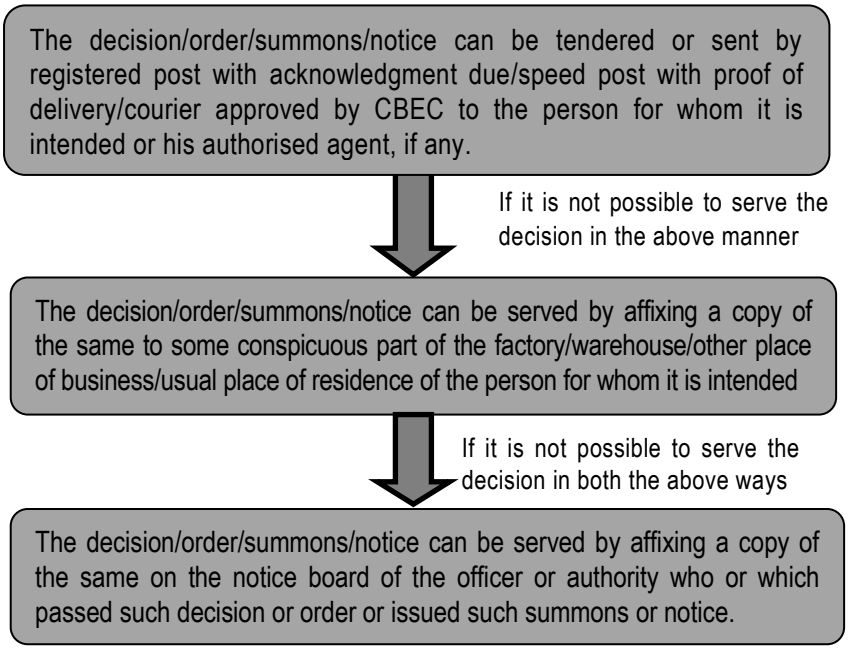
8.8.5 Duty of excise not levied or short-levied as a result of general practice not to be recovered [Section 11C]: Sometimes it may happen that goods may be liable to excise duty but on account of generally prevalent practice no excise duty is charged on them or a lower rate of duty than the applicable rate is levied on the excisable goods. In such cases, the Central Government has the power to direct by notification that such not-levied excise duty or short levied excise duty shall not be required to be paid in respect of such goods.

When such a notification in respect of any goods is issued, the whole of the excise duty (in case of non-levy) or excess excise duty (in case of short levy) which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of section 11B(2).

The person claiming the refund of such duty or the excess duty has to make an application to the Assistant/Deputy Commissioner of Central Excise in the prescribed form (same form for making a refund claim under section 11B) before the expiry of six months from the date of issue of the said notification.

8.9 Miscellaneous

8.9.1 Service of notices/decisions/orders/summons etc. [Section 37C]: A show cause notice becomes a valid notice only if it is issued in consonance with the provisions of section 11A and served in accordance with the provisions of section 37C. Provisions of section 37C also apply to serving of decisions or orders passed or any summons issued under the Act. Sub-section (1) of section 37C provides as under:



Deemed date of serving of the decision/order/summons: Sub-section (2) of section 37C provides that every decision or order passed or any summons or notice issued is deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1).

8.9.2 Rounding off of duty, etc. [Section 37D]: The amount of duty, interest, penalty, fine or any other sum payable, and the amount of refund or any other sum due, under the provisions of this Act shall be rounded off to the nearest rupee. For this purpose, where such amount contains a part of a rupee consisting of *paise* then, if such part is fifty *paise* or more, it shall be increased to one rupee and if such part is less than fifty *paise* it shall be ignored.

8.9.3 Manner of determination of commencement and termination of time: Section 9 of the General Clauses Act, 1897 lays down the provision relating to commencement and termination of time. It stipulates that in any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from, and, for the purpose of including the last in a series of days or any other period of time, to use the word to.

In simple words, while computing time, the rule is to exclude the first day and to include the last day. Courts have held that the word "from" is akin to "after" and that the word "from" if used for the purpose of and in reference to the computation of time, as for example, from a stated date, that stated date is *prima facie* excluded from computation. Although on some occasions, Courts have a taken a view that the question as to whether the stated date should or should not be so excluded, should be decided according to the context in which the word "from" occurs.

It is worthwhile to mention here that the Supreme Court, in case of *M/s. Econ Antri Ltd v. M/s. Rom Industries Ltd. & Anr,* had also taken a similar view on this point and decided that while computing the period of limitation, the day on which the offence is committed/ date of cause of action has to be excluded.

Another point which needs a mention here is that section 3(35) of the General Clauses Act, 1897 defines the expression "month" to mean a month reckoned according to the British calendar. Further, Allahabad High Court in case of *CCus & CEx. v. Ashok Kumar Tiwari 2015 (37) STR 727 (All.)* has held that where the legislature has stipulated the period of limitation in terms of months, such a stipulation can only mean a calendar month and not 30 days.

8.9.4 Information in respect of persons in certain cases to be published [Section 37E]: This provides for publishing the name of any person and particulars of any proceedings in relation to such person, in public interest. The provisions are discussed below in detail:

(1) The Central Government may publish name of any person and any other particulars relating to any proceedings in respect of such person if it is of the opinion that it is necessary or expedient in the public interest to do so. The Government can do the publication in such manner as it thinks fit.

(2) The publication shall be made in relation to any penalty only after the time for presenting an appeal to the Commissioner (Appeals) or the Appellate Tribunal expires without an appeal being presented or the appeal, if presented, gets disposed of.

(3) In the case of a firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, may also be published if, in the opinion of the Central Government, circumstances of the case justify it.

9

Refund

9.1 Refund of duty

Refund of any duty of excise and interest, if any, paid on such duty is governed by section 11B of the Central Excise Act, 1944. By definition, refund includes rebate of duty paid on goods exported out of India or on materials used in the manufacture of goods exported out of India. The refund claim can be filed within one year from the relevant date in the specified Form by an assessee or even a person who has borne the duty incidence, to the Deputy/Assistant Commissioner of Central Excise having jurisdiction over the factory of manufacture.

The "relevant date" has been defined in the said section and refund of duty paid can be sought provided the manufacturer has not passed on the burden of duty. In case the burden of duty has been passed on, the refund can be claimed by the person who has actually paid the duty or, in the alternative, the amount can be deposited in the Consumer Welfare Fund created by the statute.

9.2 Interest on delayed refund

The Central Excise Act also provides for payment of interest on delayed payment of refund. As per section 11BB, if any duty ordered to be refunded under section 11B(2) has not been refunded within three months from the date of receipt of the refund application in the prescribed manner and form along with the supporting documentary evidence as laid down in the relevant rules, interest at the rate notified by the Government which should not be below 5% and should not exceed 30% per annum (currently notified as **6% p.a.** as per *Notification no. 67/2003 dated 12.9.2003*) shall have to be paid on such duty.

The interest will be paid from the date immediately after the expiry of three months from the date of receipt of application till the date of refund of such duty. As per Explanation to Section 11BB where any order of refund is made by Commissioner (Appeals) or Tribunal or Court the said order shall be deemed to be a refund order for the purpose of section 11B (2).

From the above provisions it is evident that in case any order for refund is passed by the Commissioner (Appeals) or Tribunal or Court, interest will have to be paid from the expiry of the three months from the date of filing of refund application. Interest is always with reference to date of application and not with reference to the date of passing of order.

However, interest cannot be claimed in case the application is not filed as per the provisions of the statute.

9.3 Theory of unjust enrichment

Section 11B of the Central Excise Act, 1944 is perhaps the most important provision governing refunds. Explanation to section 11B defines the term "refund" to include rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods exported out of India. The definition is inclusive and therefore would govern all refunds except for which there could be a special procedure.

Section 11B was inserted with effect from 11.7.1980. The most important amendment took place on 20.9.91 wherein the theory of unjust enrichment was built into the statute. This theory postulates that only the person who has not passed on the incidence of duty will be eligible to claim the refund. The section today recognises that a buyer of goods can also claim refund. The **most important decision on refund** is by a Nine Member Bench of the Supreme Court in ***Mafatlal Industries Ltd. v. U.O.I.- 1997 (89) E.L.T. 247***. The salient features of this judgment can be summarised as under :

(a) The theory of unjust enrichment is valid and constitutional. However, the theory that the manufacturer would be unjustly impoverished in case of demands has not been agreed to.

(b) All pending applications as on 20-9-1991 would be governed by this theory of unjust enrichment.

(c) Sections 11B (Excise Act) and 27 (Customs Act) are self contained codes for refunds and resort to civil suits or writs is not permissible unless the taxing provision is struck down as unconstitutional. The general theory laid down in certain judgments of both the Supreme Court and High Courts that refund could be claimed within three years of discovery of mistake has been disapproved.

(d) Unless the levy is struck down as unconstitutional, all Courts must exercise jurisdiction in terms of section 11B and refuse to grant relief if the incidence of tax has been passed on.

(e) Whatever amount is collected as duty will have to be paid to the Government. If excess is collected than that payable, it would be credited to the Consumer Welfare Fund or given as refund to the person who has borne the incidence of duty.

The Supreme Court has held in *Solar Pesticides case 2000 (116) ELT 401* that refunds will not be allowed on captive consumption of inputs. However, it would be possible to get the refund even in case of captive consumption provided it is proved that the incidence of duty is not passed on to the customers. But there is a necessity for the assessee to prove that the incidence of duty has not been passed on to the customers.

Further, the Supreme Court in the case of *CCE v. Allied Photographics 2004 (166) ELT 3* has held that doctrine of unjust enrichment applies even when duty is paid under protest. It has been held that even if there is no change in price before and after assessment (i.e. before and after imposition of duty), it does not lead to the inevitable conclusion that incidence of duty has been passed on to the buyer, as such uniformity may be due to various factors.

There could be situations where the manufacturer has paid the duty and the same has been shown in the invoice issued to the buyer. The buyer failed to reimburse the duty for various reasons. In such case, it would not be proper to conclude that the incidence of the duty has not been passed on to the buyer as the CENVAT credit on inputs/capital goods can be taken

based on the duty component mentioned on the invoice and not depending upon the payment to the supplier. Only acceptable evidence would be to show that the buyer has not paid the amount to the manufacturer and has not availed the CENVAT credit of duty paid or if he has taken, he has reversed it.

According to section 11B(2), the Assistant Commissioner, on being satisfied that excise duty and interest paid on such duty is refundable, shall grant refund to the applicant only in the following cases :

(a) Rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) Unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner/ Commissioner of Central Excise;

(c) Refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) The duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest to any other person;

(e) Duty of excise and interest, if any, paid on such duty borne by the buyer if he has not passed on the incidence of such duty and interest to any other person;

(f) The duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by Notification in the Official Gazette, specify.

(No notification under clause (f) shall be issued unless the Central Government is of the opinion that the incidence of duty has not been passed on by the persons concerned to any other person. No refund shall be made except herein provided).

In other cases, the Assistant Commissioner shall make an order that the whole or any part of the duty is refundable and the amount so determined shall be credited to the "Consumer Welfare Fund" established under section 12C. The following shall be credited to the Fund:

(a) the amount of duty of excise as per section 11B(2) or section 11C(2) or section 11D(2);

(b) the amount of duty of customs as per section 27(2) or section 28A(2), or section 28B(2) of the Customs Act, 1962;

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund;

(d) the surplus amount referred to in sub-section (6) of section 73A of the Finance Act, 1994.

Any money credited to the Fund shall be utilized by the Central Government for the welfare of the consumers. The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

It must be noted that as per rule 7(6) of the Central Excise Rules, 2002 refunds pertaining to finalisation of provisional assessments are also governed by the law of unjust enrichment.

Concept of unjust enrichment does not apply to refunds arising out of settlements between parties under contract - *Living Media Ltd.* v. *U.O.I.* - 1998 (104) E.L.T. 3 (S.C.).

9.4 Assessment documents to show duty payment particulars

1. Section 12A makes it obligatory on the person liable to pay duty to indicate on the invoice or like documents, the amount of duty which will form part of the price at which such goods are sold.
2. Section 12B casts a presumption that duty has been passed on to the buyer. This presumption is rebuttable.
3. The amount of excise duty to be mentioned is not the actual duty paid or payable on the goods but only the actual duty being passed on to the buyer as part of the price of goods sold.
4. The document relating to assessment are:
   (a) Invoices/AR1
   (b) Monthly ER-1 return
   (c) Receipted treasury challans on which deposits were being made.
   (d) Original and duplicate copies of the account-current and also of account in Cenvat credit records as the case may be.
   (e) The obligation under this section is applicable only to persons who are liable to pay excise duty – viz. manufacturers, curers etc. It does not apply to wholesale dealers, traders etc.

9.5 Time-limit for making the application for refund of duty

1. Under Section 11B, the application for refund has to be made within **one year** from the relevant date.
2. The meaning of the term "relevant date" is set out in the Explanation (B) to section 11B.
3. The relevant date in the various cases is as follows :
   (a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,
      (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or,
      (ii) if the goods are exported by land, the date on which such goods pass the frontier, or
      (iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;
   (b) in the case of goods returned for being remade, refined, reconditioned or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in the case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(f) in case of goods which are exempt from payment of duty by a special order under section 5A(2), the date of issue of such order;

(g) in case of provisional assessment, the date of adjustment of duty after final assessment;

(h) in case where the duty becomes refundable as a consequence of judgement, decree, order or direction of appellate authority, Appellate Tribunal or any Court, the date of such judgement, decree, order or direction;

(i) in any other case, the date of payment of duty.

4. The aforesaid period of limitation will not apply if duty is paid under protest.

Unless the duty is paid under protest, the application for refund claim should be filed within one year from the relevant date. In this context, the Supreme Court in the case of *CCE Vs Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (S.C.)* has held that where the assessee has not challenged the adjudication order in time despite being appealable, such order cannot be questioned by filing refund claim after the time limit on the ground that adjudicating authority has committed an error in passing earlier order.

However, the limitation period contained in section 11B is not applicable in case of refund pre-deposit made during the course of investigation.

9.6 Presentation of refund claim

Any person, who deems himself entitled to a refund of any duties of excise or other dues, or has been informed by the department that a refund is due to him shall present a claim in proper Form, along with all the relevant documents supporting his claim and also the copies of documents/records supporting his declaration that he has not passed on the duty incidence.

The claim will be filed with the Deputy/Assistant Commissioner of Central Excise with a copy to the Range Officer.

The claim shall be presented in duplicate and shall be duly signed by the claimant or by a duly authorised person on his behalf and shall be pre-receipted (with revenue stamp on original copy, where necessary).

It may not be possible to scrutinise the claim without the accompanying documents and decide about its admissibility. If the claim is filed without requisite documents, it may lead to delay in sanction of the refund. Moreover, the claimant of refund is entitled for interest in case refund is not given within three months of the filing of claim. Incomplete claim will not be in the interest of the Department. Consequently, submission of refund claim without supporting documents will not be allowed. Even if post or similar mode files the same, the claim should be rejected or returned with Query Memo (depending upon the nature/importance of document not filed). The claim shall be taken as filed only when all relevant documents are available. In case of non-availability of any document due to reasons for which the Central Excise or Customs Department is solely accountable, the claim may be admitted that the claimant is not in disadvantageous position with respect to limitation period.

Subsequent to filing of the application, the Range Officer will complete the scrutiny of the papers within 2 weeks from the date of receipt of the claim in the Range Office and send a report to their scrutiny to the Divisional Deputy/Assistant Commissioner of Central Excise.

The Divisional Office will scrutinise the claim, in consultation with Range, and check that the refund application is complete and is covered by all the requisite documents. This should be done, as far as possible, the moment refund claim is received and in case of any deficiency, the same should be pointed out to the applicant with a copy to the Range Officer within 15 days of receipt.

In the Divisional Offices, final processing of refund claims after the receipt of Range Officer's report should be completed including the verification of the fact whether the assessee has passed on the duty incidence to their buyer (in cases where the refund claim is filed by a manufacturer or owner of warehoused goods). The types of cases to which this provision will not be attracted are already specified in section 11B itself. Where the duty incidence has been passed on, the duty refund, if otherwise admissible, will be ordered in file, but will also be ordered to be credited to the Consumer Welfare Fund. The burden of proving that the duty incidence has not been passed on, is on the claimant and the latter may be required to submit sufficient documentary proof for this purpose. It is clarified that the question of unjust enrichment has to be looked into case by case. There cannot be a general instruction indicating the documents and /or record, which the claimant should produce as a proof that he has not passed on the duty incidence to any other person.

Claim for refund of less than ₹ 100 shall not be entertained in respect of all excisable commodities.

9.7 Payment of refund

Where the claim has been admitted whether in part or in full, and claimant is eligible for refund, the Deputy/Assistant Commissioner of Central Excise should ensure that payment is made to the party within 3 days of the order passed after due audit, if any.

All claims shall be paid to the applicant by a cheque on the authorised bank with which the sanctioning authority maintains account.

In case of *UOI v Slovak India Trading Co. 2008(10) STR 101 (Kar HC)*, the court held that refund of cenvat credit has to be made in cash when the company is closed or goes out of cenvat credit scheme. There is no prohibition under the cenvat credit provisions when there is no manufacture due to closure of the factory.

9.8 Post audit

All refund claim papers should be sent by the Divisional Deputy/Assistant Commissioner to the Commissionerate Headquarters (to the Additional/Joint Commissioner–Audit) within a week after the payment thereof irrespective of the amount involved. At the Commissionerate Headquarters, a special cell comprising Deputy/Assistant Commissioner (Audit) – for immediate supervision – one superintendent, one Inspector and two Deputy Office Superintendents - may be created out of the sanctioned strength of the audit staff in the Commissionerate for post -audit of these claims.

This cell may undertake examination on merits of each such claim where the amount of refund granted is ₹ 5 lakh or more. In regard to the remaining refund claims involving amounts below ₹ 5 lakh, post audit may be undertaken on the basis of random selection by the Deputy/Assistant Commissioner (Audit). This post audit may be completed before the expiry of three months from the date of payment and where ever the grant of refund is not found to be correct, action should be taken in terms of provisions contained in section 35E of the Central Excise Act, 1944. This special Cell may work directly under the charge of Additional/Joint Commissioner (Audit).

9.9 Monitoring and control for timely disposal of refunds

The Commissioner of Central Excise should devise appropriate control to ensure that the refund/rebate claims are expeditiously sanctioned within the time limit stipulated above.

9.10 Provisions relating to interest on delayed refunds [Section 11BB]

1. Interest is payable to the assessee if the amount claimed as refund is not paid within three months of receipt of refund claim. The interest shall be paid at such rate not below 5% and not exceeding 30% p.a.
2. The interest rate has been fixed by the CBEC as 6% per annum.

   [*Notification No. 67/2003 – C.E. (N.T.) dated 12.9.2003]*
3. Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any court against an order of the Assistant/Deputy Commissioner of Central Excise under section 11B(2), the order passed by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.
4. Interest will start from the expiry of three months after date of acknowledgement of application. However, if the matter is pending before the Settlement Commission, the period commencing from date of filing of application and ending with the date of receipt of the case sent back to the officer will be excluded for calculation of interest [Section 32L(3)].

10

Appeals

10.1 Introduction

In taxation laws, litigation is inevitable as the taxpayer interprets the provisions to his benefits and the revenue interprets to its benefit. Appeal is a remedy available to the aggrieved by the decision or order passed by the authority, wherein the higher authority decides about the correctness of the said decision or order. It is important to understand that if appeal is not preferred, the order passed even if it were incorrect / questionable would become final.

The provisions for appeal are contained in Chapter VI A of the Central Excise Act, 1944 and Central Excise (Appeals) Rules, 2001 (hereinafter be referred to as 'Appeal Rules').

Some of the terms used in appellate procedures are summarized below:

1. **Aggrieved:** 'substantial grievance, a denial of some personal, pecuniary or property right, or imposition upon a party of a burden or obligation.'
2. **Aggrieved Person:** 'one whose legal right is invaded by an act complained of or whose pecuniary interest is directly and adversely affected by a decree or judgment.'
3. **Appeal:** 'resort to a superior court to review the decision of an inferior (i.e. trial) court or administrative agency.'
4. **Appellant:** 'the party who takes an appeal from one court or jurisdiction to another.'
5. **Appellate Court:** 'the court which is having jurisdiction of appeal and review.'
6. **Fact:** 'reality of events or things the actual occurrence or existence of which is to be determined by evidence.'
7. **Order:** 'direction of court or judge made or entered in writing, and not included in a judgment, which determines some point or directs some steps in the proceedings.'
8. **Question of law:** 'question concerning legal effect to be given to an undisputed set of facts. An issue which involves the application or interpretation of law and hence within the province of the judge and not the jury'.
9. **Respondent:** 'the party who contends against an appeal or the party against whom the appeal is taken, i.e., the appellant.'

These provisions provide for appeals to Commissioner (Appeals), Appellate Tribunal, procedure orders of Appellate Tribunal, powers of revisions of Board, revision by Central Government, appeal to High Court, appeal to the Supreme Court, transfer of certain pending proceedings and transitional provisions.

"The right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant."

[Vijay Prakash D. Mehta v. Collector of Customs 1989 (39) E.L.T. 178 (S.C.)]

10.2 Appellate stages

Under Chapter VIA of the Central Excise Act, 1944 both assessee and Department have been conferred with a right of three stage remedies against the orders passed under Central Excise Act and Rules. Briefly, it consists of three stages of appeal two stages of revision and further appeal to Supreme Court. The three stages of Appellate Authorities are the Commissioner (Appeals), CESTAT and High Court.

In case of orders passed by officers lower than the rank of Principal Commissioner/ Commissioner of Central Excise, the first appeal lies to the Commissioner (Appeals) and there from to the Appellate Tribunal and then to High Court and finally to the Supreme Court. Where the order of the Tribunal does not relate to determination of rate of duty or value of goods, an appeal is made to the High Court under sections 35G, instead of appeal to Supreme Court. In cases where the order-in-original is passed by a Principal Commissioner/ Commissioner of Central Excise, appeal lies directly to the Appellate Tribunal.

As per the provisions of section 35 read with sections 35B, 35E, 35EE, 35G and 35L of the Central Excise Act, any person aggrieved by the order passed by the Central Excise Officer, can file an appeal to the following authorities:-

	Order passed by	Appellate Authority
1.	All officers upto & including Additional Commissioner	Commissioner (Appeals)
2.	Principal Commissioner/ Commissioner or Commissioner (Appeals)	CESTAT, except in case where the order relates to:– a) A case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse; b) A rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India; c) Goods exported outside India (except to Nepal or Bhutan) without payment of duty;
3.	Commissioner (Appeals)	Revision application to Central Government (in matters relating to rebate of duty on exports, export without payment of duty, loss of goods in transit and

		processing loss). No further appeal.
4.	CESTAT	Supreme Court (matters relating to valuation and rate of duty)
5.	CESTAT	High Court (Other than matters relating to valuation and rate of duty)
6.	High Court	Supreme Court

10.3 Appeals to Commissioner (Appeals) [Section 35]

All decisions and orders passed under the Central Excise Act or the rules made thereunder are subject to two departmental appeals except in the case where the order-in-original is passed by the Principal Commissioner/ Commissioner as an adjudicating authority when only one right of appeal to the Tribunal is conferred. The First Appeal as per the provisions of section 35 of the Central Excise Act lies to the Commissioner (Appeals) if the order or decision is of an officer lower in rank than the Principal Commissioner/ Commissioner of Central Excise.

Such an appeal can be filed within **sixty days** from the date of the communication of decision/ order. This period can be extended by a further period of thirty days by Commissioner (Appeals) on sufficient cause being shown.

Commissioner (Appeals) may, if sufficient cause is shown, at any stage of proceeding, grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment can be granted for a **maximum of three times** to a party during the proceeding.

The Second Appeal against the order of the Commissioner (Appeals) can be filed to the Appellate Tribunal except for the type of cases referred to in Sl.No.2 of the chart above.

Form and manner of filing appeal: As per Rule 3 of Central Excise (Appeals) Rules, 2001 an appeal under sub-section (1) of section 35 to the Commissioner (Appeals) shall be made in Form No.E.A.-1 (in duplicate) and shall be accompanied by a copy of the decision or order appealed against.

Signatories to the appeal: As per Rule 3(2), of Appeal Rules, 2001 the grounds of appeal and the form of verification as contained in Form No.E.A.-1 shall be signed -

(a) in the case of an individual, by the individual himself or where the individual is absent from India, by the individual concerned or by some person duly authorized by him in this behalf; and where the individual is a minor or is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf;

(b) in the case of a Hindu undivided family, by the karta and, where the karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;

(c) in the case of a company or local authority, by the principal officer thereof;

(d) in the case of a firm, by any partner thereof, not being a minor;

(e) in the case of any other association, by any member of the association or the principal officer thereof; and

(f) in the case of any other person, by that person or some person competent to act on his behalf.

The Supreme Court, in *Commissioner v. Eicher Motors Ltd. 2007 (216) E.L.T. A133 (S.C.),* held that Commissioner (Appeals) cannot take a view contrary to decision of Tribunal on the same and identical set of facts for periods subsequent to decision of Tribunal.

10.3.1 Procedure in appeal [Section 35A]: The Commissioner (Appeals) shall give an opportunity to the appellant to be heard, if he so desires. At the hearing of an appeal, Commissioner (Appeals) may allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if he is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable.

The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against. However, an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order. Further, where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 11A to show cause against the proposed order.

The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision. The Commissioner (Appeals) shall, where it is possible to do so, **hear and decide every appeal within a period of six months from the date on which it is filed.** On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority, the Principal Chief Commissioner/ Chief Commissioner of Central Excise and the Principal Commissioner/ Commissioner of Central Excise.

10.4 Production of additional evidence before Commissioner (Appeals)

As per Rule 5 of the Appeal Rules, the appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority except in the following circumstances, namely:

(a) Where the adjudicating authority has refused to admit evidence which ought to have been admitted; or

(b) Where the appellant was prevented by sufficient cause from producing the evidence which was called upon to produce by the adjudicating authority; or

(c) Where the appellant was prevented by sufficient cause from producing before the adjudicating authority any evidence which is relevant to any ground of appeal; or

(d) Where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

No additional evidence shall be admitted as said above unless the Commissioner (Appeals) records in writing the reasons for its admission.

The Commissioner (Appeals) shall not take any additional evidence unless the adjudicating authority or an officer authorized in this behalf by the said authority has been allowed a reasonable opportunity -

(a) to examine the evidence or document or to cross-examine any witness produced by the appellant, or

(b) to produce any evidence or any witness in rebuttal of the additional evidence produced by the appellant under sub-rule (1).

It is also important to note that the power of the Commissioner(Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal is independent of the above provisions relating to additional evidence and his powers will be not affected by the said provisions.

10.5 Appeals to Appellate Tribunal

10.5.1 CESTAT: In response to the long outstanding demand of trade and industry for establishing an independent machinery to redress the grievances of the Excise and Customs assesses, the Central Government set up the Customs, Excise and Gold Control Appellate Tribunal (CEGAT) in the year 1982 to hear and dispose of appeals in Central Excise, Customs and Gold Control matters. However, after scraping of Gold (Control) Act, 1962 and introduction of service tax by the Finance Act, 1994, a need arose to enhance the Tribunal's jurisdiction to include/entertain appeals of cases relating to service tax, hence; it was renamed as Central Excise Customs and Service Tax Appellate Tribunal (CESTAT).

The Benches of the Tribunal are composed of Judicial and Technical Members. Single member Bench has the jurisdiction to hear appeals involving an amount of duty, fine or penalty not exceeding **₹ 50,00,000/-.**

10.5.2 Appeal to Appellate Tribunal [Section 35B]: The provisions in respect of appeals to the Appellate Tribunal are summarized as under:

(1) Orders appellable to Appellate Tribunal: Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order –

(a) a decision or order passed by the Principal Commissioner/ Commissioner of Central Excise as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) under section 35A;

Orders not appealable: No appeal shall lie to the Appellate Tribunal in respect of any order passed by Commissioner (Appeals) if such order relates to -

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Bhutan) without payment of duty;

Minimum amount of disputed duty/fine/penalty for filing an appeal to CESTAT: The Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order passed by the Commissioner (Appeals) under section 35A where –

(i) in any disputed case, (other than a case relating to the determination of rate of duty or valuation of goods) the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order,

does not exceed ₹ 2,00,000.

(1B) Committee of Chief Commissioners or Commissioners of Central Excise: The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 may by order, constitute such Committees as may be necessary for the purposes of the Act. Every Committee so constituted shall consist of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.

(2) Appeal by Committee of Commissioners of Central Excise: A Committee of Commissioners may, if it is of the opinion that an order passed by the Commissioner (Appeals) under section 35A is not legal or proper, direct any Central Excise Officer authorized by him in this behalf to appeal on its behalf to the Appellate Tribunal against such order.

Difference in opinion in the Committee of Commissioners of Central Excise: Where the Committee of Commissioners of Central Excise differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Principal Chief Commissioner/ Chief Commissioner of Central Excise. The Principal Chief Commissioner/ Chief Commissioner shall direct any Central Excise Officer to appeal to the Appellate Tribunal against such order if it is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper.

It has also been clarified that "jurisdictional Chief Commissioner" means the Principal Chief Commissioner/ Chief Commissioner of Central Excise having jurisdiction over the adjudicating authority in the matter.

(3) Time limit for filing appeal: Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the Principal Commissioner/ Commissioner of Central Excise, or, as the case may be, the other party preferring the appeal.

(4) Memorandum of Cross objections: On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

Extension of time period for filing of Memorandum of Cross objections: Sub-section (5) provides that the Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

(6) Fee for filling an appeal: An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a specified amount of fee.

The fee payable in different cases has been tabulated as under:

Amount of duty, interest demanded and penalty levied	Fee for filing an appeal
Less than or equal to ₹ 5,00,000	₹ 1,000.00
More than ₹ 5,00,000 but not exceeding ₹ 50,00,000	₹ 5,000.00
More than ₹ 50,00,000	₹ 10,000.00

However, no such fee shall be payable in the case of an appeal preferred by a Central Excise Officer on the directions of Committee of Commissioners. Also, no fee shall be payable in the case of filing of a memorandum of cross-objections.

(7) Fee for filling an application: Every application made before the Appellate Tribunal, —

(a) in an appeal for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application,

has to be accompanied by a fee of ₹ 500. However, no such fee shall be payable in the case of an application filed by or on behalf of the Principal Commissioner/ Commissioner of Central Excise.

Form and manner of filing appeal: As per Rule 6 of Appeal Rules, an appeal under section 35B(1) to the Appellate Tribunal shall be made in Form No.E.A.3 and a memorandum of cross objections to the Appellate Tribunal under section 35B(4) shall be made in

Form No. E.A. 4. The following shall be observed in this regard:

1. Where an appeal under section 35B(1) or a memorandum of cross-objections (under sub-section (4) of that section) is made by any person other than the Commissioner of Central Excise, the grounds of appeal, the grounds of cross-objections and the forms of verification as contained in Form Nos.E.A.3 and E.A.-4, as the case may be respectively shall be signed by the persons listed above in case of appeal to Commissioner (Appeals).
2. The form of appeal in Form No.E.A.-3 and the form of memorandum of cross-objections in Form No.E.A.-4 shall be filed in quadruplicate and accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy).

Form and manner of filing departmental appeal: As per Rule 7 of the Appeal Rules, an appeal under section 35B(2) shall be made in Form No.E.A.5. The form of appeal in Form No.E.A.-5 shall be filed in quadruplicate accompanied by an equal number of copies of the decision or order (one of which at least shall be a certified copy) passed by the Commissioner (Appeals) under section 35A of the Act and a copy of the order passed by the Committee of Commissioners of Central Excise under section 35B(2) of the Act.

10.5.3 Orders of Appellate Tribunal [Section 35C]: The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against. The Tribunal may even refer the case back to adjudicating authority for fresh adjudication.

Adjournment by CESTAT: CESTAT may, if sufficient cause is shown, at any stage of proceeding, grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding [Sub-section (1A)].

Rectification of mistakes: The Appellate Tribunal may, at any time within six months from the date of order, with a view to rectifying any mistake apparent from the record, amend any order passed by it and the Tribunal shall make such amendments if the mistake is brought to its notice by Principal Commissioner/ Commissioner of Central Excise or the other party to the Appeal. However, an amendment which has the effect of increasing the liability of the other party will not be made without giving a notice to him and allowing him a reasonable opportunity of being heard [Sub-section (2)].

Time period for deciding the appeal: Every appeal shall be decided by the Appellate Tribunal within a period of three years from the date on which such appeal is filed, if it is possible to do so.

Finality of the orders of the CESAT: The orders passed by the Appellate Tribunal are final unless an appeal is made to the High Court or the Supreme Court under section 35G or 35L respectively [Sub-section 4].

The Appellate Tribunal shall send a copy of every order passed under this section to the Principal Commissioner/ Commissioner of Central Excise and the other party to the appeal [Sub-section (3)].

10.6 Deposit of certain percentage of duty demanded or penalty imposed before filing appeal [Section 35F]

(i) The Commissioner (Appeals) shall not entertain any appeal under section 35(1), unless the appellant has deposited 7.5% of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner/ Commissioner of Central Excise;

(ii) The Tribunal shall not entertain any appeal against the decision or order passed by Principal Commissioner/ Commissioner of Central Excise under section 35B(1)(a), unless the appellant has deposited 7.5% of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) The Tribunal shall not entertain any appeal against the decision or order passed by Commissioner (Appeals) under section 35B(1)(b), unless the appellant has deposited 10% of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:

(iv) The amount of pre-deposit shall not exceed ₹ 10 crores.

(v) Duty demanded shall include,—

(a) amount determined under section 11D;

(b) amount of erroneous CENVAT credit taken;

(c) amount payable under rule 6 of the CENVAT Credit Rules, 2004.

Thus, all the above-mentioned items would also be included within the ambit of expression 'duty demanded' in addition to the duty specified under section 3 of the Central Excise Act, thereby making their pre-deposit necessary as a condition for hearing appeal.

The provisions relating to making pre-deposits at first and second appellate stages are summarized as under:

Stage of appeal	Appellate Authority	Quantum of pre-deposit
First Appeal	Commissioner (Appeals) or CESTAT	7.5% of the duty where only duty or both duty and penalty are in dispute OR 7.5% of the penalty where only penalty is in dispute
Second Appeal	CESTAT	10% of the duty where only duty or both duty and penalty are in dispute OR 10% of the penalty where only penalty is in dispute

Points to be noted:

- Pre-deposit shall be computed as a percentage of only duty demanded even in cases

where dispute involves both duty demanded and penalty levied. Only when penalty alone is in dispute, would the pre-deposit be computed on the basis of penalty.

- New section 35F does not include interest payable within the ambit of duty demanded. Thus, pre-deposit of 7.5%/10% would exclude interest, if any, payable on the duty demanded.

It has been clarified by CBEC vide its *Letter DOF No. 334/15/2014 TRU dated 10.07.2014* that another 10% of the duty or penalty is to be paid at the time of filing second appeal before CESTAT.

CBEC has issued *Circular No. 984/08/2014 CX dated 16.09.2014* which clarifies the following:

Quantum of pre-deposit

- Where an appeal is made against the order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals). This amount may or may not be same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.
- Where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, pre-deposit would be calculated based on the aggregate of all penalties imposed in the order sought to be appealed against.

Payments made during investigation

- Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10% (subject to a limit of ₹ 10 crore), will be considered as payments towards pre-deposit for filing the appeals.
- Date of filing of appeal will be deemed to be the date of deposit of such payments.

Recovery of the amounts during the pendency of appeal

- No coercive measures for the recovery of balance amounts of demands of tax and penalties can be taken if the party/ assessee shows the proof of payment of pre-deposit (7.5% / 10%) and the copy of appeal memo.
- Recovery can be initiated only after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department unless order of Commissioner (Appeals) or CESTAT is stayed by authority/higher court. The amount to be recovered will include interest calculated from the date duty became payable till the date of payment.

Refund of Pre-Deposit

- Refund of pre-deposit is not refund of duty and hence the same will not be governed by provisions of section 11B of Central Excise Act/section 27 of Customs Act, 1962. Therefore, once the appeal is decided in favour of the assessee, he can apply for refund of pre-deposit.
- Refund of pre-deposit along with interest will have to be made within 15 days of receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.

- Refund of pre-deposit should not be withheld on the ground that Department is proposing to file an appeal or has filed an appeal against the order granting relief to the party.
- In the event of a remand, refund of the pre-deposit shall be payable along with interest.

10.6.1 Interest on delayed refund of amount deposited under section 35F (pre-deposit) [Section 35FF]

Section 35FF of Central Excise Act, 1944 which provides for interest on delayed refund of pre-deposit has been substituted with a new section. New section 35FF provides that where an amount deposited by the appellant under section 35F is required to be refunded consequent upon the order of the appellate authority, interest will have to be paid on the refund of such pre-deposit from the date of its payment to the date of refund. The rate of interest would be anywhere between 5% to 36% and would be notified separately. Interest on delayed refund of pre-deposit made prior to 06.08.2014 will continue to be governed by the erstwhile provisions of section 35FF.

Notification No. 24/2014 CE (NT) dated 12.08.2014 has been issued to specify 6% as the rate of interest payable on delayed refund of pre-deposit.

10.7 Monetary limits for filing of appeals by the Department

As per the National Litigation Policy, in Revenue matters, appeal shall not be filed if the amount involved is less than the monetary limit fixed by the Revenue authorities for the said purpose. CBEC has issued the instructions fixing the following monetary limits of duty below which an appeal shall not be filed by the Department in CESTAT, High Court and Supreme Court:-

Sl.No.	Appellate Forum	Monetary limit
1.	CESTAT	₹ 5,00,000/-
2.	High Courts	₹ 10,00,000/-
3.	Supreme Court	₹ 25,00,000/-

Following clarifications have been given by the Board with regard to the monetary limits:

(i) Monetary limit shall apply on the disputed duty and not on the total duty demanded in a case.

(ii) Monetary limits being would apply to cases of refund as well.

(iii) Monetary limits will not be applicable to application filed before the Joint Secretary (Revision Application).

10.8 Review by Committee of Chief Commissioners and Principal Commissioner/ Commissioner [Section 35E]

Sections 35E of the Central Excise Act provides for review of orders of -

(i) Principal Commissioners/ Commissioners of Central Excise by Committee of Chief Commissioners of Central Excise;

(ii) Adjudicating officers below the rank of Principal Commissioner/ Commissioner by Principal Commissioner/ Commissioner of Central Excise.

Section 35E gives powers to Committee of Chief Commissioners of Central Excise or Principal Commissioner/ Commissioner of Central Excise to pass certain orders.

Review by Committee of Chief Commissioners of Central Excise: Sub-section (1) of section 35E provides that the Committee of Chief Commissioners of Central Excise may of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner/ Commissioner of Central Excise has passed any order so as to satisfy itself upon the legality or propriety of the order. Thereafter, the Committee of Chief Commissioners may direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal to determine such points as may be specified by it.

Difference in opinion in the Committee of Chief Commissioners of Central Excise: Where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board. If the Board, after considering the facts of the order, is of the opinion that the decision or order passed by the Principal Commissioner/ Commissioner of Central Excise is not legal or proper, it may direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order.

Review by Principal Commissioner/ Commissioner of Central Excise: Sub-section (2) of section 35E grants similar powers of review to the Principal Commissioner/ Commissioner of Central Excise in respect of decisions taken by the adjudicating authority subordinate to him. The Principal Commissioner/ Commissioner may direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner (Appeals) to determine such points as may be specified by him.

Time limit for passing the order: Every order under sub-section (1) and sub-section (2) shall be made within a period of 3 months from the date of communication of the decision or order of the adjudicating authority. However, the Board may, on sufficient cause being shown, extend the said period by another 30 days [Sub-section (3)].

Time limit for making the application to CESTAT/Commissioner (Appeals): The time period available to the Principal Commissioner/ Commissioner or the adjudicating authority to make an application to the Appellate Tribunal or the Commissioner (Appeals) is 1 month from the date of communication of the order of the Committee of the Chief Commissioner or Principal Commissioner/ Commissioner. Such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals) as if such application were an appeal made against the decision or order of the adjudicating authority. The provisions regarding appeals, including the provisions of sub-section (4) of section 35B shall, so far as may be, apply to such application [Sub-section (4)].

Form and manner of filing application with CESTAT: As per Rule 7 of the Appeal Rules an application under section 35E(4) [to be made by the Commissioner on the direction of the Committee of Chief Commissioners of Central Excise to the Appellate Tribunal] shall be made

in Form No.E.A.5.

The form of application in Form No.E.A.-5 shall be filed in quadruplicate accompanied by an equal number of copies of the decision or order (one of which at least shall be a certified copy) passed by the Commissioner of Central Excise and a copy of the order passed by the Committee of Chief Commissioners of Central Excise under section 35(1) of the Act.

Form and manner of filing application with Commissioner (Appeals): As per Rule 4 of Appeal Rules, an application under section 35E(4) [to be made by the adjudicating authority on the direction of the Commissioner of Central Excise] to the Commissioner (Appeals) shall be made in Form No.E.A.2.

The form of application in Form No.E.A.2 shall be filed in duplicate and accompanied by a certified copy of the decision or order passed by the adjudicating authority and a copy of the order passed by the Commissioner of Central Excise directing such authority to apply to the Commissioner (Appeals).

10.9 Revision by the Central Government [Section 35EE]

Section 35EE gives the power of revision to the Central Government. As per sub-section (1), revision application needs to be filed with the Central Government against the orders passed by the Commissioner (Appeals), if such order relates to:

(a) loss of goods in transit from factory to warehouse or from warehouse to warehouse;

(b) rebate of duty of excise on goods exported;

(c) goods exported outside India (except Nepal and Bhutan) without payment of duty;

(d) processing loss;

In other words, in respect of the orders passed by the Commissioner (Appeals) in relation to any of the matters listed above, appeal will not lie to Appellate Tribunal, but a revision application will have to be filed with the Central Government.

Minimum amount of duty/fine/penalty for filing a revision application with the Central Government: The Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed ₹ 5000.

Revision application by the Department: The Principal Commissioner/ Commissioner of Central Excise may direct the proper officer to make an application to the Central Government for revision of the order passed by the Commissioner (Appeals) if he thinks that such order is not legal or proper [Sub-section (1A)].

Time limit for making the application: The revision application by an assessee has to be made within **three months** from the date of the communication of the disputed order to the applicant.

However, such period can be extended by a further period of three months by the Central

Government, if it is satisfied by the sufficiency of the cause [Sub-section (2)].

Fee for filing the application: The fee payable in different cases has been tabulated as under:

Amount of duty, interest demanded and fine/penalty levied	Fee for filing an appeal
Less than or equal to ₹ 1,00,000	₹ 2,00
More than ₹ 1,00,000	₹ 1,000

However, no such fee shall be payable if the application is filed by the proper officer on behalf of the Principal Commissioner/ Commissioner of Central Excise [Sub-section (3)].

Revision order: The Central Government may, of its own motion, annul or modify any order referred to in sub-section (1) [Sub-section (4)].

As per sub-section (5), no order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed —

(i) in any case in which an order passed under section 35A has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value; and

(ii) in any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.

Sub-section (6) lays down that in case of non/short levy of excise duty, no order levying or enhancing the duty shall be made unless the aggrieved person is given notice to show cause against it within the time-limit specified in section 11A.

Form and manner of filing the application: As per Rule 9 & 10 of the Appeal Rules, the revision application under section 35EE shall be in Form E.A.-8 & presented in person to the Under-Secretary Revision Application Unit, Government of India, Ministry of Finance, Department of Revenue, New Delhi or sent by registered post addressed to such officer. The following need to be observed in this regard:

1. The revision application sent by registered post shall be deemed to have been submitted to the said Under Secretary on the date on which it is received in office of such officer.
2. The grounds of revision application and the form of verification as contained in Form EA-8 shall be signed by the person specified in sub-rule (2) of Rule 3.
3. The application shall be filed in duplicate & shall be accompanied by two copies of following documents, i.e.
   (i) Order referred to in 1st proviso to section 35B(1)
   (ii) Decision or order passed by Central Excise Officer which was the subject matter of the order referred to in Rule 9(4)(i)

10.10 Appeal to High Court [Section 35G]

Order appealable to High Court: An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law [Sub-section (1)].

Time period and fee for filing the appeal: The Principal Commissioner/ Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal shall be-

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Principal Commissioner/ Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved [Sub-section (2)].

Condonation of delay in filing the appeal: The High Court has power to condone the delay and admit an appeal after the expiry of the period of 180 days referred to in sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period [Sub-section (2A)].

Formulation of question of Law: Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question [Sub-section (3)].

Hearing of appeal: The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. However, the Court has the power to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question [Sub-section (4)].

Order of the High Court: The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit [Sub-section (5)].

The High Court may determine any issue which has not been determined by the Appellate Tribunal or has been wrongly determined by the Appellate Tribunal, by reason of a decision on a question of law [Sub-section (6)].

Decision by majority of the Judges: When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges [Sub-section (7)].

Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it [Sub-section (8)].

Provisions of Code of Civil Procedure to apply in case of appeals to High Court: The provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section [Sub-section(9)].

10.11 Appeal to Supreme Court [Section 35L]

The Central Excise Act, 1944, provides a two tier machinery for redressal of grievances against the decision of the Appellate Tribunal. In cases where the decision of the Appellate Tribunal relates to any question having relation with the determination of 'rate of duty' or 'value of goods' amongst other things, the same is directly appealable to the Supreme Court under section 35L of the Central Excise Act.

However, where the order of the Appellate Tribunal does not relate to 'rate of duty' or 'value of goods', first an appeal is made to the High Court and thereafter an appeal against the judgment of the High Court can be made to the Supreme Court provided the High Court certifies it to be a fit case for appeal to the Supreme Court.

Orders appealable to Supreme Court: Section 35L(1) provides that an appeal shall lie to the Supreme Court from

(a) any judgment of the High Court delivered in an appeal made under section 35G if the High Court certifies the case to be fit for appeal to the Supreme Court. The High Court can certify any case on its own motion or on an oral application made by or on behalf of the aggrieved party, immediately after passing of the judgement.

(b) any order of the Appellate Tribunal passed having relation to the determination of rate of duty or value of goods, among other things.

For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment. Therefore, appeal against orders of Tribunal in such matters would lie before the Supreme Court [Sub-section (2)].

In case of *Kalyani Packing Industry v. Union of India 2004 (168) E.L.T. 145 (S.C.)*, it was held that in the case of a conflict between Supreme Court decision and Departmental clarification, Board's Circular cannot prevail over law laid down by the Supreme Court. Court/Tribunal cannot ignore judgment of Supreme Court and follow CBEC circular.

In the case of *CCE v. Indo Exim - 2006 (194) E.L.T. 19 (S.C.)*, the Court has held that in an appeal to Supreme Court, the issue of fact which was not specifically pleaded in answer to writ petition before High Court cannot be allowed as the ground for interference with the decision of the High Court.

10.12 Power of CBEC to issue instructions regarding non-filing of appeal in certain cases [Section 35R]

Section 35R provides that the Board is empowered to issue orders or instructions or directions

fixing monetary limits for the purposes of regulating the filing of appeal, application, revision or reference by the Central Excise Officer under the provisions of Chapter VIA.

The Central Excise Officer who has not been able to file an appeal/ application/ revision/ reference against any decisions/order on account of such monetary limits, will not be precluded from filing any appeal/application/revision/reference in any other case involving the same or similar issues or questions of law. The other party to the appeal will not be able to contend that the Central Excise Officer has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference.

10.13 Summary

The law and procedure relating to appeal can be summarized in the form of following table.

Order passed by	Appeal lies to	Form to be used	Section
1. Assistant/Deputy/Joint/ Additional Commissioner	Commissioner (Appeals) Within 60 days of receipt of order	EA1 (Assessee) EA2 (Department)	Section 35 & Section 35E
2. Principal Commissioner/ Commissioner/ Commissioner (Appeals) *[Except where the order of Commissioner (Appeals) relates to loss of goods in transit, processing loss, rebate of duty on exports and exports without payment of duty (other than Bhutan)]*	Appellate Tribunal Within 3 months of receipt of order	EA3 (Appellant) EA 4 (Cross objections by opposing party) EA5 for departmental appeal *[in case of order passed by Commissioner (Appeals)]*/application *[in case of order passed by the* Principal Commissioner/ *Commissioner]*	Section 35B & Section 35E
3. Appellate Tribunal (not involving rate of duty or valuation)	High Court Within 180 days of receipt of order	EA6 (Appellant) EA7 (Cross objections by opposing party)	Section 35G
4. High Court	Supreme Court **by permission of High Court**	No specified form	Section 35L
5. Appellate Tribunal (relating to rate of duty/valuation)	Supreme Court	No specified form	Section 35L
6. Commissioner	Revision Application	EA 8	Section 35EE

(Appeals) relating to loss of goods in transit, processing loss, rebate of duty on exports and exports without payment of duty (other than Bhutan)	to be made to Government of India (Revisionary Authority) Within 3 months of receipt of order **[No provision for further appeal]**		

Apart from the above appellate remedies available under the central excise law, the Constitution of India also provides remedies in the form of Special Leave Petitions (SLPs) and Writs. The Supreme Court of India is empowered under Article 136 of the Constitution of India to grant special leave to any of the parties to appeal, aggrieved by any order or judgment passed by any Court or Tribunal in India. The applications under Article 136 are termed as Special Leave Petitions (SLPs) as these can be admitted only with special leave (permission) of Supreme Court. The High Courts, within the territory of its jurisdiction, have powers, vide article 226 of Constitution, to issue orders or writs for enforcement of any fundamental right and *for any other purpose*. The Supreme Court, under Article 32 of the Constitution of India, is also empowered to issue writs for enforcement of fundamental rights

11

Remission of Duty and Destruction of Goods

11.1 Statutory provisions

Section 5 of the Central Excise Act, 1944 empowers the Central Government to grant remission of duty leviable on excisable goods, where there is a deficiency in the quantity due to natural causes. Rule 21 of the Central Excise Rules, 2002 provides for remission of duty in certain situations.

Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods as specified in the corresponding entry in the said Table, subject to such conditions as may be imposed by him by order in writing. The term "Commissioner" shall be substituted depending upon the liability, as given in the Table below. The competence to supervise destruction of excisable goods claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal has also been specified in column 4 of the said Table. Destruction shall be carried on only after the competent officers have passed the order for remission.

S.No.	Competent Central Excise Officer	Amount of duty empowered to be remitted
1.	Commissioner	Without limit, but normally any amount exceeding ₹ 5,00,000
2.	Additional/Joint Commissioner	₹ 1,00,000 to ₹ 5,00,000
3.	Deputy/Assistant Commissioner	₹ 10,000 to ₹ 1,00,000
4.	Superintendent	Below ₹ 10,000
5.	Inspector	None

The proper officer may not demand duty (remit duty) due on any excisable goods, including 'tea', claimed by the manufacturer as unfit for consumption or marketing provided the goods are destroyed irrecoverably under the supervision of the proper officer, and subject to the procedure, specified hereinafter.

The remission of duty can be done only in cases where goods have been lost or destroyed by natural causes or by unavoidable accident. If the goods are destroyed by accident which could

have been avoided in such circumstances remission of duty cannot be done. For example, goods were destroyed by fire. Such fire occurred due to short circuit. The arrangements for safety and security of goods were not proper to prevent the fire. The fire could have been avoided if proper safety measures were in place. Hence, the remission of duty cannot be done.

11.2 Procedure for destruction of goods and remission of duty

The procedure to be followed for destruction of goods and remission of duty thereon shall be, as follows:

(i) A manufacturer desiring to destroy and seek remission of duty in respect of the excisable goods manufactured in his factory on the grounds that the said goods have been rendered unfit for consumption or for marketing, will make an application in duplicate to the proper officer indicating complete details of the goods and reasons for destruction, along with the proof that the goods have become unfit for consumption or for marketing such as report of chemical test or any other test, conducted by a Government recognised laboratory.

(ii) The application will be quickly processed by the said Officer. In case the he is competent to allow destruction and remission (in terms of para 11.1 above) he will proceed to take necessary action at his level.

(iii) The officer will scrutinise the application and based upon the information given by the assessee, if found in order, allow destruction of goods and remission of duty.

(iv) Where only physical verification is required, the same may be conducted by the remission granting authority (proper officer), as specified above and upon his satisfaction, destruction of goods and remission of duty may be allowed.

(v) In case of any doubts, the competent authority may, for reasons to be recorded in writing, order for drawing of samples and its testing by the Central Revenue Control Laboratory or the Customs House Laboratories or any other Government recognized laboratories where the aforementioned laboratories cannot test the samples. The testing of samples will be done in the manner specified in the Basic Excise Manual as modified by the instructions issued, if any, by the Board in this regard.

(vi) Ordinarily the views of the assessees that the goods are rendered unfit for consumption or marketing, should be accepted and necessary permission should be granted within a period of 21 days or earlier, if possible. Where samples are drawn, such permission should be granted within 45 days.

(vii) Actual destruction of goods should be supervised by the officers according to the monetary limits specified in column (4) of the Table in para 11.1 above. The date and time for destruction should be fixed by mutual convenience of the proper officer and the assessee and it should be ensured that the same date and time are not fixed for more than one assessee. It should also be ensured that there is no inordinate delay once permission for destruction and remission is granted.

(viii) The proper officer personally supervising the destruction will check the quantity by physical verification i.e. by weight or by counting or using appropriate method in case of

liquid, as the case may be, and the identity of goods by reference to relevant records and the application for destruction. The clearance of goods, within or outside the factory premises, shall be done on an invoice, indicating 'nil' duty. The order of the proper officer permitting destruction and remission should be quoted on the invoice.

(ix) As far as possible, destruction should be made inside the factory.

11.3 Manner of destruction

The goods intended and presented before the proper officer for destruction must be destroyed in such a manner that they become irretrievable as excisable commodity. The actual method of destruction will depend upon the nature of the goods to be destroyed. For example, matches, cotton, rayon and woollen fabrics, paper, cigar and cheroots may be destroyed by fire. Electric bulb and batteries may be destroyed by crushing into bits and scraps. Vegetable oils and vegetables products may be destroyed by mixing earth or kerosene and dumping into pits. Whatever method of destruction is adopted, the officer supervising the destruction will satisfy himself that the destroyed goods cannot be marketed. If there is any doubt with regard to the suitability of any particular method for destruction of any goods, the officer destroying the goods will refer the matter to his superior officer for orders.

The officer supervising the destruction must endorse under his signature the relevant records/ documents such as AR-1, invoices and other relevant factory records indicating the description and quantity of the goods destroyed in his presence at which time and on which day.

Immediately after destruction of the goods is completed, the officer supervising destruction must also send a certificate to his immediate superior, countersigned by the factory manager and the factory officer in the prescribed form.

Where excisable goods are manufactured out of inputs on which Cenvat credit was availed, proportionate credit should be reversed before destruction of such goods. Proportionate credit should also be reversed in respect of inputs that are destroyed as such.

There will be no limit on the executive powers of the Commissioners to order remission of duty in such cases. However, it has been decided that as a measure of administrative control and information, where the duty amount exceeds ₹ 5 lakhs in a case, the Commissioners will send a report to the Board giving sufficient details of such cases.

No remission of duty in case of theft should be allowed, since the goods are available for consumption somewhere. This Board's instruction is contrary to case laws decided.

11.4 Case laws pertaining to remission of duty

Particulars	Citation
1. 'Theft' or 'dacoity' cannot be called unavoidable accident within the meaning of the rule 49 of the erstwhile Central Excise Rules, 1944 (now rule 21 of the Central Excise Rules, 2002) and the goods lost in theft or dacoity would not be eligible for remission.	*Gupta Metal Sheets v. CCE 2008 (232) ELT 796 (Tri. - LB)*

2. Remission of duty possible in case of loss occurring due to de-bagging, shifting of concentrates, seepage of rain water, storage and loading on trucks, accounting method adopted.	*UOI v. Hindustan Zinc Limited 2009 (233) E.L.T. 61 (Raj.)*

12

Warehousing

12.1 Introduction

Under Central Excise Law, the removal of excisable goods from the factory requires the payment of duty. This provision can cause some difficulty especially when the goods may be ultimately consigned for export. Such removals are facilitated by warehousing provisions. Further, certain excisable goods are also allowed to be stored in warehouses without payment of duty.

This is also in line with the provisions of the section 4 of Central Excise Act, 1944, which defines place of removal as not only factory but also a warehouse or any other premises where goods have been allowed to be stored without payment of duty.

12.2 Statutory provisions

Rule 20 of the Central Excise Rules 2002, contains provisions relating to warehousing.

Under Rule 20(1), the Central Government is authorised to extend the warehousing provisions by issue of notifications for the goods specified therein. Warehousing allows removal of specified goods from factory to warehouse or from one warehouse to another warehouse without payment of duty.

The facility under sub-rule (1) is available subject to such conditions, including penalty and interest, limitations, including limitation with respect to the period for which the goods may remain in the warehouse, and safeguards and procedure, including in the matters relating to dispatch, movement, receipt, accountal and disposal of such goods, as may be specified by the Board [Sub-rule (2)].

The consignee is responsible for payment of duty on goods removed from factory to warehouse or one warehouse to another [Sub-rule (3)]. If the goods dispatched for warehousing or re-warehousing are not received in the warehouse, the liability to pay duty will be on the consignor [Sub-rule (4)].

At present, the warehousing provisions are applicable in respect of the following:

(a) (i) benzene, toluene and xylene (ii) Goods transferred to customs bonded warehouse as stores to a foreign going vessel or aircraft [The goods are cigarettes, aerated waters, prepared and preserved foods, aluminium foil covers, stainless steel cutlery, butter and cheese] – Vide *Notification No.17/2004 CE(NT) dated 04.09.2004*

(b) Goods removed by exporters who are Status Holders, foreign departmental stores of repute and the automobiles manufacturers who have signed MOU with DGFT for

subsequent exports under rule 18 or 19 of the Central Excise Rules, 2002 – Vide *Notification No.46/2001 CE(NT) dated 26.06.2001 as amended*

(c) Excisable goods removed without payment of duty for storage in godown/retail outlet of a Duty Free Shop in the Departure Hall/Arrival Hall of International Airport, appointed/licensed as 'warehouse' under sections 57 or 58 of the Customs Act, 1962 and for sale therefrom, against foreign exchange to passengers going out of India or to the passengers or members of crew arriving from abroad – Vide *Notification No. 7/2013 CE (NT) dated 23.05.2013*

12.3 Warehousing

The procedure for warehousing and export warehousing is given by the Board in its guidelines issued in the form of CBEC's Excise Manual of Supplementary Instructions 2005. The salient features of the guidelines are discussed in the subsequent pages.

Facility of warehousing of excisable goods without payment of duty has been provided in respect of certain specified commodities by *Notification No.17/2004 CE(NT) dated 4th September, 2004.*

Central Board of Excise and Customs vide *Circular No. 579/16/2001 CX dated 26.06.2001* has also specified detailed procedure including the conditions, limitations and safeguards for removal of excisable goods from warehouse.

12.3.1 Place of registration of warehouse: The Commissioner of Central Excise will specify the places under his jurisdiction where warehouse can be registered, by issuing Trade Notice. Any person desiring to have warehouse will get himself registered under the provisions of Rule 9 of the said Rules.

12.3.2 Procedure for warehousing of excisable goods removed from a factory or a warehouse

1. The consignor (i.e. the manufacturer or the registered person of the warehouse) shall prepare an application for removal of goods from a factory or a warehouse to another warehouse in quadruplicate in the specified Form.
2. The consignor shall also prepare an invoice in the manner specified in Rule 11 of the said Rules in respect of the goods proposed to be removed from his factory or warehouse.
3. The consignor shall send the original, duplicate and triplicate application and duplicate invoice along with the goods to the warehouse of destination.
4. The consignor shall send quadruplicate copy of the application to the Superintendent–in-charge of his factory or warehouse within twenty-four hours of removal of the consignment.
5. On arrival of the goods at the warehouse of destination, the consignee (i.e. the registered person of the warehouse who receives the excisable goods from the factory or a warehouse) shall, within twenty-four hours of the arrival of goods, verify the same with all the three copies of the application. The consignee shall send the original application to

the Superintendent-in-charge of his warehouse, duplicate to the consignor and retain the triplicate for his record.

6. The Superintendent-in-charge of the consignee shall countersign the application received by him and send it to the Superintendent-in-charge of the consignor.

7. The consignor shall retain the duplicate application duly endorsed by the consignee for his record.

12.3.3 Failure to receive a warehousing certificate: The consignor should receive the duplicate copy of the warehousing certificate, duly endorsed by the consignee, within ninety days after the removal of the goods. If the warehousing certificate is not received within ninety days of the removal or such extended period as the Commissioner may allow, the consignor shall pay appropriate duty leviable on such goods.

If the Superintendent-in-charge of the consignor of the excisable goods does not receive the original warehousing certificate, duly endorsed by the consignee and countersigned by the Superintendent-in-charge of the consignee, within ninety days of the removal of the goods, weekly reminders must be issued by him to the Superintendent-in-charge of the consignee. If despite such reminders the original warehousing certificate is not received within a further period of sixty days after the expiry of the ninety days period, the Superintendent-in-charge of the consignor shall inform his Assistant Commissioner/ Deputy Commissioner who shall either secure a satisfactory proof of the goods having been duly received by the consignee or ensure that the duty of excise due on the goods not received at destination is recovered from the consignor.

12.3.4 Accountal of goods in a warehouse: The registered person of the warehouse shall maintain a register showing all entries in to and removals of the goods from his warehouse and shall indicate the value, quantity of the goods removed, their marks and numbers as well as the rate of duty and amount of duty involved. The processes carried out on the warehoused goods, if any, shall also be recorded.

The first and last pages of the register should be pre-authenticated by the owner of the warehouse or his authorised agent.

12.3.5 Responsibility of the registered person: The registered person of the warehouse shall be responsible for due reception of the goods in to the warehouse and delivery therefrom including their safety during the period they are lodged in the warehouse.

The registered person shall be responsible for the payment of penalty or interest leviable in respect of the goods which are warehoused as per the provisions of the Central Excise Act, 1944 and the rules made thereunder.

12.3.6 Period of warehousing: Warehousing of goods shall initially be allowed for a period upto six months, which may be further extended by the Assistant/Deputy Commissioner, each extension being for a period not exceeding six months, subject to the verification that the goods have not deteriorated in quality. The maximum period, for which goods may be left in the warehouse in which they are deposited, or in any warehouse to which such goods have been removed, shall be three years from the date on which such goods were first warehoused.

Excisable goods shall be deemed to be cleared for home consumption on expiry of the warehousing period including the extensions granted, if any. Duty and interest @ 24% per annum shall be charged on such deemed removal.

12.3.7 Revoked or suspended registration of a warehouse: If the registration of a warehouse is revoked or suspended, the excisable goods lodged therein shall either be cleared for home consumption on payment of duty and **interest @ 24% per annum** or shall be removed to another warehouse without payment of duty.

12.3.8 Warehouse to store goods belonging to the registered person: A warehouse shall be used solely for storing excisable goods belonging to the registered person of the warehouse alone. He shall not admit or retain in the warehouse any excisable goods on which duty has been paid.

The Commissioner of Central Excise having jurisdiction over the warehouse may permit storage of excisable goods along with the excisable goods belonging to another manufacturer.

The Commissioner of Central Excise having jurisdiction over the warehouse may permit the registered person of the warehouse to store duty paid excisable goods or duty paid imported goods along with non-duty paid excisable goods in the warehouse.

12.3.9 Registered person's right to deal with the warehoused goods: The owner of the warehouse may sort, separate, pack or re-pack the goods and make such alterations therein as may be necessary for the preservation, sale or disposal thereof.

12.4 Export warehousing

In pursuance of sub-rule (1) of rule 20 of the Central Excise Rules, 2002 (hereinafter referred to as the 'said Rules') the Board has issued *Notification No. 46/2001 CE (NT) dated 26.06.2001* whereby the warehousing provisions have been extended to all excisable goods specified in the First Schedule to the Central Excise Tariff Act, 1985 intended for storage in a warehouse registered at such places as may be specified by the Board and export therefrom.

In pursuance of the above-mentioned notification, the Board has also specified by *Circular No. 581/18/2001-CX dated 29.06.2001* the places and class of persons to whom the provisions of the *Notification No. 46/2001 CE (NT) dated 26.06.2001* shall apply. In the same Circular, the Board has specified the conditions (including interest), limitations, safeguards and procedures.

12.4.1 Eligibility: The facility of export warehousing is available to the following exporters and places, namely: -

1. Exporters: The exporters who are Status Holders, the foreign departmental stores of repute and the automobiles manufacturers who have signed Memorandum of Understanding with Directorate General of Foreign Trade in the Ministry of Commerce and Industry.

2. Places: The warehouses may be established and registered in Ahmedabad, Bangalore, Kolkata, Chennai, Delhi, Hyderabad, Jaipur, Ludhiana, Mumbai, District of Pune and Raigad, District of East Midnapore, District of Kancheepuram.

12.4.2 Conditions of export warehousing: Where any goods are diverted to home consumption from the warehouse, interest shall be charged at the rate of twenty four per cent per annum on the duty payable, calculated from the date of clearance from the factory of production or any other premises approved by the Commissioner, till the date of payment of duty and clearances.

The exporter shall furnish a general Bond (B-3) under Rule 19 of the said Rules read with notifications issued thereunder, backed by twenty five per cent security of the bond amount in the manner specified in para 12.4.4.

12.4.3 Registration: The exporter shall make a written request along with application for registration under Rule 9 to the Commissioner for being allowed to establish a export warehouse under this provision. The Commissioner may cause an enquiry to be made in respect of the security of the premise for warehouse indicated by the exporter in the application. If found in order, the Commissioner will accord his approval subject to such directions, terms and manners as he may specify and forward the application to the jurisdictional Superintendent of Central Excise through the jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise (having jurisdiction over the premise) within seven working days of the receipt of the application.

The registration certificate containing registration number will be issued by the jurisdictional Superintendent of Central Excise immediately on receipt. Procedure relating to registration will be same as notified in *Notification No.35/2001-Central Excise (N.T.) dated 26.6.2001*.

12.4.4 Execution of bond : Every exporter registered in the aforesaid manner, shall execute before the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the warehouse a general bond under Rule 19 of the said Rules for export of goods from the warehouse in the B-3 Bond (General Security) Format prescribed. The exporter availing this scheme shall be required to furnish security equal to 25% of the bond amount. In case any bank guarantees are furnished, it shall be the sole responsibility of the exporter to renew its validity.

Where the exporter is a manufacturer and a Status Holder with a clean track record, the requirement to furnish security equal to 25% of the bond amount shall be replaced by the requirement of furnishing an LUT initially for a period upto six months which may be extended by a further period not exceeding six months. Further extensions in the warehousing period in terms of *Circular No. 579/16/2001 CX dated 26.06.2001* shall be allowed to such exporter only on furnishing security of 25% of the bond amount.

A 'Running Bond Account' will be opened in the format specified. This register shall be maintained by the exporter in the warehouse and shall be made available to the officer-in-charge or officers of Internal Audit for scrutiny and checking.

12.4.5 Removal of goods to warehouse: For removal of excisable goods from a factory or any other premise approved by the Commissioner to a warehouse, procedure laid down in *Circular No. 579/16/2001 CX dated 26.6.2001* issued under Rule 20 of the said Rules will be applicable. It is clarified that the *Notification No. 46/2001 CE(NT) dated 26.6.2001* do not cover removal from one warehouse to another.

The Central Excise Officer in-charge of the warehouse will issue certificate of removal in duplicate in the Form CT-2 specified indicating details of the general bond executed by the exporter. The CT-2 shall bear pre-printed serial numbers running for the whole financial year beginning on the 1st April of each year. The said officer will issue twenty five CT-2 certificates at a time, signing each leaf with the official stamp. More certificates can be issued if it is so requested by the exporter on the grounds of large number of procurements. The exporter will fill up the relevant information in CT-2. After making provisional debit in the Running Bond Account, he will indicate the same in the CT-2. One copy of CT-2 will be forwarded to Officer-in charge of the warehouse. One copy will be sent to the consignor and one copy will remain with the exporter.

The consignor will prepare an application for removal in the Form specified in Annexure-IV (hereinafter referred to as ARE-3) and an invoice (under Rule 8 taking into account CT-2 certificate) and follow the procedure specified in *Circular No. 579/16/2001-CX dated 26.6.2001* issued under Rule 20. The serial number of the corresponding CT-2 shall be mentioned on the top of the each copy of ARE-3. Any nominal variations between the provisional debit indicated in the CT-2 and the actual duty involved in the goods removed as indicated in ARE-3, can be ignored. Immediately on receipt of goods, the provisional debit shall be converted into actual debit on the basis of the details mentioned in ARE-3.

The officer-in-charge of the warehouse will countersign application and despatch to the Range Office having jurisdiction over the factory / other approved premise of removal within one working day of receipt of the application. He will make suitable entry in his own record accordingly.

The exporter warehouse owner shall maintain private record (Warehousing Register) containing information relating to details of ARE-3 and invoice, date of warehousing certificate, description of goods received including marks and numbers, quantity, value, amount of duty, details of operation in the warehouse and new packages and their marks and number, clearance from the warehouse for export (ARE-1 No., Invoice No., quantity, value, duty) and clearance for home consumption. They shall produce this Register to the Central Excise Officers in-charge of the warehouse whenever required.

12.4.6 Receipt and storage of goods in warehouse: Receipt of goods will be governed by the procedure specified *Circular No. 579/16/2001-CX dated 26.6.2001* issued under rule 20.

Ten percent of the consignments, subject to minimum of two, received in a month will be randomly selected, spread over the entire month, for verification by officer-in-charge after the receipt of the written intimation.

Goods brought under the cover of each ARE-3 shall be stored separately or proper accountal shall be maintained, till these are exported or diverted for home-consumption.

12.4.7 Packing, re-packing, labelling or re-labelling within the warehouse: The operations of packing, re-packing, labelling or re-labelling in relation to excisable goods received and stored in the warehouse are be governed by the procedure specified under Rule 20. Suitable entries must be made in the Export-Warehouse register. In case of non-reconciliation of quantity, after adjusting any wastage or refuse, the differential quantity shall be treated as unaccounted and action for recovery of duty will be initiated.

The exporter may procure packing or labelling material and bring the same into the warehouse under the warehousing procedure itself. No duty paid goods will be permitted to be brought into the warehouse. However, an exporter desirous of bringing duty paid packing material required for packaging of other material in the warehouse, may submit a written request to the jurisdictional AC/DC of the Division, who may grant the permission for a period of one year at a time. The exporter will maintain proper account of such goods and shall not claim any export benefit like rebate of duty paid on the said material.

Where the process of packing, repacking, labelling or relabelling amounts to manufacture in terms of the provisions of the Central Excise Tariff Act, 1985, the goods permitted for clearance for home consumption shall be assessed accordingly.

12.4.8 Goods supplied by a SSI unit exempted from registration: An SSI Unit exempted from registration under Rule 9 of the said rules will also prepare ARE-3 against CT-2 except that he will use his own invoice. Registration under Rule 9 shall not be insisted. The Warehousing Certificate forwarded to the Range Office having jurisdiction over such SSI Unit shall be retained in the office and will be tallied with the details submitted by the SSI Unit in the quarterly statement. The procedure to be followed is based on Board's *Circular No. 212/46/96-CX dated 20th May, 1996*, which continues to be applicable under the said Rules. The clearances on those ARE-3 in respect of which Warehousing Certificate is not received within ninety days of removal or such extended period as the Commissioner may allow, will be treated as clearances for home-consumption. If the Warehousing Certificate is subsequently produced, the clearances, which were treated as "clearance for home consumption" as aforesaid, shall be expunged.

12.4.9 Clearance of goods for export outside India: For the export of goods from the warehouse, the procedure relating to preparation of application for export (ARE.1), examination and sealing, acceptance of proof of export etc. shall be governed by *Notification No. 42/2001-Central Excise (N.T.) dated 26.6.2001* and instructions applicable for this notification.

The requisite copies of application will be filed with the Deputy Commissioner or Assistant Commissioner having jurisdiction over the warehouse and with whom the Bond was executed, for acceptance of proof of export and issue of a certificate to this effect.

The credit in Running Bond Account shall be made by the exporter on the basis of the application (ARE.1) duly endorsed by Customs at the place of export evidencing that the goods have actually been exported. The exporter will submit list of ARE.1 along with the date of export for the goods exported in each month, within six months of the removal from the warehouse and the original copies of the respective ARE.1 duly certified by Customs authorities that the goods have actually been exported (containing Pass for Shipment Order). The exporter shall be liable to pay duty with interest where such proof of export is not available with him within six months from the date of removal from the warehouse.

The Superintendent in-charge of the warehouse is empowered to issue certified attested copies of ARE.1 (more than one copies may be required by exporter as one application (ARE.1) may consist of goods of several ARE-3s) and hand over to the exporter for forwarding to the factory whose goods were exported so that such factories can avail other export

benefits, such as refund of CENVAT credit accumulated on account of export in terms of the CENVAT Credit Rules, 2004. This refund will be given only after goods covered on an ARE-3 is entirely exported. In case of any diversion to home-consumption, refund will be reduced on *pro-rata* basis. For the sake of clarification, it is stated that the removal from the factory of production to export warehouse on ARE-3 is 'removal under bond for export'. Thus, the manufacturer shall not be asked to reverse CENVAT credit under rule 6 of CENVAT Credit Rules, 2004.

On request from exporter, copies of proof of export may be sent directly, by post to the Range Office having jurisdiction over the factory or handed over to the exporter in sealed cover for delivery to such Range Office.

Photocopies of the Shipping Bill/ Export Application and Bill of Lading duly attested by the Superintendent in-charge of the Warehouse along with certificate of proof of export should be accepted as valid documents for the purposes of refund of accumulated credit under the Cenvat Credit Rules, 2004 on account of exports without payment of duty. The proof of export received directly or in official sealed cover from the Superintendent in-charge of the warehouse may be used to verify the authenticity.

Where neither the duplicate copy of ARE.1 nor the original copy of ARE-1 duly attested at the port of export, are made available within the time stipulated period of six months, it shall be presumed that export of goods cleared from warehouse has not taken place. The demand shall be raised by the Deputy/Assistant Commissioner having jurisdiction over the warehouse for non-fulfilment of the conditions of bond executed by the exporter.

12.4.10 Diversion of goods for home consumption: Goods can be diverted for home-consumption from the warehouse with the permission of the jurisdictional Deputy/Assistant Commissioner of Central Excise. The clearance shall be effected on invoice on payment of duty, interest and any other charges on TR-6 Challans and after making necessary entries in the export warehouse register maintained by the exporter in the warehouse. Credit will be permitted in the Running Bond Account equivalent to the duty involved in the goods so diverted, which shall not exceed amount of duty debited on the basis of ARE-3 on which such goods were received in the warehouse. If entire quantity is not diverted, calculation shall be done on pro-rata basis.

Goods can be diverted for home-consumption even after the clearance from the warehouse on ARE.1. For cancellation of documents, provisions of *Notification No. 46/2001 CE(NT) dated 26.6.2001* shall be followed. The intimation shall be given to Deputy/Assistant Commissioner having jurisdiction over the warehouse. Credit in Running Bond Account will be permitted in the same manner as mentioned above.

Where the goods are diverted for home-consumption in full or in part the exporter shall be liable to pay interest @ 24% per annum on the amount of duty payable on such goods from the date of clearance from the factory of production or any other premises approved, till the date of payment of duty and clearance.

12.4.11 Waiver of physical warehousing in case of exigency: The officer- in-charge of the warehouse may permit waiver from physical warehousing (i.e. permitting export without

physically storing the goods in the warehouse) where exporter so requests in writing provided all the formalities relating to record-keeping shall be completed in usual manner with suitable record in the Warehousing Register: 'warehousing waived'. This permission will be given in exceptional cases where delay occurred due to delayed supply from the factory or longer transit-period or requirement of immediate export or any other genuine reasons, provided the entire consignment is entered for export in the original packing. Such cases of permission granted will be reported to Superintendent-in-charge of the warehouse at the earliest.

12.4.12 Provision of accommodation for the officer: The exporter shall provide adequate office accommodation and furniture for the Officer deployed for examination and supervision, in the warehouse. Where the exporter is willing to bear the cost of the posting of Officers on "cost recovery basis", the Commissioner, depending upon the administrative feasibility, may consider the deployment.

13

Exemption Based on Value of Clearances (SSI)

13.1 Introduction

Small Scale Units (SSI) are given relief under the Central Excise Law by way of exemption notification. *Notification No. 8/2003 dated 01.03.2003* provides an exemption upto the turnover of ₹ 150 lakh whose turnover was less than ₹ 400 lakh in the preceding financial year. The manufacturer availing the exemption under the said notification has to satisfy certain conditions for availing the benefit and the goods manufactured should be covered under this notification. This is a beneficial notification where all entrepreneurs irrespective of their investment are eligible to avail the benefit.

13.2 Meaning of Small Scale Units

Small Scale Units are not defined in the Central Excise Act 1944 or rules made thereunder. The Small Scale Unit is defined in Industries (Development and Regulation) Act, 1951 for the purpose of exempting them from Registration under that Act. The definition basically takes the investment made on the plant and machinery by any industries as the basis for determining the small scale industries. However it would be pertinent to note that the definition given under the said Act is not applicable for the purpose of getting the benefit of exemption under Central Excise. The basis for ascertaining the Small Scale Units as given in the notification mentioned in the earlier paragraph is the value of the clearances made by any units in the previous financial year. Therefore, the definition that has to be adopted for ascertaining the Small Scale Units is not as understood generally by the industry and other sectors like banking, but has to be ascertained on the basis of the value of clearances(i.e. ₹ 400 lakh).

13.3 Products covered under the SSI exemption notification

The exemption to be given to SSIs is not applicable for all the goods. The benefit of the said notification is restricted to the products listed in the notification. The notification covers most of the products to fulfill the intention of the notification. However, tobacco products, pan masala, watches, matches, some textile products etc. are specifically excluded from SSI exemption. The manufacturer has to ascertain the classification of the products before making a decision to opt for the benefit under this notification.

13.4 Eligibility

The units whose value of clearances computed in accordance of the notification does not exceed ₹ 400 lakh (4 crore) in the previous financial year are eligible for the benefit of the *Notification No. 8/2003*.

For example, if ABC Ltd. wants to claim the benefit of the notification in the year 2015-2016, then it has to see whether the clearances of the year 2014-2015has exceeded ₹ 4 crore. In the same example, if ABC Ltd. has started up the business only in the year 2015-2016, then it is entitled for the benefit of the said notification for the year 2015-2016 as its previous year clearances are nil (even with the fact that the company has not started the operation).

The limit will be calculated by taking into account the clearances in respect of one manufacturer from one or more factories or from a factory by one or more manufacturers. There are many issues and cases on the issue which is popularly known as clubbing of clearances. The basic idea behind this is to curtail the creation of dummy units for availing the benefit of the notification for each such unit.

Exempted units whose turnover is more than prescribed limit (called specified limit) have to file a declaration in prescribed form with Assistant Commissioner of Central Excise and should obtain a dated acknowledgement. Such declaration is filed only once in the lifetime of the assessee and not every year. The 'specified limit' for this purpose is ₹ 60 lakh below exemption limit. In present provisions this limit works out to be ₹ 90 lakh (₹ 150 lakh – ₹ 60 lakh). Therefore, the declaration shall be filed by units whose turnover exceeds ₹ 90 lakh. Small units whose turnover is below the specified limit (₹ 90 lakh) per annum shall not file any declaration at all.

The benefit under this notification is only an option to the manufacturer, and if the manufacturer wishes to pay normal duty availing CENVAT facility, he can do so. The manufacturer has to intimate his option with the following details either to Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise marking a copy to Superintendent of Central Excise providing the following details:–

(a) Name and address of the manufacturer;

(b) Location of the factory/factories;

(c) Description of the inputs used in the manufacture;

(d) Description of goods manufactured;

(e) Date on which this option is exercised;

(f) Aggregate value of clearances of goods (excluding the value of clearances as discussed in the para 13.7);

Special provision in respect of textile products: In respect of textile products falling under headings 61, 62 or 63, the principal manufacturer (person on whose behalf the goods are manufactured by job-workers) is liable to pay the duty under rule 4(1A) of Central Excise Rules, 2002 and not the job worker. Therefore, such person is considered as manufacturer and is eligible for SSI exemption. Presently, only branded readymade garments are liable to excise duty.

13.5 Relaxation in the duty

The exemption given vide *Notification No. 8/2003* can be summarised in the following table:

Value of clearances in ₹ lakh in a financial year	Duty Structure
0- 150 lakh	0%
>150 lakh	Normal duty

13.6 Availability of CENVAT credit

13.6.1 CENVAT credit on inputs: In respect of units availing the benefits of *Notification No. 8/2003* (i.e. full exemption), no CENVAT credit is available in respect of inputs upto clearances of ₹ 150 lakh.

However, CENVAT credit will be available on the inputs used in the manufacture of the specified goods bearing the brand name or trade name of another person, which are ineligible for the grant of SSI exemption.

13.6.2 CENVAT credit on capital goods

(a) CENVAT credit on capital goods can be availed, but utilized only after clearances of ₹ 150 lakh.

(b) An assessee eligible to avail SSI exemption is allowed to take the CENVAT credit in respect of capital goods for the whole amount of the duty paid on such capital goods in the same financial year.

13.7 Value of clearances to be excluded for the calculation of limit of ₹ 150 lakh & ₹ 400 lakh

13.7.1 Value of clearances to be excluded for the calculation of limit of ₹ 150 lakh: For the purposes of determining the first clearances upto an aggregate value not exceeding ₹ 150 lakh made on or after the 1st day of April in any financial year, the following clearances shall not be taken into account:

(a) Clearances exempt from the excise duty: Clearances, which are exempt from the whole of the excise duty leviable thereon (other than an exemption based on quantity or value of clearances) under any other notification or on which no excise duty is payable for any other reason.

(b) Clearances bearing the brand name or trade name of another person: Clearances bearing the brand name or trade name of another person, which are ineligible for the grant of this exemption.

(c) Clearances of intermediate goods/goods captively consumed in case the final product is eligible for SSI exemption: Clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods. Here, specified goods are those goods, which are eligible for SSI concession.

(d) Export clearances: Clearances meant for exports.

13.7.2 Value of clearances to be excluded for the calculation of limit of ₹ 400 lakh: For the purposes of determining the aggregate value of clearances of all excisable goods for home consumption, i.e. ₹ 400 lakh, the following clearances shall not be taken into account:

(a) Clearances to FTZ/SEZ/100% EOU/EHTP/STP/UNO/International organization :

Clearances of excisable goods without payment of duty-

(i) to a unit in a free trade zone (FTZ); or

(ii) to a unit in a special economic zone (SEZ); or

(iii) to a hundred percent export-oriented undertaking (100% EOU); or

(iv) to a unit in an Electronic Hardware Technology Park or Software Technology Park (EHTP/STP); or

(v) supplied to the United Nations Organisation (UNO) or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under *Notification No.108/95- C.E. dated 28.08.1995*.

(b) Clearances bearing the brand name or trade name of another person : Clearances bearing the brand name or trade name of another person, which are ineligible for the grant of this exemption;

(c) Clearances of intermediate goods/goods captively consumed in case the final product is eligible for SSI exemption: Clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods. Here, specified goods are those goods, which are eligible for SSI concession.

(d) Clearances exempt under specific job work notifications : Clearances which are exempt from the whole of the excise duty leviable thereon under specific job work notifications, viz. *Notification No. 214/86-C.E., dated 25.03.1986 or No. 83/94-C.E., dated 11.04.1994 or No. 84/94-C.E., dated 11.04.1994.*

(e) Export clearances: Clearances meant for exports.

Value for the purpose of the SSI notification (8/2003) would mean value fixed under section 4 or 4A or tariff value fixed under section 3(2) of the Act.

Points which merit consideration

1. Export to Nepal and Bhutan is not considered as exports. It is taken as clearance for home consumption. Thus, export turnover of Nepal and Bhutan shall be included for determining the limit of ₹ 150 lakh as well as ₹ 400 lakh.
2. For computing the turnover of ₹ 150 lakh, the clearances of goods exempted under any other notification is to be excluded. It is important to note here that while computing the limit of ₹ 400 lakh, turnover of goods exempted under any other notification (except clearance to FTZ, SEZ, 100% EOU, EHTP/STP, UN etc. and specific job work notifications) has to be included.

13.8 Important case laws on value of clearances

Decision	Citation
1. If manufacture of P&P medicines takes place on job work basis and not as a loan licencee, value of clearances of the two units would be clubbed	*Aldoc Pharmaceuticals v. CCE 1994 (74) E.L.T. 94 (T-NRB)*
2. Value of captive consumption not to be included even if final products are cleared.	*CCE v. Gadgets India Ltd.. 1994 (71) E.L.T. 835 (T-NRB)*
3. Value of clearances of branded goods to be excluded from value of clearances	*Akhil Pharma Pvt.Ltd. v. CCE 1996 (83) E.L.T. 385 (T-SRB)*
4. Value of clearances of gramophone records manufactured by one unit not to be clubbed with the value of cassettes cleared by another unit.	*CCE v. Saraswathi Stores 1995 (75) E.L.T. 538 (T-NRB)*
5. Value of clearances of return of processed fabrics under bond to originating factory not to be included in value of clearances	*Sangita Printers & Exporters v. CCE 1994 (73) E.L.T. 182 (T-NRB)*
6. Value of clearances would be arrived at under section 4 of the Act after deducting excise duty from cum duty price	*Padma Packages Ltd. v. CCE 1996 (17) RLT 883 (T-NRB)*
7. Total value of excisable goods shall exclude amounts of excise duty, sales tax and other taxes	*Mahavir Metal Mart v. UOI 1997 (90) E.L.T. 20 (SC)*

13.9 Brand Name

The notification denies the benefit of the exemption for clearances done on products which bear a brand name of another person. This means that such clearances would attract normal rate of duty. Brand name or trade name is defined in Explanation to Notification as any mark, symbol, monogram, label, signature or inventor word or writing which may or may not be registered. This brand or trade name must indicate a connection in the trade between the goods and the person using such mark or name.

Goods affixed with the brand name or trade name of a foreign person

In ***Namtech Systems Ltd. v. CCE 2000 (115) E.L.T. 238***, the Larger Bench of the Tribunal

held that when the goods are affixed with the brand name or trade name of a foreign person whether manufacturer or trader, the benefit of the exemption notification cannot be taken. It must however be noted that this decision will not apply to cases where the brand name is assigned as the Calcutta High Court decision in (d) above holds good.

13.9.1 Exceptions to the use of brand name: There are however the following exceptions given to the usage of brand name i.e. the benefit of exemption under Notification No. 8/2003 would be available in the following cases even if goods bear the brand name/ trade name of another person:

(a) Manufacturers of component/parts of any machinery/equipment/appliance for use as original equipment in the factory: Where the manufacturer manufactures component/parts of any machinery, equipment or appliance for use as original equipment in the factory even if such components have a trade name or brand name, the exemption would be available by following the procedure laid in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001. This provision is there to cater to the needs of ancillary units which manufacture components for big industrial units. Such ancillary units used to mark their goods with the name of the large unit and refer to a code number or product number. They were being denied the exemption on the ground that the code number or product number is a brand name. The Madras High Court in *BHEL Ancillary Association* v. *CCE* 1990 (49) E.L.T. 33 had held that this code number or product number would not constitute a brand name.

(b) Goods bearing the brand name of KVIC/NSIC/SSIDC etc.: When the goods bear a brand name of Khadi and Village Industries Commission (KVIC) or a State Khadi and Village Industry Board or National Small Industries Corporation (NSIC) or a State Small Industries Development Corporation (SSIDC) or a State Small Industrial Corporation, such goods are entitled to SSI exemption.

(c) House mark in respect of medicinal preparations: The Supreme Court has held in ***Astra Pharmaceuticals P Ltd. v. CCE 1995 (75) E.L.T. 214*** that in respect of medicinal preparations, the mark made by the manufacturers would be called a "house mark" and would not be the brand name. Therefore, the monograph which identifies a manufacturer's name would not be a brand name.

(d) Assignment of brand name: In the case of ***CCE v. ESBI Transmission Private Ltd. 1997 (91) E.L.T. 292***, the Division Bench of the Calcutta High Court held that if the brand name belonged to the foreign company, but the Indian company was given the exclusive right to use the same being the owner through assignment, then the benefits of the notification cannot be denied. The Tribunal decisions have also held that assignment of brand name is valid for availing the benefit of SSI exemption in the following cases:

(i) *Opus India* v. *CCE* 1992 (62) E.L.T. 447 (T)

(ii) Vikshara Trading and Investment P.Ltd. v. *CCE* 1996 (87) E.L.T. 499 (T)

(iii) *CCE* v. *Bigen Industries* 1999 (107) E.L.T. 213 (T)

(e) Raw materials bearing the brand name: When raw materials/inputs received by the SSI unit bear brand name of the manufacturer of raw material, SSI exemption is available as the brand name printed on raw material does not become brand name of the final product manufactured by SSI unit.

(f) Goods manufactured in rural area: When the goods bear the brand name of any person, such goods shall be eligible for SSI exemption if such goods are manufactured in a rural area.

> **Rural area** means the area comprised in a village as defined in the land revenue records, excluding –
>
> (i) the area under any Municipal Committee, Municipal Corporation, Town Area Committee, Cantonment Board or Notified Area Committee.
>
> (ii) any area that may be notified as an urban area by the Central Government or a State Government.

(g) The Larger Bench of the Tribunal in *Intertec* v. *CCE* 2001 (127) E.L.T. 609 (T-LB) has held that if the goods manufactured by the SSI unit fall outside paragraph 1 of the said notification, consequent to their being branded goods, payment of duty on such branded goods will not disentitle the other products from getting the benefits of the Notification.

(h) Account books, registers, writing pads and file folders: Account books, registers, writing pads and file folders falling under heading 4820 or 4821 of the First Schedule of the Central Excise Tariff are entitled to small scale exemption even if they bear a brand name or trade name whether registered or not, of another person.

(i) Packing materials: SSI exemption is available in case the specified goods are in the nature of packing materials and are meant for use as packing material by or on behalf of the person whose brand name they bear even if they bear the brand name of others.

For the removal of doubts, it is hereby clarified that **"packing material"** includes labels of all kinds.

Relevant case law: In the case of ***CCE, Trichy* v. *Rukmani Pakkwell Traders 2004 (165) E.L.T 481 (S.C.),*** it was held by the Supreme Court that if there is more than one registered mark in respect of the same trade mark, then merely because the other person has the same registered mark in some other goods would not preclude one owner from getting benefit of exemption. However, it was also held that the use of even a part of brand name of another person indicating a connection in course of trade would be sufficient to disentitle a claim for SSI exemption.

13.10 Clubbing of clearances

As per section 2(f) of the Central Excise Act, 1944 a manufacturer means not only a person who employs hired labour but also person who engages in production or manufacture on his own account. The words "on his own account" have caused considerable litigation. The question regarding who is a manufacturer has been often invoked to deny the benefit of exemption notifications.

The Department normally denies the benefit of the exemption notification on the ground that one manufacturer wants to split up one unit into various units to take advantage of Nil duty clearances upto ₹ 150 lakh in respect of each unit. It is the contention of the Department that there is considerable revenue loss when the manufacturer deliberately plans his affairs in this manner while continuing to exercise managerial control over all the units. Therefore, the Department denies the benefit of the exemption notification when they find common directors or common shareholders or common employees or common usage of facilities including funds.

The main aspects which lead to clubbing of clearances are as under:

a. reason to start is due to customers not willing to pay the excise duty;

b. beneficial financial interest in new unit which indicates financial flow back;

c. working in tandem and as one unit;

d. common procurement or sale (common products and sales force);

e. insufficient production/managerial capability;

f. common stock usage;

g. free processing facility;

The reasons for commencing investigation are same/adjoining location, same product, sharing of customers, same partners (beneficial interest), interest free advances, shared facilities, sharing of expenses and incomes etc.

On the other hand, judicial decisions have always stressed the point that unless there is a flow back of profits from all the other units to the parent unit in whose hands the turnover of all the units is clubbed, clubbing clearances would not be possible. Therefore, it would be imperative for the Department to prove that the other units are sham units and that there is a profit flow back to the manufacturer who has set up the various units. In fact, the Supreme Court in *Calcutta Chromotype Ltd*. v. *CCE* 1998 (99) E.L.T. 202 held that the principle that a company is a separate entity is not of universal application and in fit circumstances, the veil of incorporation can be lifted to see who is behind the actual operations. Though this decision pertains to who is a related person under section 4, the principles enunciated could well be applied here also.

A perusal of the case laws available on the subject clearly shows that the Tribunal has been reluctant to accept departmental view unless there is a profit flow back or common funding. However, no other generalisation can be made since each matter is to be decided based on the facts of the case.

13.11 Case laws relating to clubbing of clearances

Particulars	Citation
1. If one person owns a factory and is a partner in another factory, the production of all factories cannot be clubbed.	*AC* v. *Jayanthilal Balubhai & Ors*. 1978 (2) E.L.T. J317(SC)
2. Factors such as common location of factories, common expenses, common partners, common	*Jagjivandas & Co*. v. *CCE* 1985 (19) E.L.T. 441 (T) affirmed by Supreme

trade mark, sharing of machinery usage, mutual financial transaction without interest not enough to club clearances.	Court in 1989 (44) E.L.T. A24. **Authors note:** This is a landmark judgment often used by assessees.
3. Turnover of limited companies being independent not clubbable in the absence of financial flowback.	*Spring Fresh Drinks* v. *CCE* 1991 (54) E.L.T. 333 (T) [This case was maintained in *Collector v. Spring Fresh Drinks 1997 (92) ELT A70 (SC)]*
4. Common employees, proximity of factories, closeness of relationship are not sufficient to club clearances in the absence of flow back of profits.	*Renu Tandon* v. *UOI* 1993 (66) E.L.T. 375 (Raj)
5. When two units are functioning in the same Commissionerate and have been granted separate registrations and facility of job work under Rule 57F, turnover not clubbable.	*Nikhildeep Cables P. Ltd*. v. *CCE* 1994 (70) E.L.T. 273 (T)
6. Units separately incorporated with separate plant not clubbable because of few common directors or grant of interest free loans.	*Alpha Toyo Ltd*. v. *CCE* 1994 (71) E.L.T. 689 (T)
7. Manufacture of same products in factory as well as job workers factory not clubbable unless common control shown.	*CCE* v. *MM Khambatwala* 1996 (84) E.L.T. 161 (SC)
8. SSI units – Registration of SSI units/ undertakings by Director of Industries – Clubbing of units/ undertakings for computing investment in plant and machinery – A proprietor can be common if he is the same person. Similarly, a partner can be common if two firms are constituted with similar number of partners – Same is the position of a company having common director – If the number of partners / directors differs, then it cannot be said that the unit is set up with common partner or director.	*Kemtrode Pvt. Ltd.* v. *Joint Director (SSI), Govt. of Karnataka* 1999 (108) E.L.T. 616 (Kar.)
9. Two units, one owned in individual capacity and other as Karta of HUF. Both the units are having separate machineries, separate income-tax PAN No., separate sales tax, separate professional tax registration and separate electricity meters. No evidence to show that the two units are not independent. Clubbing of clearance does not apply	*CCEx., Ahmedabad, v. Arbuda Industries, 2008 (230) E.L.T. 159(ri.-Ahmd.)*
10. With regard to 'clubbing of clearances', it was held that demand based on two units having common Directors and one person looking after affairs of both and second unit which is not having complete	*CCE v. Superior Products 2008 (230) E.L.T. 3 (S.C.)*

machinery to manufacture final product, the impugned Tribunal order containing finding that accounts of both units managed separately and capital, premises, machinery, labour and operations separate cannot be interfered with since it is essentially a finding of fact and therefore Apex Court refused to interfere with such finding of fact.	
11. Where the Tribunal in its impugned order had held that both units as separate and independent, Apex Court held that such finding of facts cannot be interfered with as the Revenue further accepted Tribunal's decision in earlier similar proceedings of assessee, not justified to challenge same subsequently.	*CCE v. Shakti Tubes Ltd 2008 (231) E.L.T. 193 (S.C.)*
12. Maintenance of accounts of various units by a single person and at one office is not a ground for justifying clubbing. If different firms operated with its own machinery in separate premises leased from appellant, clubbing their clearances cannot be justified. A single security guard was in charge of security of all units in no way contributed to a finding that clearances of these units could be clubbed. Mutuality of interest, financial integrity among various units and unit of control are sine qua non for clubbing of clearance of units involved. The Units engaged in production and transactions are assessed to sales tax and income tax, hence entitled to be considered as independent units in their own right.	*Techno Device v. CCE 2009 (243) E.L.T. 79 (Tri. - Chennai)*
13. In absence of any finding of there being any common funding and financial flow-back, clubbing of clearances is not permissible, merely on the premise of familiarities between partners of units and other administrative commonalities	*Coimbatore Engineering Works v. CCE 2009 (239) E.L.T. 366 (Tri. - Chennai)*
14. In this case, both units had their premises in same block. Property tax, water charges and other charges relating to entire premises occupied by both the units paid by appellant. Office staff was common for both and salary paid by appellants. Products sold through a common marketing agent. It was held that the benefit of SSI exemption not available.	*Harnik Nutrients Pvt. Ltd. v. CCE 2009 (238) E.L.T. 235 (Bom.)*

14

Notifications, Departmental Clarifications and Trade Notices

It can be seen from the earlier chapters that the mechanism employed by the Ministry of Finance to effect changes in excise law and rules is through the issuance of Notifications. Further, the procedural requirement of the various provisions of the Central Excise Rules are laid down from time to time through issuance of Trade Notices by the individual Commissionerates.

14.1 Power of the Central Government to make rules

Section 37 of the Central Excise Act, empowers the Central Government to make rules to carry into effect the purposes of this Act. The rules may lay down the procedures governing several specific situations. A total of 38 different situations have been explicitly enumerated under section 37(2). Such rules may

1. provide for determining under section 4 the nearest ascertainable equivalent of the normal price;
2. having regard to the normal practice of the wholesale trade, define or specify the kinds of trade discount to be excluded from the value under section 4 including the circumstances in which and the conditions subject to which such discount is to be so excluded;
3. provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid;
4. provide for charging or payment of interest on the differential amount of duty which becomes payable or refundable upon finalisation of all or any class of provisional assessments;
5. provide for the remission of duty of excise leviable on any excisable goods, which due to any natural cause are found to be deficient in quantity, the limit or limits of percentage beyond which no such remission shall be allowed and the different limit or limits of percentage for different varieties of the same excisable goods or for different areas or for different seasons;
6. prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers

thereof, except on land or premises approved for the purpose;

7. prohibit absolutely, or with such exceptions, or subject to such conditions, as the Central Government thinks fit, the transit of excisable goods from any part of India to any other part thereof;

8. regulate the removal of excisable goods from the place where produced, stored or manufactured or subjected to any process of production or manufacture and their transport to or from the premises of a registered person, or a bonded warehouse, or to a market;

9. regulate the production or manufacture, or any process of the production or manufacture, the possession, storage and sale of salt and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, or of any other excisable goods, or of any component parts or ingredients or containers thereof;

10. provide for the employment of officers of the Government to supervise the carrying out of any rules made under this Act;

11. require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation;

12. provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses;

13. provide for the distinguishing of goods which have been manufactured after registration, of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act;

14. impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and the manner in which they shall be verified;

15. require that excisable goods shall not be sold or offered or kept for sale in India except in prescribed containers, bearing a banderol, stamp or label of such nature and affixed in such manner as may be prescribed;

16. provide for the issue of registration certificates and transport permits and the fees, if any, to be charged therefor:

    However, the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely:—

	₹
Licence to manufacture and refine saltpetre and to separate and purify salt in the process of such manufacture and refining	50
Licence to manufacture saltpetre	2
Licence to manufacture sulphate of soda (Kharinun) by solar heat in evaporating pans	10
Licence to manufacture sulphate of soda (Kharinun) by artifical heat ...	2
Licence to manufacture other saline substances ...	2

17. provide for the detention of goods, plant, machinery or material, for the purpose of exacting the duty, the procedure in connection with the confiscation, otherwise than under section 10 or section 28, of goods in respect of which breaches of the Act or rules have been committed and the disposal of goods so detained or confiscated;
18. provide for withdrawal of facilities or imposition of restrictions (including restrictions on utilisation of CENVAT credit) on manufacturer or exporter or suspension of registration of dealer, for dealing with evasion of duty or misuse of CENVAT credit;
19. authorise and regulate the inspection of factories and provide for the taking of samples, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods;
20. authorise and regulate the composition of offences against, or liabilities incurred under this Act or the rules made thereunder;
21. provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India including interest thereon (such power shall include the power to give retrospective effect to rebate of duties on inputs used in the export goods from a date not earlier than the changes in the rates of duty on such inputs);]
22. provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods;
23. provide for the giving of credit of sums of money with respect to raw materials used in the manufacture of excisable goods;
24. provide for charging and payment of interest as the case may be, on credit of duty paid or deemed to have been paid on the goods used in, or in relation to the manufacture of excisable goods where such credit is varied subsequently;
25. exempt any goods from the whole or any part of the duty imposed by this Act;
26. provide incentives for increased production or manufacture of any goods by way of remission of, or any concession with respect to, duty payable under this Act;
27. define an area no point in which shall be more than one hundred yards from the nearest

point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which saltpetre is manufactured or refined, and regulate the possession, storage and sale of salt within such area;

28. define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area;

29. authorise the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) or Principal Commissioners/ Commissioners of Central Excise appointed for the purposes of this Act to provide by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section;

30. provide for the publication, subject to such conditions as may be specified therein of names and other particulars of persons who have been found guilty of contravention of any of the provisions of this Act or of any rule made thereunder

31. provide for the charging of fees for the examination of excisable goods intended for export out of India and for rendering any other service by a Central Excise Officer under this Act or the rules made thereunder;

32. specify the form and manner in which application for refund shall be made under section 11B;

33. provide for the manner in which money is to be credited to the Fund;

34. provide for the manner in which the Fund shall be utilised for the welfare of the consumers;

35. specify the form in which the account and records relating to the Fund shall be maintained;

36. specify the persons who shall get themselves registered under section 6 and the manner of their registration.;

37. provide for the lapsing of credit of duty lying unutilised with the manufacturer of specified excisable goods on an appointed date and also for not allowing such credit to be utilised for payment of any kind of duty on any excisable goods on and from such date.

38. provide for credit of service tax paid or payable on taxable services used in, or in relation to, the manufacture of excisable goods.

39. provide for the amount to be paid for compounding and the manner of compounding of offences under section 9A.

Sub-section (3) of section 37 provides that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding ₹ 5000.

As per sub-section (4), the Central Government, without prejudice to the provisions of section 9, in making rules may provide that if any manufacturer, producer or licensee of a warehouse:

(a) removes any excisable goods in contravention of the provisions of any such rule, or

(b) does not account for all such goods manufactured, produced or stored by him, or

(c) engages in the manufacture, production or storage of such goods without having applied for the registration required under section 6, or

(d) contravenes the provisions of any such rule with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding the duty leviable on such goods or ***₹ 5,000*** whichever is greater

The Central Government may make rules to provide for the imposition of penalty upon any person who acquires possession of, or is in any way concerned in

(i) transporting,

(ii) removing,

(iii) depositing,

(iv) keeping,

(v) concealing,

(vi) selling or purchasing, or

in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation. Such penalty shall not exceed the duty leviable on such goods or ***₹ 5,000*** whichever is greater [Section 37(5)].

14.2 Power of the Central Government to empower Central Excise Authorities

In addition to section 37, section 37A authorises the Central Government, by issuance of a notification, to empower any of the excise authorities, from the Board to the Assistant Commissioner, to exercise such of those powers as may be delegated by the Central Government. In other words, the Central Government has unfettered power to delegate its powers to the authorities specified in section 37A.

14.3 Emergency power of the Central Government under Central Excise Tariff Act, 1985 to increase the duty

The Tariff Act with its two schedules is an Act of Parliament and can be amended only by Parliament. This is usually done through the Finance Bill in the Annual Budget. Any increase in the duties proposed in the Finance Bill will have immediate effect (from the midnight of the Budget Day). Any decrease will have effect only after the bill is enacted. However, the Government has the power to grant exemption from the whole or part of the duty, by notification as per Section 5A of the Central Excise Act, 1944. So whenever duty is reduced in the Budget, it is normally given effect to by an exemption notification.

Generally, the Government increases the duty only through the Finance Bill. However, as per Section 3 of the Central Excise Tariff Act, the Government also has emergency powers to increase the duty by amending the rates in the First and Second Schedules, subject to certain

conditions. This is only an emergency power and is rarely used. Section 3 of CETA provides that:

Where, in respect of any goods, the Central Government is satisfied that the duty leviable thereon under section 3 of the Central Excise Act, 1944 should be increased and that circumstances exist which render it necessary to take immediate action, the Central Government may, by notification in the Official Gazette, direct an amendment of the First Schedule and the Second Schedule to be made so as to substitute for the rate of duty specified in the First Schedule and the Second Schedule in respect of such goods, -

(i) in a case where the rate of duty as specified in the First Schedule and the Second Schedule as in force immediately before the issue of such notification is nil, a rate of duty not exceeding fifty per cent *ad valorem* expressed in any form or method;

(ii) in any other case, a rate of duty which shall not be more than twice the rate of duty specified in respect of such goods in the First Schedule and the Second schedule as in force immediately before the issue of the said notification.

However, the Central Government shall not issue any notification for substituting the rate of duty in respect of any goods as specified by an earlier notification issued under these provisions by the Government before such earlier notification has been approved with or without modifications.

"Form or method", in relation to a rate of duty of excise, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty may be levied.

Every notification under the above provisions shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification. However, if the Parliament is not sitting the notification shall be placed within seven days of its re-assembly. The Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People. However, if the Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

It has been clarified that any notification issued under the above provisions including any such notification approved or modified may be rescinded by the Central Government at any time by notification in the Official Gazette.

14.4 Exemption notifications in central excise

Central excise legislation is driven by exemption notifications. Under section 5A, the Central Government is empowered to grant exemption in public interest either absolutely or subject to conditions (either before or after removal) from the whole or any part of the duty of excise payable. Notifications issued under section 5A(1) are not applicable to the excisable goods manufactured in FTZ/SEZ/100% EOU and brought to any other place in India, unless

otherwise specified. This is because the goods manufactured in such units are exempted under other notifications issued specially for them.

It is clarified that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods [Sub-section (1A)].

Sub section (2) of section 5A states that the Central Government can exempt excisable goods from the payment of duty by a special order if it is satisfied that it is necessary in the public interest to do so, under circumstances of an exceptional nature which are to be stated in such order.

Sub-section (2A) empowers the Central Government, if it considers it necessary or expedient so to do, to insert an explanation in such notification or order, by notification in the official gazette at any time within one year of issue of the notification under Section 5A (1) or (2), for the purpose of clarifying the scope or applicability of such notification. This enables the Central Government to issue clarifications retrospectively.

In *Kasinka Trading v. U.O.I. 1994 (74) E.L.T. 782*, the Supreme Court held that the power to exempt includes the power to modify or withdraw in terms of Section 21 of the General Clauses Act, 1897. It was held that even a time bound exemption notification issued under section 5A of the Central Excise Act, 1944, or section 25 of the Customs Act, 1962 can be modified and revoked if it is in public interest and the doctrine of Promissory Estoppel cannot be invoked since a notification cannot be said to be making a representation or a promise to a party getting benefit thereof.

It was held in case of *Orient Traders Vs. CTO 2009 (237) E.L.T. 447 (S.C.),* that the exemption notifications are to be construed strictly. If the intention of the legislature is clear and unambiguous, then it is not open to the courts to add words in the exemption notification to extend the benefit to other items which do not find mention in the notification.

Date of effect of Notification - Section 5A provides that the date of effect of the notification will be the **date of its issue**. It also provides for statutory obligation on the part of the Department to publish and sell the notifications to the public through Directorate of Publicity and Public Relations on or before the date on which the notification will be effective.

Notification to be treated as a part of the enactment itself - *CCE* v. *Parle Exports P. Ltd*. 1998 (38) ELT 741 (SC).

Interpretation given at the time of enactment or issue to be given weight - *CCE* v. *Parle Exports P. Ltd.* 1988 (38) E.L.T. 741 (S.C.)

In *ITC Ltd. v. CCE 1996 (86) E.L.T. 477* the Supreme Court said that non-availability of the Gazette on the date of issue of the notification will not affect the operation and enforceability of the notification particularly when there are radio announcements and press releases explaining the changes on the very day.

14.5 Publication of rules and notifications and laying of rules before Parliament [Section 38]

All rules made and notifications issued under Central Excise Act, 1944 shall be published in the Official Gazette [Sub-section (1)].

Every rule made under this Act, every notification issued under section 3A, section 4A, sub-section (1) of section 5A, section 5B and section 11C and every order made under sub-section (2) of section 5A, other than an order relating to goods of strategic, secret, individual or personal nature, shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or notification or order, or both Houses agree that the rule should not be made or notification or order should not be issued or made, the rule or notification or order shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification or order [Sub-section (2)].

14.6 Effect of amendments, etc., of rules, notifications or orders [Section 38A]

Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not –

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.

14.7 Departmental circulars and trade notices in central excise

Under section 37B, which is titled "Instructions to Central Excise Officers", the Central Board of Excise and Customs (CBEC or Board), which is constituted under the Central Boards of Revenue Act, 1963, shall issue instructions to officers who are bound to follow them. These instructions or orders can be for the purpose of ensuring uniformity in the classification of excisable goods or with respect to levy of duty of excise on goods. However, such orders cannot be passed to direct any officer to dispose of a case in a particular manner or interfere with the discretion of the Commissioner (Appeals).

The trade notice has a legitimate source of law and the same is binding on the departmental officers concerned. Authorities cannot take one stand in one State and another stand in another State. Trade notice issued by one Custom House must bind all customs authorities and, if it is erroneous, it should be withdrawn or amended.

[Steel Authority of India v. Collector of Customs Mumbai 2000 (115) ELT 42 (SC)]

14.8 Binding nature of Board circulars

It is well settled in law today that Board Circulars are not binding on the Supreme Court, High Court or the Tribunal. Departmental clarifications are also not binding on the assessee. These judicial bodies as well as the assessee can take a view different from that taken in the Board Circular. Since Board Circulars are for the purpose of administration, it cannot be binding on an officer who is exercising quasi-judicial function as is seen from proviso to Section 37B as also the decision of the Supreme Court in *Orient Paper Mills Ltd.* v. *U.O.I. 1978 (2) E.L.T. J345 (SC).*

However, from the recent Supreme decisions, which are emanating, it seems as if the Departmental officers cannot take a stand contrary to beneficial Board Circulars.

In *Ranadey Micronutrients v. CCE 1996 (87) E.L.T. 19*, the Supreme Court held that even if it be contended that a circular is not issued under section 37B, circulars issued have to be treated as if issued under the said Section and the Department will be estopped from arguing that the circular is not valid.

The Supreme Court also held that such circulars are not advisory in character but binding on central excise officers. The Supreme Court went on to add that the Department cannot take a plea that the circular is contrary to the statute since consistency and discipline is more important than winning or losing a case. This far reaching decision seems to suggest that in a given case even if the Tribunal wants to take a different view from a circular, it would be difficult for the Department to justify its stand since a beneficial Board Circular exists.

The Board cannot issue a circular to restrict power of appellate authority nor can be issued to interfere with its discretion in exercise of its appellate functions even while passing interim orders.

14.9 Can Departmental authorities of one region refuse to accept a circular issued by another region?

It was the customary practice of the Departmental authorities of one region to contend that the circulars issued by another region or Commissionerate do not bind them.

It is important to note that the Supreme Court has held in *Steel Authority of India v. CC 2000 (115) E.L.T. 42* that authorities cannot take different stand in different States and that trade notice issued by customs house will bind all customs authorities.

14.10 Can Departmental circulars be inconsistent with the law?

Supreme Court in case of ***Ratan Melting & Wire Industries v. CCE 2008 (231) E.L.T. 22 (S.C.)*** has held that circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. A circular which is contrary to the statutory provisions has really no existence in law.

In the light of the aforesaid judgment, CBEC, vide Circular No. 1006/13/2015-CX dated 21.09.2015, has clarified that Board Circulars contrary to the judgements of Hon'ble Supreme Court and High Court judgments where Board has decided not to file an appeal on merit, become non-est in law and should not be followed.

All pending cases decided after the date of the judgement should, conform to the law laid by the Hon'ble Supreme Court or High Court, as the case may be, irrespective of whether the circular has been rescinded or not.

The Gujarat High Court has held in *Raymon Glues and Chemicals v. UOI 2000 (117) E.L.T. 29 (Guj.)* that the Board is not empowered to issue circulars contrary to Tribunal decisions and instead has to take up the matter in appeal.

14.11 Date from which Board circulars are effective

The Supreme Court has held in *HM Bags* v. *CCE* 1997 (94) E.L.T. 3 that Board Circulars are effective from the date of their issue and demands prior to such circular are not valid.

Beneficial circulars to be applied retrospectively as per Supreme Court rulings.

[D.C. Polyester Pvt. Ltd. v. 2009 (242) E.L.T. 348 (Bom.)]

15

Advance Ruling

15.1 Definitions

To facilitate a Non-resident / foreign investor / notified resident person in ascertaining his excise duty liability, the scheme of Advance Ruling was incorporated in Chapter IIIA of the Central Excise Act, 1944 with effect from 11-5-1999. This Chapter contains section 23A to section 23H setting out the provisions on advance ruling. The provisions relating to advance ruling are summarised as under:

15.1.1 Advance Ruling: Under section 23A(b) advance ruling means determination of question of law or fact regarding liability to duty in relation to an activity proposed to be undertaken by the applicant.

15.1.2 Activity means production or manufacture of goods and includes any new business of production or manufacture proposed to be undertaken by the existing producer or manufacture, as the case may be [Section 23A(a)].

The above mentioned provisions imply that the advance ruling can be sought for the activity of production/manufacture of goods, which is "proposed" activity and not an ongoing one. For example, expansion of the existing plant by creating additional capacity cannot be considered as proposed activity qualifying for a pronouncement of ruling.

15.1.3 Applicant: Section 23A(c) defines applicant to mean:

"applicant" means—

(i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or

(b) a resident setting up a joint venture in India in collaboration with a non-resident; or

(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

who or which, as the case may be, proposes to undertake any business activity in India;

(ii) a joint venture in India; or

(iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf,

and which or who, as the case may be, makes application for advance ruling under sub-section(1) of section 23C.

The Central Government has notified public sector companies, resident public limited companies, resident private limited companies ***and resident firm*** as the class or category of resident persons who can apply for advance ruling.

Public sector company: A public sector company shall have the same meaning as is assigned to it in section 2(36A) of the Income Tax Act, 1961.

Public limited company: Public limited company shall have the same meaning as is assigned to "public company" in section 3(1)(iv) of the Companies Act, 1956[1] and shall include a private company that becomes a public company by virtue of section 43A of the said Act.

As per section 3(1)(iv) of the Companies Act, 1956, public limited company means a company which –

(a) is not a private company ;

(b) has a minimum paid-up capital of ₹ 5 lakh or such higher paid-up capital, as may be prescribed ;

(c) is a private company which is a subsidiary of a company which is not a private company and

shall include a private company that becomes a public company by virtue of section 43A of the Companies Act, 1956.

Resident: Resident shall have the same meaning as is assigned to it in section 2(42) of the Income-tax Act, 1961 in so far as it applies to a company.

Private limited company: Private limited company shall have the same meaning as is assigned to "private company" in section 2(68) of the Companies Act, 2013.

As per section 2(68) of Companies Act, 2013, private company means a company having a minimum paid-up share capital of ₹ 1,00,000 or such higher paid-up share capital as may be prescribed, and which by its articles,-

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to 200:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member.

Provided further that-

(A) persons who are in the employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company.

[1] Section 2(71) of Companies Act, 2013

Joint venture in India: "Joint venture in India" means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or an equity holder is a non-resident having substantial interest in such arrangement. Thus, in case of joint venture an application for advance ruling can be made only when one of the partners is non-resident.

Non-resident, Indian Company and Foreign Company: "Non-resident", "Indian Company" and "Foreign Company" shall have the meaning as in sections 2(30), 2(26) and 2(23A) of the Income-tax Act, 1961 respectively [Section 23A(f)]. The collaboration would mean either technical or financial collaboration.

Firm shall have the meaning assigned to it in section 4 of the Indian Partnership Act, 1932 and includes-

(i) the limited liability partnership as defined in section 2(1)(n) of the Limited Liability Partnership Act, 2008; or

(ii) limited liability partnership which has no company as its partner; or

(iii) the sole proprietorship; or

(iv) one Person Company.

Sole proprietorship means an individual who engages himself in an activity as defined in section 23A(a) of the Central Excise Act, 1944.

One Person Company means as defined in section 2(62) of the Companies Act, 2013.

Resident: shall have the meaning assigned to it in section 2(42) of the Income-tax Act, 1961 in so far as it applies to a resident firm.

15.1.4 Authority: "Authority" means the Authority for Advance Rulings, constituted under sub-section (1), or authorized by the Central Government under sub-section (2A), of section 28F of the Customs Act, 1962 [Section 23A (e)].

15.2 Procedure for application for Advance Ruling

Under section 23C, advance ruling can be asked only for

(a) classification of goods under the Tariff;

(b) application of tariff notification issued under section 5A of the Act;

(c) principles to be adopted for purpose of determining value of goods.

(d) notifications issued, in respect of duties of excise under the Act, the Central Excise Tariff Act, 1985 and any duty chargeable under any other law for the time being in force in the same manner as duty of excise leviable under the Act.

(e) admissibility of credit of service tax paid or deemed to have been paid on input service or excise duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of the excisable goods.

(f) determination of the liability to pay duties of excise on any goods under the Act.

Apart from the above, no other matter can be referred for advance ruling.

It would also be noted that as per section 23D(2), applicants (whether resident or non-resident) who apply for such facility should not have the matter pending before the Appellate Tribunal or Court or if the same is already decided by Appellate Tribunal or Court.

The applicant may withdraw the application within 30 days from date of application. [Section 23C(4)]. An application fee of ₹ 2500/- is payable along with the application.

Under section 23F, advance ruling will be void if, on a representation from Commissioner or otherwise, it can be proved that it was obtained by fraud or misrepresentation of facts.

As per section 23E, it is binding only on the applicant who sought it for matters specified in section 23(C)(2) and on the Commissionerate in respect of the applicant. Change in the law or facts may however make the advance ruling obsolete.

15.3 Constitution of Authority for Advance Ruling (Central Excise, Customs and Service Tax)

The Authority can formulate its own procedure. This Authority can examine people on oath and compel production of documents like a Civil Court under Code of Civil Procedure. It is a civil court for purposes of section 195 of Code of Criminal Procedure and proceedings are deemed to be judicial proceedings under section 193 and 228 of the IPC.

Under section 28F of the Customs Act, 1962, the authority shall consist of a Chairperson who shall be retired judge of Supreme Court along with officer of Indian customs and excise service qualified to be a Member of the Board and officer of Indian Legal Service qualified to be Additional Secretary to Government of India.

As per section 28F *supra,* the authority shall be situated at Delhi.

Under section 23D(5), the applicant can appear in person or through authorised representative as set out in section 35Q.

The status of the Advance Ruling Authority falls within the meaning of Article 227 of the Constitution of India. Advance Ruling Authority is vested with the powers of civil court on inspection, enforcing attendance, examination under oath, compelling production of books of account, summons, etc. [Section 23G].

Hence, the status of the Authority of Tribunal and is amenable to writ jurisdiction of High Courts.

In *UAE Exchange Center Ltd v. UOI 2009 (236) ELT 223 (Del)*, the High Court held that writ jurisdiction was invocable against advance rulings.

15.4 Procedure to be followed by Authority for Advance Ruling (Central Excise, Customs and Service Tax) on receipt of application [Section 23D]

1. On receipt of application for advance ruling, the Authority shall forward a copy to the relevant Commissioner. The records shall be returnable after the ruling is given.

2. The Authority has the sole discretion to accept or reject the application. However, a hearing has to be given before rejection. Application is liable to be rejected in the following cases:
   (i) where the question raised in the application is already pending before any Central Excise Officer, the Appellate Tribunal or any court; or
   (ii) where the question raised is the same as in a matter already decided by any Appellate Tribunal or any court.
3. The Authority shall pass an order admitting or rejecting the application. A copy of such order should be given to the applicant and the Commissioner.
4. The Authority can further examine any material placed before it after admission of the application.
5. The Authority should pronounce the final order within 90 days of receipt of application.
6. Copies of the order have to be given to the applicant and the Commissioner.

15.5 Important judgments with regard to Advance Rulings

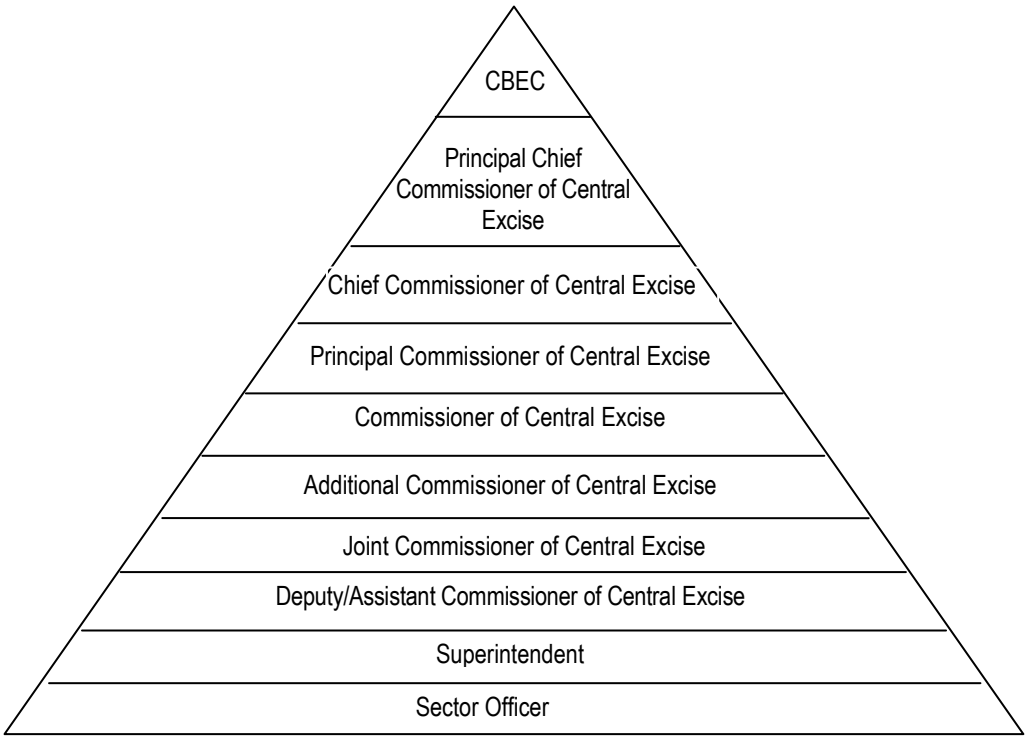
Ruling by Advance Rulings Authority binding on applicant, transaction on which ruling sought and the departmental officers concerned - Jurisdiction of Courts not excluded by implication or otherwise - Writ jurisdiction invocable against advance rulings - Article 226 of Constitution of India	*UAE Exchange Centre Ltd v. UOI 2009 (236) ELT 223 (Del)).*
The advance ruling can be applied for only proposed activity. It cannot be applied for any ongoing activity. For example: Expansion of existing manufacturing activity	*Zuari Cement Ltd. 2009 (239) E.L.T. 495 (A.A.R.)*
In this case, it was held that the application for rectification of mistake is not maintainable as the error was not apparent from the record.	*Tex (India) Pvt. Ltd. 2004 (168) E.L.T. 27 (AAR)*
It was held that, the question raised in application that has already been decided by the Appellate Tribunal and was not raised at the time of admission of application such plea cannot be entertained by the Authority.	*Permalite Electricals (P) Ltd. 2004 (168) E.L.T 164 (A.A.R)*

16

Organisation Structure of the Excise Department

16.1 Organisation Structure

The structure of the Excise Department is largely similar to the structure of the Income Tax Department. However, in view of the fact that the area of indirect taxes encompasses custom duties, excise duties and service tax, the Department is structured in a manner that facilitates collection of all the three indirect taxes.



16.1.1 Central Board of Excise and Customs (CBEC):

(a) Introduction: Central Board of Excise and Customs (CBEC) is a statutory board constituted under the statute-the Central Boards of Revenue Act, 1963 and is subordinate to the Department of Revenue under the Ministry of Finance, Government of India.

The Board is the administrative authority for its subordinate organizations, including Custom Houses, Central Excise Commissionerates and the Central Revenues Control Laboratory.

(b) Role of CBEC: It deals mainly with the tasks of formulation and implementation of policy concerning to the levy and collection of customs and central excise duties and service tax, prevention of smuggling and administration of matters relating to Customs, Central Excise, Service Tax and Narcotics to the extent under CBEC's purview.

(c) Recruitment to the Customs and Excise Department: Recruitment to the Customs and Excise Department is through the Indian Revenue Service. The successful candidates in the Civil Service examinations are required to choose between the direct and indirect tax streams.

(d) Chairman and members of the Board: The Board consists of a Chairman and other members. The Chairman is the first among equals. The Chairman and the Members are currently of the rank of ex-officio Additional Secretaries to the Government of India.

16.1.2 Principal Chief Commissioner or Chief Commissioner of Central Excise: Immediately below the CBEC are the Principal Chief Commissioners and then Chief Commissioners of Central Excise. Principal Chief Commissioners and Chief Commissioners are responsible for all matters under their jurisdiction and report to the CBEC as a whole.

16.1.3 Principal Commissioner or Commissioner of Central Excise - Executive Commissioner heads the Commissionerate. They are administrative in-charge of the 'Commissionerate'.

Commissioner (Adjudication): is exclusively engaged in passing of adjudicating orders in terms of the powers granted under various sections of the Central Excise Act, depending of course, on jurisdiction and on the monetary amounts involved in the demands.

Commissioner (Appeals): acts as an appellate authority and pass orders on appeal in relation to all adjudication orders passed by an authority subordinate to the rank of a Commissioner. In other words, the Commissioner (Appeals) has jurisdiction to hear and dispose off all appeals filed against orders of the Assistant Commissioner, Deputy Commissioner, Joint Commissioner as well as the Additional Commissioner.

The senior most of these three Commissioners would be the Executive Commissioner.

16.1.4 Additional Commissioner of Central Excise: Additional Commissioner is equivalent to the Commissioner for all purposes other than for the purposes of the appellate procedures (incorporated under Chapter VIA of the Central Excise Act). Consequently, appeal against orders of the Additional Commissioner lies with the Commissioner (Appeals) only whereas the appeal against the orders of the Commissioner lies with the Tribunal.

On the executive side, the Additional Commissioner is the immediate senior most officer after the Commissioner. However, as explained above, in terms of the legal definition, an Additional Commissioner is also a Commissioner.

16.1.5 Joint Commissioner of Central Excise: The said designation was created by *Notification No. 23/99-C.E. dated 11-5-1999*. The said notification substituted the earlier Deputy Commissioner/Deputy Commissioner of Central Excise with Joint Commissioner of Central Excise.

16.1.6 Deputy Commissioner/Assistant Commissioner of Central Excise: *Notification No. 23/99-C.E. dated 11-5-1999* substituted the earlier Assistant Commissioner/ Assistant Commissioner of Central Excise with Assistant Commissioner of Central Excise/Deputy Commissioner of Central Excise.

The Assistant Commissioner is the highest-ranking field level authority who holds active jurisdiction over manufacturing units and is charged with the collection of duties. The Assistant Commissioner is also the quasi-judicial authority who normally passes orders on all matters of revenue concerning units falling under his jurisdiction and for which show cause notices have been issued under various sections of the Act. Direct recruits to the All India Revenue Service are confirmed as Assistant Commissioners after their period of probation. Consequently, the post of Assistant Commissioner is the entry-level post for all direct recruits into the service.

Both Deputy Commissioner/Assistant Commissioner of Central Excise have the same powers. The only difference is the issue of the show cause notice proposing penalty or confiscation of goods. Assistant Commissioner cannot the issue show cause notice without the prior approval of Deputy Commissioner.

16.1.7 Superintendent: Superintendent is an officer of the rank of a Gazetted officer.

16.1.8 Sector officers: Sector officer (earlier known as inspectors) work under Superintendents and is not a Gazetted officer. The Sector Officers are functional in charge of day-to-day matters pertaining to assessees.

16.2. Administrative Set Up

16.2.1 Zone: For administrative convenience, whole country has been divided into several zones. Principal Chief Commissioner/ Chief Commissioners of Central Excise are administrative in-charge of each zone.

16.2.2 Commissionerate: Each zone comprises of several commissionerates, ranging from two to four. Each commissionerate is headed by a Principal Commissioner/ Commissioner. The primary function of a Central Excise Commissionerate is to implement the Central Excise Act, 1944, rules framed under various provisions of the Central Excise Tariff Act, 1985 and other allied Acts of the Parliament of India under which duty of central excise or other such duties which are levied and collected in the manner in which central excise duty is levied and collected.

16.2.3 Division: The jurisdiction of the Commissionerates has been divided into Divisions. The area of a Division depends upon the density of the industry, complexities of the commodities being dealt by the Division and quantum of revenue receipts. Each Division is headed by a Deputy Commissioner/Assistant Commissioner.

16.2.4 Range: The jurisdictional area of a Division is again divided into Ranges. Each range is headed by a Superintendent designated as 'Range Officer'. Each Range officer has two to four inspectors in his charge.

16.2.5 Sector: Each sector officer (earlier known as inspectors) is incharge of a certain number of units, which varies from range to range. The jurisdiction of sector officer is called 'Sector'.

17

Excise Audit

17.1 Audit under Central Excise Act, 1944

Central Excise Act, 1944 provides for following types of audit:

(a) Special audit for valuation purposes under section 14A,

(b) Special audit for Cenvat credit purposes under section 14AA

The provisions in respect of each of the audit have been discussed below:

(a) Valuation audit [Section 14A]

Who can order audit: Any Central Excise Officer not below the rank of an Assistant/Deputy Commissioner of Central Excise can order for valuation audit at any stage of enquiry, investigation or any other proceedings before him if he is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person. However, for ordering such an audit prior approval of the Principal Chief Commissioner/ Chief Commissioner of Central Excise is necessary.

The directions given by Assistant/Deputy Commissioner for special audit after obtaining prior approval of Principal Chief Commissioner/ Chief Commissioner of Central Excise is not an appealable order in terms of section 35B. The Tribunal in the case of *Neelam Products Ltd. vs. CCE Delhi III* held that an opportunity for hearing is to be given to the assessee before the issuance of the direction for special audit. As the opportunity for hearing would help the authority to form an objective opinion on the complexity of the case based on prescribed factors.

Audit by practicing Chartered/Cost Accountant: The Central Excise officer will direct such manufacturer/person to get the accounts of his factory, office, depots, distributors or any other place, as may be specified by the said Central Excise Officer, audited by a Cost Accountant or Chartered Accountant. Such Cost Accountant or Chartered Accountant will be nominated by the Principal Chief Commissioner/ Chief Commissioner of Central Excise in this behalf.

Cost accountant shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959.

Chartered Accountant shall have the meaning assigned to it in section 2(1)(b) of the Chartered Accountants Act, 1949.

Audit Report: The Cost Accountant or the Chartered Accountant has to submit the duly signed and certified audit report within the period specified by the Central Excise Officer. He shall also mention in the report such other particulars as may be prescribed by such Central Excise Officer.

Time limit for submission of report: Such period can be extended by the Central Excise Officer at the request of the manufacturer/person for material and sufficient reason. However, the maximum period of submission of audit report shall be 180 days from the date of receipt of the cost audit order by the manufacturer. This audit shall be in addition to any other audit under any other law for the time being in force or otherwise.

Manufacturer is given the opportunity of being heard: The manufacturer/person shall be given an opportunity of being heard in respect of any material gathered on the basis of audit and proposed to be utilized in any proceedings under the Central Excise Act or rules made thereunder.

(b) CENVAT Credit audit [Section 14AA]

Who can order audit: The Principal Commissioner/ Commissioner of Central Excise may call for an audit if he has reason to believe that the credit of duty availed of or utilized by a manufacturer of any excisable goods –

(a) is not within the normal limits having regard to the nature of the excisable goods produced or manufactured, the type of inputs used and other relevant factors, as he may deem appropriate;

(b) has been availed of or utilized by reason of fraud, collusion or any willful mis-statement or suppression of facts.

Audit by practicing Chartered/Cost Accountant: The Principal Commissioner/ Commissioner shall direct such manufacturer to get the accounts of his factory, office, depot, distributor or any other place, as may be specified by him, audited by a Cost Accountant or Chartered Accountant nominated by him.

Cost Accountant shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959.

Chartered Accountant shall have the meaning assigned to it in section 2(1)(b) of the Chartered Accountants Act, 1949.

Audit Report: The Cost Accountant or the Chartered Accountant has to submit the duly signed and certified audit report within the period specified by the Central Excise Officer. He shall also mention in the report such other particulars as may be prescribed by such Central Excise Officer. This audit shall be in addition to any other audit under any other law for the time being in force or otherwise.

Manufacturer is given the opportunity of being heard: The manufacturer shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit and proposed to be utilized in any proceeding under the Central Excise Act or rules made thereunder.

17.2 Audit by the Central Excise Department

History of provisions: In conventional sense, "audit" means scrutiny and verification of documents, events and processes in order to verify facts and, draw conclusions regarding the correctness of recording of facts and the efficiency of a system under study. For Central Excise purposes "audit" means scrutiny of the records of assessee and the verification of the actual process of receipt, storage, production and clearance of goods with a view to check whether the assessee is paying the central excise duty correctly and following the central excise procedures.

Under the conventional /traditional system of central excise audit, audit parties visited assessees unit without much preparation and verify all the statutory records (i.e. those prescribed under the Central Excise law) to check compliance of procedures and also leakage of revenue, if any. Experiences showed that such audits did not result in detection of major aberrations. Most of the audit objections pertained to either minor procedural irregularity or duty short payment of small amounts mostly due to human error. Further, this method of auditing did not envisage checking of the internal records of the assessee as well as those records which are maintained by the assessee under the other laws like Income-tax Act, Sales Tax Act, Companies Act etc.

In the year 2000, as a measure of simplification of procedures, the maintenance of all statutory records under the central excise law was dispensed with. No longer was the assessee required to record the receipt of raw material, production and clearance/sale of finished goods etc. in registers/documents prescribed by the central excise department. As a result, the assessees are now allowed to maintain all their records in whichever form they like (including maintenance of the entire records in electronic form) provided the essential information required for calculation of central excise duty liability can be obtained from such records. Under these circumstances it becomes necessary for the auditors to look into the assessees own (private) records to verify whether the assessee is paying central excise duty correctly and following the laid down procedures.

Another change brought in recent years is doing away the system of assessment of the returns by the departmental officers. Now the assessee is required to self assess his monthly tax returns before filing the same with the department. The departmental officers only scrutinise this return to check for any apparent mistake made by the assessee. They are not required to carry out detailed verification. Therefore, the entire burden of checking whether the assessee actually paying his taxes correctly, now lies with audit.

The statutory changes resulting in dispensation of statutory records as well as self assessment of central excise duty by the assessee has led to the conventional/traditional system of audit becoming irrelevant.

Departmental Excise Audit: The Central Excise Department has thus, evolved a new system of departmental audit in view of the fact that all the statutory records to be maintained by the assessee have been abolished in year 2000/01.

Director General of Audit at Delhi supervises audit functions. An Audit section is attached to each Commissionerate. Audit of assessee's factory is carried out by visit by 'audit party'. The Audit Party usually consist of 2/3 inspectors and a Deputy Office Superintendent, headed by a Excise Superintendent. In case of larger units, Assistant/Deputy Commissioners may also accompany the audit parties. Audit by these audit parties is called 'Departmental Audit'.

The detailed guidelines, formats and check lists for audit is provided in the **Audit Manual** prepared by the CBEC for the use of its auditors.

Submission of records at the time of audit: Rule 22(3) of the Central Excise Rules, 2002 requires every assessee, and first stage and second stage dealer to submit to his range officer empowered by Commissioner or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India or Cost Accountant/ Chartered Accountant nominated under section 14A/14AA of the Act, the following for scrutiny within the time limit specified by the said officer or the audit party or the Cost Accountant or Chartered Accountant, as the case may be-

(i) the records maintained or prepared in terms of rule 22(2);

(ii) the cost audit reports under section 233B of the Companies Act, 1956[1] ; and

(iii) the Income-tax audit report under section 44AB of the Income-tax Act, 1961

17.3 Excise Audit 2000

Excise Audit 2000 (EA 2000) is a new system of audit initiated from 1st December 1999. The essential philosophy of EA 2000 is that this audit is based on the scrutiny of business records of the assessee. This is a more systematic form of audit wherein the auditors are required to gather basic information about the assesee and analyze them to find out vulnerable areas before conducting the actual audit. The audit is therefore more focused and in-depth as compared to the traditional audit. Further, at every stage of audit, the assessee is consulted. This makes EA2000 audit user friendly.

17.3.1 Procedure of Excise Audit 2000

(i) <u>Selection criteria of the assessees for the audit:</u> ***Circular No. 995/2/2015 CX dated 27.02.2015, which has come into effect from 1st July, 2015 has specified new norms to be followed by Audit Commissionerates. The new norms do not prescribe any frequency for conducting audits. The new norms have introduced risk based selection of assessees for audit based on identified/quantified risk parameters and also introduced jurisdictional specific criteria (as opposed to uniform norm across the country) for segmenting the taxpayer into large, medium & small categories.***

The criteria for categorizing an assessee as large, medium or small would be value of clearances and total excise duty paid. The threshold limits of value of clearances for categorizing the units into large, medium and small would be dependent upon (i) the available manpower in the Audit Commissionerate and (ii) the assessee base, turnover and excise duty paid by each assessee in the jurisdiction of the Audit Commissionerate. It may be noted that threshold limits may vary from one Audit Commissionerate to another Audit Commissionerate in view of varying number of assessees and quantum of value of clearances and excise duty paid in case of each assessee.

[1] Section 148 of Companies Act, 2013

The selection of assessees would be done based on the risk evaluation method prescribed by the Directorate General of Audit. The risk evaluation method would be separately communicated to the Audit Comissionerates during the month of March / April every year. The risk assessment function will be jointly handled by National Risk Managers (NRM) situated in the Directorate General of Audit and Local Risk Managers (LRM) heading the Risk Management section of Audit Commissionerates. The Audit Commissionerates could also select few units at random or based on risk perception in each category of large, medium and small tax payers.

(ii) Desk Review: The auditors are assigned the assessees to be audited at the beginning of the financial year. The auditors are required to gather as much information about the assessee as possible. They can gather information from the departmental records, published documents like balance sheets annual statements etc., and through market enquirer. Since this can be done without interacting with the assessee, this step called as 'desk-review'.

(iii) Documenting Information: At the stage of 'Desk Review' the auditors may have already identified certain areas, which warrant closer examination. The auditor may also require certain documents or information from the assessee to complete his preliminary investigation. For this he may write letter to the assessee or send him a questionnaire to obtain this information. This step is called 'gathering and documenting assessee information'.

(iv) Touring: The auditor then visits the unit of the assessee to see the actual running of the unit, the systems that are followed for maintaining records in various sections and the system of movement of goods and the related documents within the unit. This step is called 'touring of the premises'. This gives the auditors a general overview about the procedure adopted by the assessee and the possible loopholes through which revenue leakage can take place.

(v) Audit Plan: Based on his experiences and the information gathered so far about the assessee, the auditor now makes a 'audit plan'. The idea of developing audit plan is to list the areas which, as per the auditor are the vulnerable areas from the revenue point of view. Since number of documents/records maintained by assessee is huge in number, it also necessary that the auditor should select only some of them for the actual verification. The preparation of audit plan helps him to do that. It must be remembered that audit plan is not rigid but a dynamic concept. During the course of audit if the auditor notices certain new facts or new aspects of the planned area of audit, he can always alter the audit plan accordingly, with the approval of his supervisor. Similarly, during the actual audit, if the auditor is convinced that any area which was earlier planned for verification does not require in-depth scrutiny, he may alter the plan midway after obtaining approval of the superior officers. Preparation of audit plan is one of the most important steps of EA 2000. A well thought audit plan generally increases the success of audit result manifolds.

(vi) Verification: The most important step of audit is the conduct of actual audit, which in technical parlance is called 'Verification'. The auditors visit the unit of the assessee on a scheduled date (informed to the assessee in advance) and carry out the scrutiny of the records of the assessee as per the audit plan. The auditor is required to compare the documentation of a fact from different documents. For example, the auditor may check the figures of clearance of finished goods showed by the assessee in central excise return with

the sales figures of the said goods in Balance Sheet, Sales Tax Returns, Bank statements etc. The auditor may also enquire about the entries which appear vague (say an entry like 'Misc. Income') in various records and documents. The idea behind conduct of verification is to reasonably ensure that no amount, which as per the Central Excise law is chargeable to duty, escapes taxation. The process of verification is always carried out in presence of the assessee so that he can clarify the doubts and provide required information to the auditor.

(vii) Audit Objection and Audit Para: Where the auditor finds instances of short payment of duty or non-observance of Central excise procedures, he is required to discuss the issue with the assessee. After explanation provided by the assessee, if the auditor is satisfied that such non-tax compliance has occurred, he records the same as an 'Audit Objection' or 'Audit Para' of the 'draft audit report' that he would be preparing at the end of the verification process. Auditor is advised not to take formal objections to mere procedural lapses/ infractions/ adoption of wrong procedures, which do not result in any short payment of duty or do not have bearing upon the duty payment. In such cases the auditor is required to discuss the matter with the assessee and advise him to follow the correct procedure in future. Further, while making an audit para, attempt should be made to tabulate the duty short paid by the assessee at the spot and incorporate it in the para itself. However, if this is not possible for the paucity of time or for the want of some information not available at that time, the auditor should make a note of the same in his report.

(viii) Audit Report: At the end of the process of verification the auditor prepares an 'Draft Audit Report' which incorporates all the audit objections/audit paras. An audit report provides (issue or para wise) the issue in brief, the reply or the explanation of the assessee, the reason for the auditor not being satisfied with the reply, the amount of short payment (if tabulated) and the recoveries of the same (if could be made at the spot). The draft audit report is then submitted to the superior officers for review, who examine the sustainability of the objections raised by the auditors. After such review, the audit report becomes final and in cases where the disputed amounts have not already been paid by the assessee at the spot, demand notices are issued by the department for their recoveries.

(ix) Conclusion: EA 2000 is a modern, transparent and interactive method of audit wherein the auditor proceeds with audit fully conversant with the business of the assessee. On his part, the assessee is given full opportunity to explain his stand on any particular matter so that matters are resolved in full appreciation of legal position. EA 2000 is thus a participative audit.

A requirement of EA 2000 is that the auditors must be thorough in their knowledge of Central Excise law and procedures, notifications, instructions and circulars issued by the Finance Ministry and the judicial decisions on issues relating to central excise laws. To be successful auditor, knowledge about financial bookkeeping, accountancy and proficiency in understanding commonly used commercial books and documents is of great help. Further, being computer literate is an added requirement while auditing an assessee who maintains his accounts in electronic format.

17.4 Central Excise Receipt Audit [CERA]

'CERA' is one of the important aspects of central excise audit. It is conducted by the Comptroller and Auditor-General of India.

Audit by Comptroller and Auditor-General of India: The Comptroller and Auditor-General of India (C & AG) is a constitutional authority created under Article 148 of the Constitution of India to audit all receipts and expenditure of the Government of India and the State Governments, including of bodies and authorities substantially financed by the Government. The C& AG is also the external auditor of Government-owned companies. A report of the C & AG is submitted to the President of India under Article 151 of Constitution of India. The reports of the C& AG are taken into consideration by the Public Accounts Committees, which are special committees in the Parliament of India and the State Legislatures.

One of the audit functions discharged by C & AG is revenue audit which covers central excise, service tax and customs law. The Central Excise Audit conducted by C & AG is called as CERA (Central Excise Receipt Audit). CERA audits are conducted as a part of audit of Government accounts. Thus, these audits are conducted under Constitutional authority and are in no way connected or related to internal audits carried out by the staff of excise department.

Generally, the CERA audit parties visit the premises of the assessees by giving advance intimation and conduct the audit of the records of the assessees. The CERA audit, in fact, is the examination of the assessees' records to point out the deficiencies, leakage of revenue and non-recovery of dues by the Central Excise Department. In this sense, the CERA audit is an audit of efficacy of the Central Excise Department in collecting the duty leviable under the Central Excise Act, 1944.

18

Settlement Commission

18.1 Introduction

Provisions relating to Settlement Commission are contained in Chapter V of the Central Excise Act, 1944. This Chapter was inserted by the Finance (No. 2) Act, 1998 to evolve a mechanism for speedy settlement of cases involving high revenue stakes. This Chapter contains sections 31 to 32P.

The basic objective of setting up of the Settlement Commission is to expedite payments of customs & excise duties and service tax involved in disputes by avoiding costly and time consuming litigation process and to give an opportunity to tax payers to come clean who may have evaded payments of duty/tax. It provides a forum for the assesses to apply for settlement of their cases, on the basis of true and complete disclosure of their duty/tax liability by them.

Customs, Central Excise and Service Tax Settlement Commission is constituted by Central Government and shall consist of one Chairman, Vice-Chairman and other members as the Central Government may think fit. This Commission is a part of Ministry of Finance and is constituted by the people of integrity and outstanding ability having special knowledge and experience in respect of administration of customs, central excise and service tax laws.

18.2 Salient features of Settlement Commission

Questions	Answers
1. Who can make an application for settlement? Can it be withdrawn?	Section 32E states that an assessee may make a case for settlement. An assessee is defined in Section 31(a) as any person who is liable to pay excise duty assessed and includes any manufacturer/producer or a registered person of a private warehouse. An application once made cannot be withdrawn [Section 32E(4)]
2. What is it that can be settled?	A case can be settled. The case is defined in section 31(c) as any proceeding under this Act or any other Act for the levy, assessment and collection of excise duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 32E is made. However, when any proceeding is referred back, by any

	court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause. Thus, Settlement Commission can only be approached when original adjudication is pending.
3. What categories of cases cannot be settled?	See para 18.3 for such cases.
4. What is the procedure to be followed by the Settlement Commission on receipt of application?	See para 18.4 for details.
5. Can Settlement Commission grant immunity from prosecution and penalty/ interest/ fine?	The Commission can grant immunity under section 32K from prosecution only for any offence under the Central Excise Act and either wholly or in part from the imposition of penalty and fine if it is satisfied that the applicant has made full and true disclosure and co-operated with the Commission. It may be noted that if prosecution is launched before receipt of application, immunity against such prosecution cannot be granted.
6. Can such immunity be withdrawn?	Immunity can be withdrawn under section 32K only if the person fails to pay the sums due within the time specified in the settlement order or where the applicant has concealed any material to the settlement or given false evidence relating to the settlement.
7. Can the case be sent back by the Settlement Commission to the Central Excise officer?	Under Section 32L, this can be done only where the Commission is satisfied that the person has not co-operated. The consequences of this are that it would be deemed that no application has been made before the Commission.
8. Can the Central Excise officer who received the case back use the materials produced before the Commission?	Yes as per Section 32L.

9. Is the order of settlement final?	As per section 32M, except as provided in Chapter V, the order is final and conclusive and shall not be re-opened in any proceeding under this Act or under any other law. For example, section 32F(8) provides that if the order was obtained by fraud or misrepresentation, it would become void.
10. What is the time limit for payment of amounts ordered by Settlement Commission?	Under section 32F(9), the duty, interest, fine and penalty payable in pursuance of the order under sub-section (5) shall be paid by the assessee within 30 days of receipt of a copy of the order by him. If the assessee fails to do so the amount which remains unpaid shall be recovered along with interest due thereon as the sums due to the Central Government by the Central Excise Officer having jurisdiction over the assessee in accordance with the provisions of section 11.
11. Can a completed proceeding be re-opened?	No, the Settlement Commission cannot reopen the proceedings.
12. Is the proceeding before the Settlement Commission a judicial proceeding?	Section 32P deems that the proceeding is a judicial proceeding within the meaning of sections 193 and 228 of the IPC.
13. Where are the Benches of Settlement Commission located?	The principal Bench is at New Delhi with Additional Benches at Chennai, Kolkata and Mumbai. The jurisdiction of the Bench is decided not by the place of business of the applicant but by the location of the headquarters of the Commissionerate passing the order.
14. What is the procedure to make an application and what are the fees?	See Procedure below.
15. Can the applicant take legal assistance?	Under section 32F(5), assistance of authorised representative can be taken.
16. Can the property of the applicant be attached?	Provisional attachment by Settlement Commission is possible under section 32G. See procedure to be followed by Commission below for details.

18.3 Categories of cases that can be settled

The following categories of cases can be settled as per section 32E:

a. Where the assessee has filed the application for settlement in respect of a case relating to him before the adjudication thereof;

b. If the applicant has filed returns showing production, clearance and central excise duty paid. However, if Settlement Commission is satisfied that circumstances exist for not filing the returns, it may allow the applicant to make an application for settlement after

recording reasons for the same. Thus, Settlement Commission has the discretion to allow such applications after recording reasons therefor.

c. Where the applicant has received a show cause notice;

d. Where the case is not pending before the Appellate Tribunal or any Court;

e. Where the dispute does not relate to interpretation of classification;

f. Where the additional amount of duty accepted by the applicant in his application exceeds ₹ 3,00,000;

g. Where the applicant, while filing the application, has deposited the additional amount of excise duty accepted by him along with interest due under section 11AA;

h. Where the assessee admits short levy in respect of excisable goods on account of misclassification, undervaluation, inapplicability of exemption notification or CENVAT credit or otherwise.

18.4 Procedure to be followed by the Settlement Commission [Section 32F]

(1) The Settlement Commission shall issue a notice to the applicant within 7 days from the date of receipt of the application, to explain in writing as to why the application made by him should be allowed to be proceeded with. After taking into consideration the explanation provided by the applicant, the Settlement Commission shall, within a period of 14 days from the date of the notice, pass an order either allowing the application to be proceeded with, or rejecting the same. The proceedings before the Settlement Commission shall abate on the date of rejection.

However, where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

(2) A copy of every order under sub-section (1), shall be sent to the applicant and to the Principal Commissioner/ Commissioner of Central Excise having jurisdiction.

(3) Where an application is allowed or deemed to have been allowed to be proceeded with under sub-section (1), the Settlement Commission shall, within 7 days from the date of order under sub-section (1), call for a report along with the relevant records from the Principal Commissioner/ Commissioner of Central Excise having jurisdiction. The Principal Commissioner/ Commissioner shall furnish the report within a period of 30 days from the date of the receipt of communication from the Settlement Commission.

However, where the Principal Commissioner/ Commissioner does not furnish the report within the aforesaid period of 30 days, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner/ Commissioner.

(4) After examination of the report of the Principal Commissioner/ Commissioner submitted within time, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct, for reasons to be recorded in

writing, the Commissioner (Investigation) within 15 days of the receipt of the report, to make such further enquiry or investigation on the matters covered by the application and any other matter relating to the case. The Commissioner (Investigation) should furnish the report of such enquiry within a period of 90 days from the date of the receipt of the communication from the Settlement Commission.

However, where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under sub-section (5) without such report.

(5) The Settlement Commission may pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Principal Commissioner/ Commissioner of Central Excise and Commissioner (Investigation) after examination of the records, the report of the Principal Commissioner/ Commissioner of Central Excise and the report, if any, of the Commissioner (Investigation) of the Settlement Commission. An opportunity of being heard either in person or through a representative duly authorised in this behalf shall be given to the applicant and to the Principal Commissioner/ Commissioner of Central Excise having jurisdiction before passing of such order. The Commission shall also examine any further evidence as may be placed before it or obtained by it before passing the order.

(6) The order under sub-section (5) shall be passed within **9 months** from the last day of the month in which the application was made. However, if the order is not passed within the stipulated time, the settlement proceedings shall abate and the adjudicating authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

However, the aforesaid period may be extended, for reasons to be recorded in writing, by the Settlement Commission for a further period not exceeding three months.

(7) Subject to the provisions of section 32A, the materials brought on record before the Settlement Commission shall be considered by the Members of the concerned Bench before passing any order under sub-section (5). In relation to the passing of such order, the provisions of section 32D shall apply.

(8) The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective. However, in case of rejection the order shall contain the reasons therefor. The order shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

The amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant under section 32E.

(9) The duty, interest, fine and penalty payable in pursuance of the order under sub-section (5) shall be paid by the assessee within 30 days of receipt of a copy of the order by him. If the assessee fails to do so the amount which remains unpaid shall be recovered along with interest due thereon as the sums due to the Central Government by the Central Excise Officer having jurisdiction over the assessee in accordance with the provisions of section 11.

(10) Where a settlement becomes void as provided under sub-section (8), the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission. The Central Excise Officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of 2 years from the date of the receipt of communication that the settlement became void.

18.5 Bar on subsequent application for settlement in certain cases [Section 32-O]

As per section 32-O, a person shall not be entitled to apply for settlement under section 32E in relation to any other matter in the following cases:-

(a) Where an order of the Settlement has been passed which provides for the imposition of a penalty on the applicant under section 32E for settlement, on the ground of concealment of particulars of his duty liability made from the Central Excise Officer or

(b) Where after the passing of an order of settlement, in relation to a case, such person is convicted of any offence in relation to that case; or

(c) Where the case of such person is sent back to the Central Excise Officer by the Settlement Commission under section 32L.

Students should refer to the Chapter on Settlement Commission in the Customs section as additional reading.

18.6 Important judgments

Citation	Judgment
RR Builders vs. CCE 2008 (223) E.L.T. 348 (Guj.)	Once there is a requirement prescribed by the statute by way of a qualifying condition, it is not possible to admit applications which do not fulfill the requirement stipulated by the first proviso to Section 32E(1) of Central Excise Act, 1944.
Mars Thereputics and Chem. Ltd. vs. CCE Settlement Commission 2008 (223) E.L.T. 363 (AP)	An application can be admitted and proceeded with only when Settlement Commission is satisfied that applicant has made a full and true disclosure. The onus is

	on applicant to make a full and true disclosure of duty liability and the manner in which same is arrived at.
In Re: Sadik Sadruddin Chunara (Sett.Comm) 2006 (203) E.L.T. 324.	The Person who is absconding and never appeared before the investigating agency cannot be prevented from making an application before Settlement Commission.
Commr of Customs v. Mahesh Raj 2006 (195) E.L.T. 261 (Kar.)	Smugglers, habitual offenders & unscrupulous elements cannot be offered protection under the settlement scheme. It covers cases only where there is no deliberate/intended desire on part of the importer to evade/avoid payment of duty.

FINAL COURSE STUDY MATERIAL

PAPER 8

INDIRECT TAX LAWS

MODULE – 2: SERVICE TAX

BOARD OF STUDIES
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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As amended by the Finance Act, 2015

Edition	:	November, 2015
Reprint Edition	:	November, 2016
Website	:	www.icai.org
Department/ Committee	:	Board of Studies
E-mail	:	bosnoida@icai.in
ISBN No.	:	
Price	:	
Published by	:	The Publication Department on behalf of The Institute of Chartered Accountants of India, ICAI Bhawan, Post Box No. 7100, Indraprastha Marg, New Delhi-110 002, India. Typeset and designed at Board of Studies.
Printed by	:	

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1

Basic Concepts of Service Tax

1.1 Introduction

In India, Government's primary sources of revenue are direct and indirect taxes. Earlier, central excise duty on the goods manufactured/produced in India and customs duties on imported goods constituted major sources of indirect taxes in India. However, revenue receipts from customs & excise declined constantly due to World Trade Commitments and rationalization of commodity duties.

On the other hand, service sector started growing phenomenally thereby pushing back the contribution of traditional contributors like agriculture and manufacturing sectors to GDP. Growing contribution to GDP accompanied by increasing growth rate in service sector promised new and wider avenues of taxation to the Government. It was felt that substantial revenue should come from the service sector and the tax on goods (excise duty) should be complemented with the tax on services. The tax on services could reduce the degree of intensity of taxation on manufacturing and trade without forcing the Government to compromise on the revenue needs, thereby enabling better pricing of its products by the manufacturing sector in the global market.

With these objectives in mind, service tax was introduced in India in 1994 and today it is envisaged as tax of future.

1.2 Genesis of service tax in India

The imposition of service tax was in sequel to the Report of the Chelliah Committee on Tax Reforms. On these recommendations, Dr. Manmohan Singh, the then Union Finance Minister, in his Budget speech (year 1994-95) introduced the new concept to tax services by mentioning "There is no sound reason for exempting services from taxation, when goods are taxed and many countries treat goods and services alike for tax purposes. The Tax Reforms Committee has also recommended imposition of tax on services as a measure for broadening the base of indirect taxes. I, therefore, propose to make a modest effort in this direction by imposing a tax on services of telephones, non-life insurance and stock brokers." Thus, initially service tax was imposed on 3 services.

The baton then passed on to successive finance ministers who widened the service tax net in their rein. This selective approach of taxation of services continued till 30.06.2012. With the introduction of the Finance Act, 2012, India embraced the new system of taxation of services by way of the introduction of negative list. Hence, with effect from July 1, 2012, there is comprehensive taxation of the entire service sector.

1.3 Constitutional provisions

Initially there was no specific entry in the Union List for levying service tax. Service tax was levied by the Central Government by drawing power from entry 97 of the Union List. Entry 97 is a 'residuary entry' in List-I, which has been reproduced below:

"97 - Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

The 'residuary entry' provides wide powers to the Central Government in respect of taxation of the subjects not mentioned in the Lists given by the constitution.

However, as a result of deliberations between the States and the Centre and as per the recommendations of the various expert committees, entry 92C was introduced in the VII Schedule in the Union List vide Constitution (92nd Amendment) Act, 2003 with effect from 07.01.2004. Entry 92C reads as under:

"92C - Taxes on services."

A new Article 268A [Service tax levied by Union and collected and appropriated by the Union and the States] was inserted in the Constitution which reads as follows:

(1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the State in the manner provided in clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be--

   (a) Collected by the Government of India and the States;

   (b) Appropriated by the Government of India and the States,

in accordance with such principles of collection and appropriation as may be formulated by the Parliament by law.

A consequential amendment to Article 270 of the Constitution was also made to enable Parliament to formulate by law, principles for determining the modalities of levying the service tax by the Central Government and collection of the proceeds thereof by the Central Government and the State Government.

With this amendment in the Constitution, the Central Government has become competent to enact a separate legislation on service tax.

Note: Although Parliament has passed the Constitutional amendment making entry 92C to Union List, this provision has not yet been made effective by the Parliament. Consequently, service tax is presently levied by virtue of Entry 97 only.

1.4 Sources of service tax law

Service tax was introduced in the year 1994 but till date, there is no independent statute for levying service tax. However, following sources provide statutory provisions relating to service tax and can be broadly grouped under the following categories:

(1) Finance Act, 1994: The statutory provisions relating to levy of service tax on services were first promulgated through Chapter V of the Finance Act, 1994. Since then, Chapter V of the Finance Act, 1994 is working as the Act for the service tax levy. Later, in the year 2003, the Finance Act, 2003 inserted Chapter VA to deal with advance rulings.

In the year 2004, the provisions relating to levy of 'education cess' on the amount of service tax were made applicable through Chapter VI of the Finance (No.2) Act, 2004 and in the year 2007, the provisions relating to levy of 'Secondary and Higher education cess' on the amount of service tax were made applicable through Chapter VI of the Finance Act, 2007. ***However, with effect from 01.06.2015, Education Cess and Secondary and Higher Education Cess leviable on taxable services have ceased to be in force.***

Swach Bharat Cess: ***The Finance Act, 2015 has empowered the Central Government to impose a Swachh Bharat Cess on all or any of the taxable services at a rate of 2% on the value of such taxable services. This cess shall be levied from such date as may be notified by the Central Government. The details of coverage of this Cess would be notified in due course. However, no notification has been issued in this regard, as yet.***

(2) Rules on service tax: Section 94 of Chapter V and section 96 -I of Chapter VA of the Finance Act, 1994 grants power to the Central Government for making rules for effective carrying out the provisions of these Chapters. Using these powers, the Central Government has issued the Services Tax Rules 1994, Service Tax (Advance Rulings) Rules, 2003, Service Tax (Registration of Special Category of Persons) Rules, 2005, Service Tax (Determination of Value) Rules, 2006, Point of Taxation Rules, 2011, Place of Provision of Service Rules, 2012 etc.

Rules should be read with the statutory provisions contained in the Act. Rules are made for carrying out the provisions of the Act and the rules cannot override the provisions contained in the Act i.e. in short, the rules can never override the Act and cannot be in conflict with the same.

(3) Notifications on service tax: Sections 93 and 94 of Chapter V, and section 96-I of Chapter VA of the Finance Act, 1994 empower the Central Government to issue notifications to exempt any service from service tax and to make rules to implement service tax provisions. Accordingly, notifications on service tax have been issued by the Central Government from time to time. These notifications usually declare date of enforceability of service tax provisions, provide rules relating to service tax, make amendments therein, provide or withdraw exemptions from service tax or deal with any other matter which the Central Government may think would facilitate the governance of service tax matters.

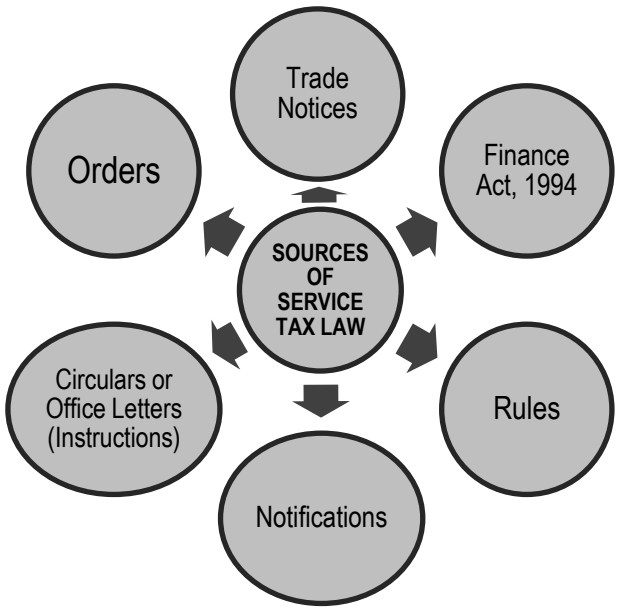
(4) Circulars or Office Letters (Instructions) on service tax: The Central Board of Excise and Customs (CBEC) issues departmental circulars or instruction letters from time to time to explain the scope of taxable services and the scheme of service tax administration etc. These circulars/instructions have to be read with the statutory provisions and notifications on service tax.

The circulars clarify the provisions of the Act and thus, bring out the real intention of the legislature. However, the provisions of any Act of the Parliament cannot be altered or contradicted or changed by the Departmental circulars.

(5) Orders on service tax: Orders on service tax may be issued either by the CBEC or by the Central Government. Rule 3 of the Service Tax Rules, 1994, empowers the CBEC to appoint such Central Excise Officers as it thinks fit for exercising the powers under Chapter V of the Finance Act, 1994. Accordingly, orders have been issued by the CBEC, from time to time, to define jurisdiction of Central Excise Officers for the purposes of service tax.

(6) Trade Notices on service tax: Trade Notices are issued by the Central Excise/Service Tax Commissionerates. These Commissionerates receive various instructions from the Ministry of Finance or Central Board of Excise & Customs for effective implementation and administration of the various provisions of service tax law. The same are circulated among the field officers and the instructions which pertain to trade are communicated to them in the form of trade notices. Trade Associations are supplied with the copies of these trade notices. Individual assesses may also apply for copies of trade notices. The trade notice disseminate the contents of the notifications and circulars/letters/orders, define their jurisdiction; identify the banks in which service tax can be deposited; give clarifications regarding service tax matters, etc.

The various components making service tax law have been represented in the following diagram:



1.5 Selective vs. comprehensive coverage

Depending on the socio-economic compulsions, each country evolved a taxation system on services adopting either a comprehensive approach or a selective approach. In comprehensive approach all services are made taxable and a negative list is provided to exempt some of the services. In selective approach, selective services are subjected to

service tax. While most of the developed countries, tax is levied on all the services with very few and limited exemptions.

India began its journey of taxation of services on July 1, 1994 with a selective approach for taxation of services. The first year had very modest collections of ₹ 407 crore.

After appearing largely as just-another-tax for the first 8 years, with collections touching ₹ 3,302 crore in 2001-02, service tax took some giant leaps in the next 7 years, both on the back of wider coverage as well as increase in tax rate, reaching ₹ 60,941 crore in 2008-09. Next two years saw the growth somewhat moderating with collections reaching ₹ 70,896 crore in 2010-11.

The buoyancy began once again on the back of some policy initiatives and service tax contributed ₹ 97,444 crore during 2011-12, an increase of nearly 37% over the previous year.

While the revenue expectations were often exceeded in all these years the administrative challenge began to assume unmanageable proportions. The newer additions to the list of services often raised issues of overlaps with the previously existing services, confounding both sides as to whether some activities were taxed for the first time or were already covered under an earlier, even if a little less specific head.

There was also a near unanimity across a wide section of thinkers that potential of service tax remained huge and largely untapped. Part of the problem identified was the lack of comprehensive taxation of services, not so much in the lack of coverage but more on account of lack of clarity and significant gaps in existing definitions, exposing the tax collection process to avoidable leakages and litigation.

Budget 2012 ushered a new system of taxation of services; popularly known as Negative List effective from 01.07.2012. There was a paradigm shift from the earlier system where only services of specified descriptions were subjected to tax. In the new system all services, except those specified in the negative list, are subject to taxation.

1.6 Administration of service tax

The Department of Revenue of the Ministry of Finance exercises control in respect of matters relating to all the direct and indirect taxes through two statutory Boards, namely, the Central Board of Direct Taxes (CBDT) and the Central Board of Excise and Customs (CBEC) respectively. Matters relating to the levy and collection of all the direct taxes (income tax, wealth tax etc.) are looked after by CBDT, whereas those relating to levy and collection of indirect taxes (customs duties, central excise duties etc.) fall within the purview of CBEC. The two Boards were constituted under the Central Board of Revenue Act, 1963.

The responsibility of administration and collection of service tax has also been vested upon the CBEC ('Board'). The Board administers service tax matters through the Central Excise Zones and each Zone, in turn works through Central Excise Commissionerate falling under its territory. Each zone is headed by a Principal Chief Commissioner / Chief Commissioner of Central Excise, while each Commissionerate is headed by a Principal Commissioner / Commissioner of Central Excise.

1.6 Service Tax

The Principal Chief Commissioner / Chief Commissioner of Zone exercises supervision and control over the working of the Commissionerates in the Zone and is mainly responsible for monitoring revenue collection, disposal of pendencies, redressal of grievances of trade, etc. He also ensures coordination among the Commissionerates within the Zone.

1.6.1 Director General (Service Tax): Considering the increasing workload due to the expanding coverage of service tax, it was decided to centralise all the work and entrust the same to a separate unit supervised by a very senior official. Accordingly, the office of Director General (Service Tax) was formed in the year 1997. It is headed by the Director General (Service Tax). The functions and powers of Director General (Service Tax) are as follows:

(1) To ensure that proper establishment and infrastructure has been created under different Central Excise Commissionerates to monitor the collection and assessment of service tax.

(2) To study the staff requirement at field level for proper and effective implementation of service tax.

(3) To study as to how the service tax is being implemented in the field and to suggest measures as may be necessary to increase revenue collection or to streamline procedures.

(4) To undertake study of law and procedures in relation to service tax with a view to simplify the service tax collection and assessment and make suggestions thereon.

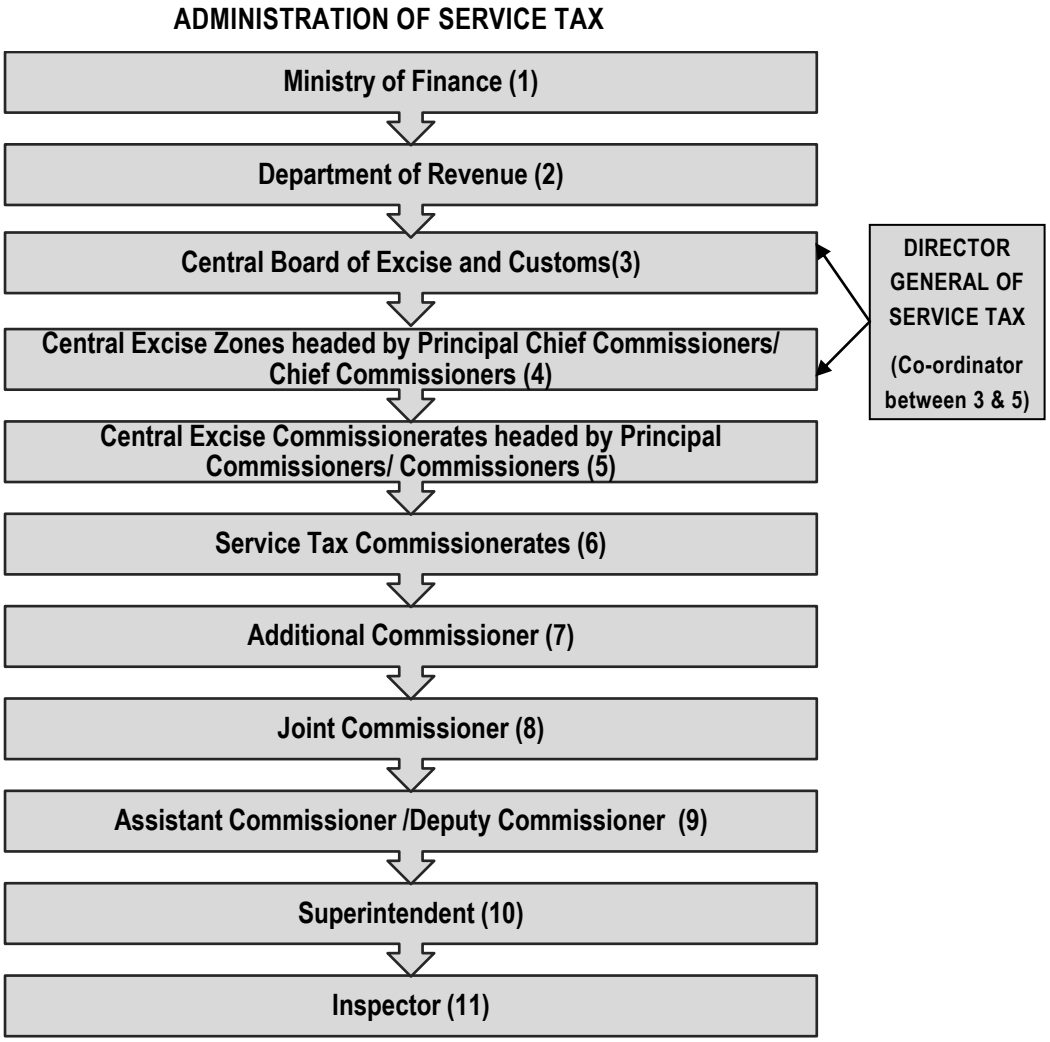
(5) To form a data base regarding the collection of service tax from the date of its inception in 1994 and to monitor the revenue collection from service tax.

(6) To inspect the service tax cells in the Commissionerate to ensure that they are functioning effectively.

(7) To undertake any other functions as assigned by the Board from time to time.

The Directorate of Service Tax coordinates between the CBEC and Central Excise Commissionerates. It also monitors the collection and the assessment of service tax. It compiles the service tax revenue reports received from various Central Excise Commissionerates and monitors the performances of the Commissionerates. It scrutinises the correspondences received from field formations and service providers and replies to the clarifications sought for, wherever possible. In cases where the doubts/clarification sought involves policy matter, the Directorate appraises the Board for issuing clarification/instruction.

The administrative machinery of the service tax law can be understood with the help of the following diagram:



1.7 Role of a Chartered Accountant

Since with the introduction of the negative list the gamut of service tax has expanded substantially, there would be a great need for professionals to advice and assist the assessees. A Chartered Accountant with strong grounding in accounting coupled with his training and experience is well-equipped to position himself in the role as an advisor and facilitator for due compliance of service tax law. The nature of professional services could be:

(1) Advisory services: With the comprehensive coverage of service tax, a great deal of professional acumen would be required to interpret and understand the law and advise the applicability of service tax qua an activity or service. A Chartered Accountant would be able to fill this void.

(2) Procedural compliance: The service tax law envisages registration, payment of tax, filing returns and assessments involving interface with the Excise Department. A

Chartered Accountant with his experience and expertise would be the best person to assist the assessee in all the above functions and ensure compliance.

(3) Personal representation: As per the service tax law read with the Central Excise Act and Rules, a Chartered Accountant is allowed to appear before the assessment authority, Commissioner (Appeals) (first appeal) and Tribunal (second appeal). Here too with his experience and expertise a chartered accountant would be well positioned to represent his clients. When the matter goes up to the High Court or Supreme Court, the Chartered Accountant can assist/ advise the advocates.

(4) Certification and audit: With the widening of tax base there will be a phenomenal growth in the number of service tax assessees. In the ensuing years the department would have to evolve a mechanism where there is management by exception i.e. generally accept all the returns as correct and pick and choose those returns which need detailed scrutiny. In this mechanism a chartered accountant could be of great assistance. Service tax returns and financial statements could be certified by the Chartered Accountant from the perspective of service tax similar to an audit under section 44AB of the Income-tax Act.

(5) Onerous task to keep pace: The service tax like excise is administered more by way of trade notices issued by various Commissionerates. A chartered accountant will have to keep himself abreast of the latest notifications and trade notices in addition to the changes in law so as to meet the client expectations. Thus, in order to render good value added services in the area of service tax a Chartered Accountant has an onerous task to keep pace with the latest in the legal front.

1.8 Extent, Commencement and Application [Section 64]

(1) Extent & commencement: The Finance Act, 1994 came into force from 1.7.1994. Vide section 64(1), the provisions of the Act extends to the whole of the country except the State of Jammu and Kashmir, and vide section 64(3), the levy applies to all **"taxable services provided"**. As per Article 370 of the Constitution, any Act of Parliament applies to Jammu & Kashmir only with concurrence of State Government. Since, no such concurrence has been obtained in respect of the Finance Act, 1994; the provisions of service tax are not applicable in the state of Jammu and Kashmir.

(2) Levy of service tax: Levy of service tax extends to whole of India except Jammu and Kashmir.

'India' means,—

(a) the territory of the Union as referred to in clauses (2) and (3) of article 1 of the Constitution;

(b) its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976;

(c) the seabed and the subsoil underlying the territorial waters;

(d) the air space above its territory and territorial waters; and

(e) the installations, structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof [Section 65B(27)].

Indian territorial waters extend upto 12 nautical miles from the Indian land mass.

1.9 Definition of service [Section 65B(44)]

Earlier, under the selective approach of taxation of services, the word "service" was nowhere defined in the Finance Act, 1994. In the negative list approach of taxation of services, the definition of service gains paramount importance. In order to determine whether a person is liable to pay service tax, the first question he needs to answer is whether the activity undertaken by him comes within the ambit of definition of "service". Consequently, section 65B(44) defines the word "service". For ease of understanding, the definition of service tax may be divided into three sections:-

I. Meaning of service

Service means

(i) any activity for consideration

(ii) carried out by a person for another and

(iii) includes a declared service.

II. Exclusions

However, a service **shall not include**:-

(a) an activity which constitutes merely,—

  (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

  (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

  (iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

III. Explanations

Explanation 1: For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local

authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2: For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include–-

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out–-

(a) by a lottery distributor or selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner;

(b) by a foreman of chit fund for conducting or organising a chit in any manner.

Explanation 3: For the purposes of this Chapter,—

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4: A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory.

Meaning of service

I. ANY ACTIVITY FOR CONSIDERATION

(a) What is an Activity?

The word 'activity' is a term with very wide connotation. It has not been defined in the Finance Act, 1994. However, in terms of the common understanding of the word, activity would include:-

(i) an act done

(ii) a work done

(iii) a deed done

(iv) an operation carried out

(v) execution of an act

(vi) provision of a facility etc.

Activity could be active or passive and would also include forbearance to act. Agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a declared service under section 66E of the Act.

(b) What is a consideration?

Explanation (a) to section 67 of the Act provides an inclusive definition of consideration. Hence, for better understanding, it would be preferable to refer definition of the 'consideration' as given in section 2(d) of the Indian Contract Act, 1872 as follows-

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a **consideration for the promise**".

In other words, 'consideration' means everything received or recoverable in return for a provision of service which includes monetary payment and any consideration of non- monetary nature or deferred consideration as well as recharges between establishments located in a non-taxable territory on one hand and taxable territory on the other hand.

1. **Monetary consideration** means any consideration received in the form of money. **Money** means legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any such similar instrument but shall not include any currency that is held for its numismatic value.
2. **Non-monetary consideration** essentially means compensation in kind such as the following:
   - Supply of goods and services in return for provision of service
   - Refraining or forbearing to do an act in return for provision of service
   - Tolerating an act or a situation in return for provision of a service
   - Doing or agreeing to do an act in return for provision of service.

   Examples of non-monetary consideration are as follows:-

   (a) Rohit agrees to dry clean Shobit's clothes, and in return, Shobit agrees to click Rohit's photograph.

   (b) Sagar agrees not to open dry clean shop in Naresh's neighborhood, and in return, Naresh agrees not to open photography shop in Sagar's neighborhood.

   (c) Pushkar agrees to design Bharat's house, and in return, Bharat agrees not to object to construction of Pushkar's house in his neighborhood.

   (d) Akash agrees to construct 3 flats for Bhola on land owned by Bhola, and in return, Bhola agrees to provide one flat to Akash without any monetary consideration.

(c) Activity for consideration

(i) Implications of the condition that activity should be carried out for a 'consideration':-

- To be taxable, an activity should be carried out by a person for a 'consideration'.
- Activity carried out without any consideration like donations, gifts or free charities are therefore outside the ambit of service. For example, grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research.
- An act by a charity for consideration would be a service and taxable unless otherwise exempted.
- Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service.

(ii) Concept of activity for consideration: The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration.

An activity done without such a relationship i.e. without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity.

The significant points to be noted in this regard are as follows:-

1. Direct and immediate link between activity and consideration

(i) Direct link: It implies that there should be a direct link and not any casual link between activity and consideration.

- Services received from government against taxes paid not taxable per se, as no direct link is there.
- Free seminar to educate about prudent investment indirectly promoting a mutual fund, in this case also direct link is missing.
- Services received from a club against membership, there is a direct link of making the facilities available for use, whether or not immediately used.

(ii) Immediate connection: It implies that there should be an immediate and not remote connection between activity and consideration. Consideration may actually be payable at a later point of time but linkage should be immediate. For instance, in case an award is received in consideration for life time contribution, there is no immediate connection and hence, it is not taxable e.g. Nobel Prize.

2. Activity not involving contractual reciprocity not included

(i) Activity without consideration not taxable

Examples of an activity without consideration are as follows:-

- Tourism information free of charge
- Access to free TV channels
- An artist performing on a street where passersby may drop some coins in his bowl kept either after feeling rejoiced or out of compassion
- Large number of governmental activities for citizens

(ii) Consideration without activity not taxable

Examples of consideration without an activity are as follows:-

- Personal obligations e.g. pocket money
- Amount paid as alimony for divorce
- Donations without conditions
- Pure gifts
- Tips and ex-gratia payments

3. Consideration for service may be paid by a person other than the person receiving the benefit of the service: The consideration for a service may be provided by a person other than the person receiving the benefit of service as long as there is a link between the provision of service and the consideration.

For example, holding company may pay for services that are provided to its associated companies.

Whether following payments constitute a consideration for provision of service?

S.No.	Nature of payment	Whether it is consideration for service?
1.	Imposition of a fine or a penalty for violation of a provision of law. Is fine or penalty the consideration for the activity of breaking the law?	In order to be service, an activity has to be carried out for a consideration. Therefore fines and penalties which are legal consequences of a person's actions are not in the nature of consideration for an activity.
2.	Amount received in settlement of dispute.	Would depend on the nature of dispute. Per se such amounts are not consideration unless it represents a portion of the consideration for an activity that has been carried out. If the dispute itself pertains to consideration relating to service then it would be a part of consideration.

3.	Amount received as advances for performance of service.	Such advances are consideration for the agreement to perform a service.
4.	Deposits returned on cancellation of an agreement to provide a service.	Returned deposits are in the nature of a returned consideration. If tax has already been paid the tax payer would be entitled to refund to the extent specified and subject to provisions of law in this regard.
5.	Advance forfeited for cancellation of an agreement to provide a service.	Since service becomes taxable on an agreement to provide a service such forfeited deposits would represent consideration for the agreement that was entered into for provision of service.
6.	Security deposit that is returnable on completion of provision of service.	Returnable deposit is in the nature of security and hence do not represent consideration for service. However if the deposit is in the nature of a colorable device wherein the interest on the deposit substitutes for the consideration for service provided or the interest earned has a perceptible impact on the consideration charged for service then such interest would form part of gross amount received for the service. Also security deposit should not be in lieu of advance payment for the service.
7.	Security deposits forfeited for damages done by service receiver in the course of receiving a service.	If the forfeited deposits relate to accidental damages due to unforeseen actions not relatable to provision of service then such forfeited deposits would not be a consideration in terms of clause (vi) of sub-rule (2) of rule 6 of the Valuation Rules.
8.	Excess payment made as a result of a mistake	If returned it is not consideration. If not returned and retained by the service provider it becomes a part of the taxable value.
9.	Demurrages payable for use of services beyond the period initially agreed upon e.g. retention of containers beyond the normal period.	This will be consideration.

II. ACTIVITY MUST BE CARRIED OUT BY A PERSON FOR ANOTHER

The phrase 'provided by one person to another' signifies that there must be two distinct entities-service provider and service receiver. Hence, services provided by a person to self are outside the ambit of taxable service. For instance, services provided by one branch of a company to another or to its head office or vice-versa are not services provided by one person to another.

Person includes,—

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a society,

(v) a limited liability partnership,

(vi) a firm,

(vii) an association of persons or body of individuals, whether incorporated or not,

(viii) Government,

(ix) a local authority, or

(x) every artificial juridical person, not falling within any of the preceding sub-clauses [Section 65B(37)].

Exceptions

General rule - Only services provided by a person to another are taxable. Explanation 3 carves out two exceptions to the general rule:-

- an establishment of a person located in taxable territory and another establishment of such person located in non-taxable territory are treated as establishments of distinct persons.
- an unincorporated association or body of persons and members thereof are also treated as distinct persons.

Hence, such persons shall be deemed to be separate persons and thus, services provided by these persons would be taxable.

For example, services provided by the branch office of a multinational company to the headquarters of the multi-national company located outside India would be taxable provided other conditions relating to taxability of service are satisfied.

Similarly, Circular No. 179/5/2014 ST dated 24.09.2014 clarifies that a joint venture (JV) (an unincorporated temporary association constituted for the limited purpose of carrying out a specified project) and the members of the JV are treated as distinct

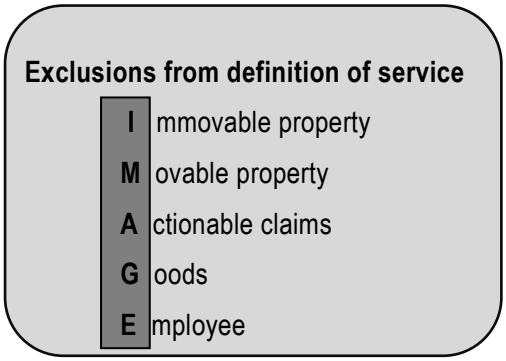
persons and therefore, taxable services provided for consideration, by the JV to its members or vice versa and between the members of the JV are taxable.

Further, if cash calls (capital contributions) made by the members to the JV are merely a transaction in money, they are excluded from the definition of service provided in section 65B(44) of the Finance Act, 1994. Whether a 'cash call' is 'merely…. a transaction in money' and hence not in the nature of consideration for taxable service, would depend on the comprehensive examination of the Joint Venture Agreement, which may vary from case to case. Detailed and close scrutiny of the terms of JV agreement may be required in each case, to determine the service tax treatment of cash calls.

III. SERVICE INCLUDES DECLARED SERVICE

Section 65B(22) defines declared service as any activity carried out by a person for another person for consideration and declared as such under section 66E *[Refer heading 1.13 for detailed discussion on declared service].*

Exclusions



(i) <u>Clause (a)(i) of exclusions:</u> Activity to be taxable should not constitute only a transfer in title of goods or immovable property by way of sale, gift or in any other manner

Mere transfer of title in goods or immovable property by way of sale, gift or in any other manner for a consideration does not constitute service. However, a transaction which in addition to a transfer of title in goods or immovable property involves an element of another activity carried out or to be carried out by the person transferring the title would not be out rightly excluded from the definition of service.

Goods means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale [Section 65B(25)].

Immovable property has not been defined in the Act. Therefore the definition of immovable property in the General Clauses Act, 1897 will be applicable which defines immovable property to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

(ii) Clause (a)(ii) of exclusions: Activity to be taxable should not constitute merely a transfer, delivery or supply of goods which is deemed to be a sale of goods within the meaning of clause (29A) of article 366 of the Constitution

It may be noted that although the transfer of title by way of sale of goods is already excluded under clause (i) above, deemed sales have been excluded specifically by this clause. The reason for the same is that some categories of deemed sales do not involve transfer of title in goods like transfer of goods on hire-purchase or transfer of right to use goods. Accordingly, deemed sales have been specifically excluded.

The six categories of deemed sales as defined in article 366(29A) of the Constitution are –

- transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration
- transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract
- delivery of goods on hire-purchase or any system of payment by installments
- transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration
- supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration
- supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

(iii) Clause (a)(iii) of exclusions: Transactions only in money or actionable claims do not constitute service

Clause (a)(iii) of exclusions has to be read in conjunction with Explanation 2.

The implications of this explanation are that while mere transactions in money are outside the ambit of service, any activity related to a transaction in money by way of its use or conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination would not be treated as a transaction in money if a separate consideration is charged for such an activity. While the transaction in money, per-se, would be outside the ambit of service the related activity, for which a separate consideration is charged, would not be treated as a transaction of money and would be chargeable to service tax if other elements of taxability are present.

For example, a foreign exchange dealer while exchanging one currency for another also charges a commission (often inbuilt in the difference between the purchase price and

selling price of forex). The activity of exchange of currency, per-se, would be a transaction only in money, the related activity of providing the services of conversion of forex, documentation and other services for which a commission is charged separately or built in the margins would be very much a 'service'.

Similarly, clause (ii) of the Explanation 2 provides that the activity carried out for a consideration —

(a) by a lottery distributor or selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner;

(b) by a foreman of chit fund for conducting or organising a chit in any manner

will not be included in the ambit of the expression transaction in money or actionable claim.

Thus, service tax would be leviable on the services provided by:

(i) chit fund foremen by way of conducting a chit

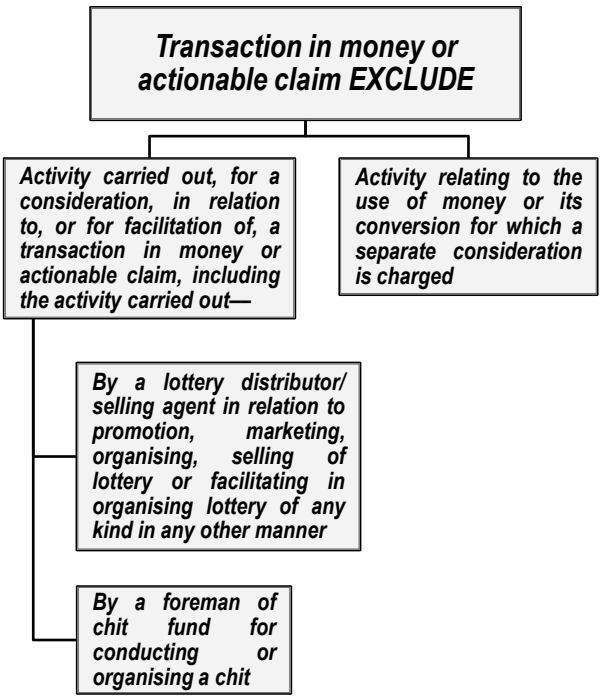
(ii) distributor or selling agents of lottery, as appointed or authorized by the organizing state for promoting, marketing, distributing, selling, or assisting the state in any other way for organizing and conducting a lottery.

Thus, what is excluded from the definition of service is only a transaction in money or actionable claim (like lottery) and not any activity in relation to, or for facilitation of a transaction in money or actionable claim.

Provisions of Explanation 2 have been explained with the help of a diagram given at the next page.

1. "Foreman of chit fund" shall have the same meaning as is assigned to the term foreman in clause (j) of section 2 of the Chit Funds Act, 1982. [Section 65B (23A)].

2. "Lottery distributor or selling agent" means a person appointed or authorised by a State for the purposes of promoting, marketing, selling or facilitating in organising lottery of any kind, in any manner, organised by such State in accordance with the provisions of the Lotteries (Regulation) Act, 1998 [Section 65B (31A)].



Whether the following transactions come under 'transaction only in money'?

S.No.	Nature of transactions	Whether come under transaction only in money?
1.	Making of a draft or a pay order by a bank	No. Since the bank charges a commission for preparation of a bank draft or a pay order it is not a transaction only in money. However, for a draft or a pay order made by bank the service provided would be only to the extent of commission charged for the bank draft or pay order. The money received for the face value of such instrument would not be consideration for a service since to the extent of face value of the instrument it is only a transaction in money.
2.	An investment	Investment of funds by a person with another for which the return on such investment is returned or repatriated to the investors without retaining any portion of the return on such investment of funds is a transaction only in money. Thus a partner being admitted in a partnership against his share will be a transaction in money. However, if a commission is charged or a portion of the return is retained as service charges, then such commission or portion of return is out of the purview of transaction only in money and hence taxable. Also, if a service is received in

		lieu of an investment it would cease to be a transaction only in money to the extent the investment represents the consideration for the service received.
3.	Debt collection services or credit control services	No. Such services provided for consideration are taxable.
4.	Sale, purchase, acquisition or assignment of a secured debt like a mortgage	Yes. However, if a service fee or processing fee or any other charge is collected in the course of transfer or assignment of a debt then the same would be chargeable to service tax.
5.	Remittance of foreign currency in India from overseas	Yes. Remittance of foreign currency in India from overseas *per se* is a transaction in money.

Money means legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any such similar instrument but shall not include any currency that is held for its numismatic value [Section 65B(33)].

Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent [Section 65B(1)].

Illustrations of actionable claims are -

--Unsecured debts

--Right to participate in the draw to be held in a lottery.

(iv) <u>Clause (b) of exclusions:</u> Provision of service by an employee to the employer is outside the ambit of service

Not all services provided by an employee to the employer are outside the ambit of services. **Only services that are provided by the employee to the employer in the course of employment are outside the ambit of services**. Services provided outside the ambit of employment for a consideration would be a service. For example, if an employee provides his services on contract basis to an associate company of the employer, then this would be treated as provision of service.

Whether the following be regarded as services in course of employment

S.No.	Nature of services	Whether regarded as services in course of employment
1.	Services provided on contract basis by a person to another	No. Services provided on contract basis i.e. principal-to-principal basis are not services provided in the course of employment.
2.	Services provided by a casual worker to employer who gives wages on daily basis to the worker.	Yes. These are services provided by the worker in the course of employment.
3.	In case the casual workers are employed by a contractor, like a building contractor or security agency services, who deploys them for execution of a contract or for provision of security services to a client.	Yes. Services provided by the worker to the contractors are in the course of employment. However, services provided by the contractor to his client by deploying such workers would not be a service provided by the workers to the client in the course of employment. The consideration received by the contractor would therefore be taxable if other conditions of taxability are present.

Pre-mature termination of employment contract: Amounts received by an employee from the employer on premature termination of contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would not be chargeable to service tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act.

Explanations

Explanation 1 clarifies that 'service' does not cover functions or duties performed by Members of Parliament, State Legislatures, Panchayat, Municipalities or any other local authority, any person who holds any post in pursuance of the provisions of the Constitution or any person as a Chairperson or a Member or a Director in a body established by the Central or State Governments or local authority and who is not deemed as an employee.

Explanation 2 & 3 have already been discussed at the relevant places.

Explanation 4 explains that a branch or an agency of a person through which the person carries out business is also an establishment of such person.

1.10 Charge of Service Tax [Section 66B]

1.10.1 Statutory provisions: Section 66B is the charging section of the Act, which provides that there shall be levied a tax (hereinafter referred to as the service tax) at the rate of ***14% [from 01.06.2015 rate has been enhanced from 12% to 14%]*** on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in

the taxable territory by one person to another and collected in such manner as may be prescribed.

(a) Provided or agreed to be provided: The implications of this phrase are –

- Services which have only been agreed to be provided but are yet to be provided are also taxable.
- Receipt of advances for services agreed to be provided become taxable before the actual provision of service.
- Advances that are retained by the service provider in the event of cancellation of contract of service by the service receiver become taxable as these represent consideration for a service that was agreed to be provided.

However, it is important to note that the liability to pay the service tax on a taxable service arise the moment it is agreed to be provided without actual provision of service. The liability to pay tax arises in such cases at the point of taxation which is determined as per the Point of Taxation Rules, 2011 (discussed in detail in Chapter 3).

(b) Provided in the taxable territory: The service must have been provided in the taxable territory. The place of provision of a service shall be determined as per the Place of Provision of Service Rules, 2012 (discussed in detail in Chapter 2).

Taxable territory means the territory to which the provisions of this Chapter apply i.e. the whole of territory of India other than the State of Jammu and Kashmir [Section 65(51)].

(c) Service should not be specified in the negative list: As per section 66B, to be taxable a service should not be specified in the negative list. The negative list of services has been specified in section 66D of the Act.

1.10.2 Steps to determine the taxability of a service: After having understood the definition of service and the provisions of charging section 66B, these simple steps can be followed to identify whether an activity is a 'taxable service'.

Step 1: To determine whether an activity is a 'service'

The following questions need to be asked to determine if the activity is a service:

S.No.	QUESTION	ANSWER
	1	2
1.	Whether the activity is being done (including, but not limited to, an activity specified in section 66E of the Act) for another person*?	Yes
2.	Whether the activity is being done for a consideration?	Yes
3.	Does this activity consist only of transfer of title in goods or immovable property by way of sale, gift or in any other manner?	No
4.	Does this activity constitute only a transfer, delivery or supply of goods which is deemed to be a sale of goods within the meaning of clause	No

	(29A) of article 366 of the Constitution?	
5.	Does this activity consist only of a transaction in money or actionable claim?	No
6.	Is the consideration for the activity in the nature of court fees for a court or a tribunal?	No
7.	Is such an activity in the nature of a service provided by an employee of such person in the course of employment?	No
8.	Is the activity covered in any of the categories specified in Explanation 1 or Explanation 2 to section 65B(44)?	No

[*if business is being done through an establishment located in the taxable territory and another establishment located in non taxable territory OR an association or body of persons or a member thereof, then please see Explanation 3 to section 65B(44) of the Act before answering this question]

If the answers to the above questions are as per the answers indicated in column 2 of the table above, THEN the activity is a 'service'.

Step 2: To determine whether the service is taxable

If the activity is a service (Step 1), then following further questions need to be asked to determine if the said service is 'taxable'-

S.No.	QUESTION	ANSWER
	1	2
1.	Has the service been provided or agreed to be provided?	Yes
2.	Has the service been provided or agreed to be provided in the taxable territory?	Yes
3.	Is this activity entirely covered in any of the services described in the negative list of services specified in section 66D of the Act?	No

If the answers to the above questions are also as per the answers given in column 2 of the table above, THEN the activity is taxable.

However, even if a service is taxable, that would not necessarily mean that service tax will be payable on the same. Service tax will be payable only if the said service is not exempted under any of the exemption notifications *[Exemptions have been discussed in detail in Chapter 5: Exemptions and Abatements].*

1.11 Negative list of services [Section 66D]

The charging section 66B of the Finance Act, 1994, *inter alia*, provides that service tax shall be levied on all services, except the services specified in the negative list. Accordingly, section 66D of the Act has specified the list of services consisting of 16 heads of services which is termed as 'Negative List'. In a comprehensive tax regime, this 'Negative List' is of paramount importance because every activity not covered under this list is chargeable to service tax.

The negative list shall comprise of the following services, namely:—

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere—

  (i) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than Government;

  (ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

  (iii) transport of goods or passengers; or

  (iv) ***support services[1],*** other than services covered under clauses (i) to (iii) above, provided to business entities;

(b) services by the Reserve Bank of India;

(c) services by a foreign diplomatic mission located in India;

(d) services relating to agriculture or agricultural produce by way of—

  (i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;

  (ii) supply of farm labour;

  (iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;

  (iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;

  (v) loading, unloading, packing, storage or warehousing of agricultural produce;

  (vi) agricultural extension services;

  (vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce;

(e) trading of goods;

(f) ***services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption;***

(g) selling of space for advertisements in print media;

(h) service by way of access to a road or a bridge on payment of toll charges;

(i) betting, gambling or lottery;

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[1] The words "support services" are to be substituted with the words "any service" from a date to be notified by the Central Government. However, no such date has been notified as yet.

Explanation – For the purpose of this clause, the expression 'betting, gambling or lottery' shall not include the activity specified in Explanation 2 to section 65B(44)[2].

(k) transmission or distribution of electricity by an electricity transmission or distribution utility;

(l) services by way of—

(i) pre-school education and education up to higher secondary school or equivalent;

(ii) education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;

(iii) education as a part of an approved vocational education course;

(m) services by way of renting of residential dwelling for use as residence;

(n) services by way of—

(i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;

(ii) *inter se* sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers;

(o) service of transportation of passengers, with or without accompanied belongings, by—

(i) a stage carriage;

(ii) railways in a class other than—

(A) first class; or

(B) an airconditioned coach;

(iii) metro, monorail or tramway;

(iv) inland waterways;

(v) public transport, other than predominantly for tourism purpose, in a vessel between places located in India; and

(vi) metered cabs or auto rickshaws;

(p) services by way of transportation of goods—

(i) by road except the services of—

(A) a goods transportation agency; or

(B) a courier agency;

(ii) by an aircraft or a vessel from a place outside India up to the customs station of clearance in India; or

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[2] The Sikkim High Court in the case of *M/s Future Gaming and Hotel Services (Pvt.) Ltd. v. Union of India 2015 TIOL 2398 HC Sikkim ST* has struck down the Explanation inserted by Finance Act, 2015 and held it to be *ultra vires* the Finance Act, 1994. The High Court was of the view that the said Explanation seeks to expand the scope of 66D, which is the main provision.

(iii) by inland waterways;

(q) funeral, burial, crematorium or mortuary services including transportation of the deceased.

ANALYSIS: Analysis of each of the entries of negative list in detail is given below.

1. Entry (a): Services by Government or Local Authority, entry (o): Transportation of passengers & entry (p): Transportation of goods

All the services provided by the Government or a local authority are not chargeable to service tax.

***Government** means the Departments of the Central Government, a State Government and its Departments and a Union territory and its Departments, but shall not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with article 150 of the Constitution or the rules made thereunder [Section 65B(26A)].*

Local authority means—

(a) Panchayat as referred to in clause (d) of article 243 of the Constitution.

(b) Municipality as referred to in clause (e) of article 243P of the Constitution.

(c) Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund.

(d) Cantonment Board as defined in section 3 of the Cantonments Act, 2006.

(e) Regional council or a district council constituted under the Sixth Schedule to the Constitution.

(f) Development board constituted under article 371 of the Constitution.

(g) Regional council constituted under article 371A of the Constitution [Section 65B(31)].

Exceptions: However, the following services, even if provided by the Government or local authority, are taxable:-

(i) Services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than Government;

(ii) Services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) Transport of goods or passengers; or

(iv) ***Support services***[3], other than services covered under clauses (i) to (iii) above, provided to business entities.

[3] The words "support services" are to be substituted with the words "any service" from a date to be notified by the Central Government. However, no such date has been notified as yet.

I. SERVICES BY THE DEPARTMENT OF POSTS PROVIDED TO A PERSON OTHER THAN GOVERNMENT

Following services **provided to a person other than Government**, by the Department of Posts are taxable:-

(a) Speed post: provides time-bound and express delivery of letters, documents and parcels across the nation and around the world. Now-days, speed posts can be tracked on a daily basis with the help of speed post tracking service started by Postal Department of India.

(b) Express parcel post: Express Parcel Post is fast and relaible service for sending the parcels upto 35 kg within India. It provides convenience to the customers by picking up from customer's premises and delivering to consignee.

(c) Life insurance: Post offices offer insurance under two schemes:

(a) Postal Life Insurance

(b) Rural Postal Life Insurance.

(d) Agency services: includes distribution of mutual funds, bonds, passport applications, collection of telephone and electricity bills, which are provided by the Department of Posts to non-Government entities.

Services provided by Department of Posts NOT liable to service tax: Therefore, the following services provided by Department of Posts are not liable to service tax:-

- Basic mail services known as postal services such as post card, inland letter, book post, registered post provided exclusively by the Department of Posts to meet the universal postal obligations.
- Transfer of money through money orders, operation of savings accounts, issue of postal orders, pension payments and other such services.

II. SERVICES IN RELATION TO AN AIRCRAFT OR A VESSEL, INSIDE OR OUTSIDE THE PRECINCTS OF A PORT OR AN AIRPORT

Services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport provided by Government or local authority are taxable.

1. **Aircraft** means any machine which can derive support in the atmosphere from reactions of the air, other than reactions of the air against the earth's surface and includes balloons, whether fixed or free, airships, kites, gliders and flying machines [Section 65B(7)].
2. **Airport** means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome**[Section 65B(8)].

   ****Aerodrome** means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structures thereon or appertaining thereto.

3. As per section 65B(38), **port** covers two types of ports:-

(i) Major ports as defined under section 2(q) of the Major Port Trusts Act, 1963:

Port means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act.

(ii) Other ports as defined under section 3(4) of the Indian Ports Act, 1908.

Port includes also any part of a river or channel in which this Act is for the time being in force.

4. **Vessel** includes anything made for the conveyance, mainly by water, of human beings or of goods and a caisson [Section 65B(53)].

III. TRANSPORT OF GOODS OR PASSENGERS

Services of transport of passengers and goods have been specifically dealt with in clause (o) and (p). Here we are discussing the complete taxability of transport of passengers and goods. As a result of the combined study of the clause (o), (p) and this part of entry (a), the taxability of transport of passengers and goods is under:-

A. Transport of passengers

Transport of passengers by Government or local authority is generally taxable. However, following services of transportation of passengers,(whether provided by Government or otherwise) with or without accompanied belongings **are not taxable:—**

(i) Transport of passengers by a stage carriage: Vehicles which can carry more than six passengers shall be included here. In other words, carriages running under public transport shall not be taxable.

It may be noted that transport of passengers by vehicles under contract carriage is outside the purview of this entry. However, specific exemption under mega exemption notification (discussed in Chapter -5) is available to services of transport of passengers by a contract carriage for transportation of passengers, excluding tourism, conducted tours, charter or hire.

Stage carriage means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey [Section 65B(46)].

(ii) Transport of passengers by railways in a class other than—

(A) first class; or

(B) an air conditioned coach

Thus, journey by rail in 2nd class, sleeper class or general class is not taxable.

Transport of passengers in railways in first class or an air conditioned coach is taxable.

(iii) Transport of passengers by metro, monorail or tramway: Transport of passengers by metro, monorail or tramway is not taxable.

(iv) Transport of passengers by inland waterways

Inland waterways means:-

(i) National waterways as defined in section 2(h) of the Inland Waterways Authority of India Act, 1985, or

(ii) Other waterway on any inland water as defined in section 2(b) of the Inland Vessels Act, 1917 [Section 65B(29)].

National waterway means the inland waterway declared by section 2 of the National Waterway (Allahabad-Haldia Stretch of the Ganga-Bhagirathi-Hooghly River) Act, 1982, to be a national waterway.

Explanation–If Parliament declares by law any other waterway to be a national waterway, then from the date on which such declaration takes effect, such other waterway–

(i) shall be deemed also to be a national waterway within the meaning of this clause; and

(ii) the provisions of this Act shall, with necessary modifications (including modification for construing any reference to the commencement of this Act as a reference to the date aforesaid), apply to such national waterway [Section 2(h) of the Inland Waterways Authority of India Act, 1985].

Inland water means any canal, river, lake or other navigable water [Section 2b) of the Inland Vessels Act 1917].

(v) Transport of passengers by public transport, other than predominantly for tourism purpose, in a vessel between places located in India: The words 'other than predominantly for tourism purpose' qualify the preceding words "public transport". This implies that the public transport by a vessel should not be predominantly for tourism purposes. Normal public ships or other vessels that sail between places located in India would be covered in the negative list entry even if some of the passengers on board are using the service for tourism as predominantly, such service is not for tourism purpose. However, services provided by leisure or charter vessels or a cruise ship, predominant purpose of which is tourism, would not be covered in the negative list even if some of the passengers in such vessels are not tourists.

For instance, services by way of transportation of passengers on a vessel, from Kolkata to Port Blair (mainland – island) or Port Blair to Rose Island (inter island), is covered in the negative list entry.

(vi) Metered cabs or auto rickshaws: Metered cab means any contract carriage on which an automatic device, of the type and make approved under the relevant rules by the State Transport Authority, is fitted which indicates reading of the fare chargeable at any moment and that is charged accordingly under the conditions of its permit issued under the Motor Vehicles Act, 1988 and the rules made thereunder but does not include radio taxi [Section 65B(32)].

B. Transportation of goods

Transport of goods by Government or local authority is generally taxable. However, following services of transportation of goods, (whether provided by Government or otherwise) **are not taxable:-—**

(i) Services by way of transportation of goods by road except the services of—

(A) a goods transportation agency; or

(B) a courier agency

Transportation of goods by road is not taxable. However, services of goods transportation agency and courier agency services are excluded from the negative list entry relating to transportation of goods by road thereby making these two services taxable.

(A) Goods transportation agency services: When the goods are transported by road by a goods transport agency, it is liable to tax. Further, the provisions relating to reverse charge, i.e. service tax is liable to be paid by the consigner or consignee in specified cases, are applicable even after the introduction of negative list.

Goods transport agency means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called [Section 65B(26)].

(B) Courier agency: Courier agency services are liable to service tax.

Express cargo service: The nature of service provided by 'Express Cargo Service' falls within the scope and definition of the courier agency. Hence, the said service is liable to service tax.

Angadia: 'Angadia' undertakes delivery of documents, goods or articles received from a customer to another person for a consideration. Therefore, 'angadias' are covered within the definition of a 'courier' and services provided by angadia are liable to service tax.

Courier agency means any person engaged in the door-to-door transportation of time-sensitive documents, goods or articles utilising the services of a person, either directly or indirectly, to carry or accompany such documents, goods or articles [Section 65B(20)].

(ii) Services by way of transportation of goods by an aircraft or a vessel from a place outside India up to the customs station of clearance in India: Transportation of goods either by air or by sea for outside India upto custom station of clearance in India is not taxable.

1. **Aircraft** means any machine which can derive support in the atmosphere from reactions of the air, other than reactions of the air against the earth's surface and includes balloons, whether fixed or free, airships, kites, gliders and flying machines [Section 65B(7)].
2. **Vessel** includes anything made for the conveyance, mainly by water, of human beings or of goods and a caisson [Section 65B(53)].
3. **Customs station** means any customs port, customs airport or land customs station [Section 65B(21)].

(iii) Services by way of transportation of goods by inland waterways: Almost any water transport within India would be covered under the negative entry for transportation of goods by inland waterways.

IV. SUPPORT SERVICES[4], OTHER THAN SERVICES COVERED UNDER CLAUSES I TO III ABOVE, PROVIDED TO BUSINESS ENTITIES

Other support services[5] provided by the Government or a local authority to the business entities are taxable services.

1. **Business entity** means any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession [Section 65B(17)].
2. **Support services[6]** means infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves, but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis [Section 65B(49)].

2. Entry (b): Services provided by Reserve Bank of India

All the services by the Reserve Bank of India gets covered in the negative list, and become non taxable.

Note: *Services **PROVIDED TO** the Reserve Bank of India are **NOT** included in the negative list and hence, would be taxable subject to any exemption granted to them.*[7]

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[4] The words "support services" are to be substituted with the words "any service" from a date to be notified by the Central Government. However, no such date has been notified as yet.

[5] Same as above

[6] Definition of "support service" as provided under section 65B(49) is to be omitted with effect from a date to be notified by the Central Government. However, no date has been notified as yet.

[7] Exemptions have been discussed in Chapter 5: Exemptions and Abatements

3. Entry (c): Services by a Foreign Diplomatic Mission located in India

All the services rendered by a foreign diplomatic mission located in India are not chargeable to service tax. This entry does not cover services, if any, provided by any office or establishment of an international organization.

4. Entry (d): Services relating to agriculture or agricultural produce

Following services relating to agriculture or agricultural produce are not taxable-

(i) Agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing

- Activities like breeding of fish (pisciculture), rearing of silk worms (sericulture), cultivation of ornamental flowers (floriculture) and horticulture, forestry are included in the definition of agriculture.
- Plantation crops like rubber, tea or coffee would be also covered under agricultural produce.
- The processes contemplated in the definition of agricultural produce are those as are **'usually done by the cultivator or producer'**. Thus agricultural products like cereals, pulses, copra and jaggery where certain amount of processing on these products is done by a person other than a cultivator or producer may not get covered in the ambit of 'agricultural produce'.

1. **Agriculture** means the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products [Section 65B(3)].
2. **Agricultural produce** means any produce of agriculture on which either no further processing is done or such processing is done as is **usually done by a cultivator or producer** which does not alter its essential characteristics but makes it marketable for primary market [Section 65B(5)].

   Circular No. 177/03/2014 ST dated 17.02.2014 has clarified that the above definition of agricultural produce covers 'paddy'; but excludes 'rice'. It implies that benefits available to agricultural produce in the negative list are not available to rice.

(ii) Supply of farm labour: The service provider who is providing the desired farm labour to the service receiver is not liable to pay service tax on the said services.

(iii) Processes which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market: The processes carried out at an agricultural farm including tending, pruning, cutting, harvesting; drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market are not taxable. However, following processes are taxable:-

(a) **Process which alters the essential characteristics of the agricultural produce:** Potato chips or tomato ketchup does not qualify as agricultural produce because in terms of the definition of agricultural produce, only such processing should be carried out as is usually done by cultivator producers **which does not alter its essential characteristics** but makes it marketable for primary market. Potato chips or tomato ketchup are manufactured through processes which alter the essential characteristic of farm produce (potatoes and tomatoes in this case).

(b) **Process which makes agricultural produce marketable in the retail market:** The processes of grinding, sterilizing, extraction packaging in retail packs of agricultural products, which make the agricultural products marketable in retail market, would NOT be covered in the negative list. Only such processes are covered in the negative list which makes agricultural produce marketable in the primary market.

(iv) **Renting or leasing of agro machinery or vacant land with or without a structure incidental to its use:** Leasing of vacant land with a green house or a storage shed which is incidental to its use for agriculture would be covered in the negative list.

(v) **Loading, unloading, packing, storage or warehousing of agricultural produce**

(vi) **Agricultural extension services:** Agricultural extension means application of scientific research and knowledge to agricultural practices through farmer education or training [Section 65B(4)].

(vii) **Services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce:** Agricultural Produce Marketing Committees or Boards are set up under a State Law for purpose of regulating the marketing of agricultural produce. Such marketing committees or boards have been set up in most of the States and provide a variety of support services for facilitating the marketing of agricultural produce by provision of facilities and amenities like, sheds, water, light, electricity, grading facilities etc. They also take measures for prevention of sale or purchase of agricultural produce below the minimum support price. APMCs collect market fees, license fees, rents etc. Services provided by such Agricultural Produce Marketing Committee or Board are covered in the negative list. However, any service provided by such bodies which is not directly related to agriculture or agricultural produce will be liable to tax e.g. renting of shops or other property.

Service provided by commission agent for sale or purchase of agricultural produce are also covered under the negative list entry.

5. Entry (e): Trading of goods

The above entry refers to the activity of trading of goods.

Thus, the check has to be twofold –

(1) the activity should be of trading and

(2) trading should be of goods.

Whether the following would be covered under trading of goods?

(a) Activities of a commission agent/CHA selling goods on behalf of another for a commission: The services provided by commission agent or a clearing and forwarding agent (CHA) are not in the nature of trading of goods. These are auxiliary for trading of goods. In terms of the provision of section 66F(1) reference to a service does not include reference to a service used for providing such service *[Refer heading 1.14 for detailed discussion on section 66F].* Moreover, the title in the goods never passes on to such agents to come within the ambit of trading of goods.

(b) Forward contracts in commodities: Forward contracts would be covered under trading of goods as these are contracts which involve transfer of title in goods on a future date at a pre-determined price.

(c) Commodity futures: Commodity futures would be covered under trading of goods. In commodity futures actual delivery of goods does not normally take place and the purchaser under a futures contract normally offset all obligations or closes out by selling an equal quantity of goods of the same description under another contract for delivery on the same date. These are in the nature of derivatives.

(d) Auxiliary services relating to future contracts or commodity futures: Such services provided by commodity exchanges clearing houses or agents would not be covered in the negative list entry relating to trading of goods.

Note: It is relevant to note here that in common parlance whenever the term 'trading' is used, it is considered as 'trading in goods'. The term 'trading of service' seems to be little uncommon to use but these kind of activities commonly takes place where a person procures services from one person and provides to another, practically such transactions most of the times get recognised as commission agent's services though may not be strictly commission based.

Goods means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale [Section 65B(25)].

Securities include —

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) Units or any other instrument issued by any collective investment scheme to the investors in such schemes;

(ii) Government securities;

(iia) such other instruments as may be declared by the central Government to be Securities; and

(iii) rights or interest in securities [Section 65B(43)].

6. Entry (f): Processes amounting to manufacture or production of goods

Any process amounting to manufacture or production of goods shall not be taxable.

Points to be noted

- This entry covers **manufacturing activity carried out on contract or job work basis**, which does not involve transfer of title in goods, **provided** duties of excise are leviable on such processes under the Central Excise Act, 1944, the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 or any of the State Acts.
- In other words, if Central Excise duty is leviable on a particular process, as the same amounts to manufacture, then such process would be covered in the negative list even if there is a central excise duty exemption for such process.
- However if central excise duty is wrongly paid on a certain process which does not amount to manufacture, with or without an intended benefit, it will not save the process on this ground and service tax would still be leviable on such process.

Process amounting to manufacture or production of goods means

(i) a process on which duties of excise are leviable under section 3 of the Central Excise Act, 1944 or the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 or

(ii) any process amounting to manufacture of opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any State Act for the time being in force [Section 65B(40)].

7. Entry (g): Selling of space for advertisements in print media

The service tax levy extends to advertisement in all media except print media. In other words, the levy extends to other segments like online and mobile advertising, advertisements on internet websites, out-of-home media, on film screen in theatres, bill boards, conveyances, buildings, cell phones, automated teller machines, commercial publications, aerial advertising*, etc.

"Print media" means,—

(i) "book" as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867, but does not include business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes;

(ii) "newspaper" as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 [Section 65B(39a)].

Thus, sale of space for advertisements in business directories, yellow pages and trade catalogues would attract service tax.

*Aerial advertising is a form of advertising that incorporates the use of aircraft, balloons or airships to create, transport, or display, advertising media. The media can be static, such as a banner, logo, lighted sign or sponsorship branding. It can also be dynamic, such as animated, lighted or audio.

Advertisement means any form of presentation for promotion of, or bringing awareness about, any event, idea, immovable property, person, service, goods or actionable claim through newspaper, television, radio or any other means but does not include any presentation made in person [Section 65B(2)].

Points to be noted

- **Making or preparing advertisements:** Services provided by advertisement agencies relating to making or preparation of advertisements would not be covered in this entry and thus, would be taxable. This would also not cover commissions received by advertisement agencies from the broadcasting or publishing companies for facilitating business, which may also include some portion for the preparation of advertisement.
- **Composite service of providing space for advertisement coupled with designing and preparation of the advertisement:** In case a person provides a composite service of providing space for advertisement that is covered in the negative list entry coupled with taxable service relating to design and preparation of the advertisement, this would be a case of bundled services taxability of which has to be determined in terms of the principles laid down in section 66F of the Act.

  As per section 66F, if such services are bundled in the ordinary course of business then the bundle of services will be treated as consisting entirely of such service which determines the dominant nature of such a bundle.

  If such services are not bundled in the ordinary course of business then the bundle of services will be treated as consisting entirely of such service which attracts the highest liability of service tax.
- **Canvassing advertisement for publishing on a commission basis:** Merely canvassing advertisement for publishing on a commission basis by persons/agencies is not covered in the negative list entry and is taxable.

8. Entry (h): Access to a road or a bridge on payment of toll charges

This entry covers the services of providing access to road and charging toll charges.

Whether the following are covered in this entry of negative list?

1. **Access to national highways or state highways:** National highways or state highways are also roads and hence covered in this entry.
2. **Collection charges or service charges paid to any toll collecting agency:** The negative list entry only covers access to a road or a bridge on payment of toll charges. Services of toll collection on behalf of an agency authorized to levy toll are in the nature of services used for providing the negative list services. As per the principle laid down in sub section (1) of section 66F of the Act the reference to a service by nature or description in the Act will not include reference to a service used for providing such service.

9. Entry (i): Betting, gambling or lottery

Services of betting, gambling or lottery are included in this entry.

Betting or gambling means putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring [Section 65B(15)].

The Explanation to the clause (i) of section 66D clarifies that the expression 'betting, gambling or lottery' shall not include the activity specified in Explanation 2 to section 65B(44). Thus, the activity carried out by a lottery distributor or selling agent in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner is out of the ambit of 'transaction in money or actionable claim' as well as the negative list of services.[8]

Auxiliary services used for organizing/promoting betting/gambling events: The auxiliary services that are used for organizing or promoting betting or gambling events are **NOT** covered in this entry. These services are in the nature of services used for providing the negative list services of betting or gambling. As per the principle laid down in sub section (1) of section 66F of the Act, the reference to a service by nature or description in the Act will not include reference to a service used for providing such service.

10. Entry (k): Transmission or distribution of electricity

The above entry covers the services of transmission or distribution of electricity by an electricity transmission or distribution utility.

Electricity transmission or distribution utility means

- the Central Electricity Authority
- a State Electricity Board
- the Central Transmission Utility
- a State Transmission Utility notified under the Electricity Act, 2003
- a distribution or transmission licensee
- any other entity entrusted with such function by the Central or State Government [Section 65B(23)].

11. Entry (l): Specified services relating to education

The following services relating to education are specified in the negative list –:-

(i) Pre-school education and education up to higher secondary school or equivalent;

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[8] The Sikkim High Court in the case of *M/s Future Gaming and Hotel Services (Pvt.) Ltd. v. Union of India 2015 TIOL 2398 HC Sikkim ST* has struck down the Explanation inserted by Finance Act, 2015 and held it to be *ultra vires* the Finance Act, 1994. The High Court was of the view that the said Explanation seeks to expand the scope of 66D which is the main provision.

(ii) Education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;

(iii) Education as a part of an approved vocational education course.

(i) Pre-school education and education up to higher secondary school or equivalent

1. Services provided by **international schools** giving certifications like IB (International Baccalaureate) are also covered in this entry.

2. **Private tuitions** are NOT covered in this entry. Hence, they are also liable to pay service tax if their aggregate values of taxable services exceed the threshold exemption.

3. **Boarding schools** provide service of education coupled with other services like providing dwelling units for residence and food. This may be a case of bundled services if the charges for education and lodging and boarding are inseparable. Their taxability will be determined in terms of the principles laid down in section 66F of the Act.

   Such services in the case of boarding schools are bundled in the ordinary course of business. Therefore the bundle of services will be treated as consisting entirely of such service which determines the dominant nature of such a bundle. In this case since dominant nature is determined by the service of education other dominant service of providing residential dwelling is also covered in a separate entry of the negative list, the entire bundle would be treated as a negative list service.

(ii) Education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force

(a) In order to be covered in the negative list, a course should be recognized by an Indian law. Services provided by way of education as a part of a prescribed curriculum for obtaining a **qualification recognized by a law of a foreign country are NOT covered** in the negative list entry.

(b) If a course in a college leads to **dual qualification** only one of which is recognized by law, service in respect of each qualification would, therefore, be assessed separately. Provision of dual qualifications is in the nature of two separate services as the curriculum and fees for each of such qualifications are prescribed separately. If an artificial bundle of service is created by clubbing two courses together, only one of which leads to a qualification recognized by law, then by application of the rule of determination of taxability of a service which is not bundled in the ordinary course of business contained in section 66F of the Act it is liable to be treated as a course which attracts the highest liability of service tax. However incidental auxiliary courses provided by way of hobby classes or extra-curricular activities in furtherance of overall well being will be an example of naturally bundled course. One relevant consideration in such cases will be the amount of extra billing being done for the unrecognized component *vis-a-vis* the recognized course.

(c) Services of conducting admission tests for admission to colleges are exempt in case the educational institutions are providing qualification recognized by law for the time being in force.

Education as a part of curriculum for obtaining a qualification recognized by law means that only such educational services are in the negative list as are related to delivery of education as 'a part' of the curriculum that has been prescribed for obtaining a qualification prescribed by law. It is important to understand that to be in the negative list the service should be delivered as part of curriculum. Conduct of degree courses by colleges, universities or institutions which lead grant of qualifications recognized by law would be covered. Training given by private coaching institutes would not be covered as such training does not lead to grant of a recognized qualification.

(iii) Education as a part of an approved vocational education course

Approved vocational education course means,—

(i) a course run by an industrial training institute or an industrial training centre affiliated to the National Council for Vocational Training or State Council for Vocational Training offering courses in designated trades notified under the Apprentices Act, 1961; or

(ii) a Modular Employable Skill Course, approved by the National Council of Vocational Training, run by a person registered with the Directorate General of Employment and Training, Union Ministry of Labour and Employment [Section 65B(11)].

Note: Educational institutes such as IITs, IIMs charge a fee from prospective employers like corporate houses/ MNCs, who come to the institutes for recruiting candidates through campus interviews. Service tax is liable on services provided by such institutions in relation to campus recruitment as such services are not covered in the negative list.

Vocational education course offered by Institutions as independent entities: Service tax is not leviable on vocational education courses (VEC) offered by the institution of the Government (Central Government or State Government) or a local authority because in terms of section 66D(a), only specified services provided by the Government are liable to tax and VEC is excluded from the service tax.

However, if the VEC is offered by an institution, as an independent entity in the form of society or any other similar body, service tax treatment would be determined by either sub-clause (ii) or (iii) of clause (l) mentioned above. In the context of VEC, qualification implies a Certificate, Diploma, Degree or any other similar certificate. The words "recognized by any law" will include such courses as are approved or recognized by any entity established under a central or state law including delegated legislation, for the purpose of granting recognition to any education course including a VEC *[Circular No.164/15/2012 ST dated 28.08.2012].*

12. Entry (m): Services by way of renting of residential dwelling for use as residence

The above entry covers services -

- by way of renting
- of a residential dwelling
- for use as residence

1. **Renting** means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property [Section 65B(41)].
2. **Residential dwelling:** The phrase 'residential dwelling' has not been defined in the Act. It has therefore to be interpreted in terms of the normal trade parlance as per which it is any residential accommodation, but does not include hotel, motel, inn, guest house, camp–site, lodge, house boat, or like places meant for temporary stay.

Renting of a residential dwelling which is for use partly as a residence and partly for non residential purpose like an office of a lawyer or the clinic of a doctor would also be a case of bundled services as renting service is being provided both for residential use and for non residential use. Taxability of such bundled services has to be determined in terms of the principles laid down in section 66F of the Act.

Whether the following renting transactions are included in the negative entry?

1. **Residential house taken on rent used only or predominantly for commercial or non-residential use:** The said renting transaction is not covered in this negative list entry.
2. **House given on rent and the same being used as a hotel or a lodge:** The said renting transaction is not covered in this negative list entry because the person taking it on rent is using it for a commercial purpose.
3. **Rooms in a hotel or a lodge let out whether or not for temporary stay:** The said renting transaction is not covered in this negative list entry because a hotel or a lodge is not a residential dwelling.
4. **Houses allotted by Government department to its employees and a license fee is charged for the same:** Such service would be covered in the negative list entry relating to services provided by Government and hence non- taxable.
5. **Furnished flats given on rent for temporary stay (a few days):** Such renting as residential dwelling for the bonafide use of a person or his family for a reasonable period shall be residential use; but if the same is given for a short stay for different persons over a period of time the same would be liable to tax.

13. Entry (n): Specified financial services

Following services are included in this entry:-

(i) Services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;

(ii) Services by way of inter se sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers.

Services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount.

Any such service wherein moneys due are allowed to be used or retained **on payment of interest or on a discount** are covered here. It is important to note that the words **'deposits, loans or advances'** have to be taken in the **generic** sense.

They would cover any facility by which an amount of money is lent or allowed to be used or retained on payment of what is commonly called the time value of money which could be in the form of an interest or a discount.

Examples of services covered in this entry:

- Loan or overdraft facility or a credit limit facility provided in consideration for payment of interest.
- Mortgages or loans with a collateral security to the extent that the consideration for advancing such loans or advances are represented by way of interest.
- Fixed deposits or saving deposits or any other such deposits in a bank or a financial institution for which return is received by way of interest.
- Corporate deposits to the extent that the consideration for advancing such loans or advances are represented by way of interest or discount.

Note: This entry would not cover investments by way of equity or any other manner where the investor is entitled to a share of profit.

Whether the following financial transactions are covered in this negative list entry?

S.No.	If	Then
1.	any service charges or administrative charges or entry charges are recovered in addition to interest on a loan, advance or a deposit	such charges or amounts collected over and above the interest or discount amounts would not be part of this negative entry and thus would represent taxable consideration
2.	there is invoice discounting or cheque discounting or any other similar form of discounting	such discounting is covered only to the extent consideration is represented by way of discount as such discounting is nothing else but a manner of extending a credit facility or a loan.
3.	services are provided by banks or authorized dealers of foreign exchange by way of sale of foreign exchange to general public	such services would not be covered in this entry because this entry only covers sale and purchase of foreign exchange between banks or authorized dealers of foreign exchange or between banks and such dealers.
4.	transactions are entered into by banks in instruments like repos and reverse repos*	they are more appropriately excluded from the definition of service itself being the sale and purchase of securities, which are goods.
5.	there is a subscription to or	since these are instruments for lending or

	trading in Commercial Paper (CP) or Certificates of Deposit (CD)**	borrowing money where in consideration is represented by way of a discount, issue or subscription to CPs or CDs, they would be covered in the negative list entry relating to 'serivces by way of extending deposits, loans or advances in so far as consideration is represented by way of interest or discount'. It may also be borne in mind that promissory note is included in the definition of money in the Act as given in clause (33) of section 65B.

***Repos and reverse repos** are financial instruments of short term call money market that are normally used by banks to borrow from or lend money to RBI. The margins, called the repo rate or reverse repo rate in such transactions are nothing but interest charged for lending or borrowing of money.

****Commercial Paper ('CP') and Certificate of Deposit ('CD')** are understood as unsecured money market instruments which may be issued in the form of a promissory note or in a dematerialized form through any of the depositories approved by and registered with SEBI. CPs are normally issued by highly rated companies, primary dealers and financial institutions at a discount to the face value. CDs can be issued by Scheduled Commercial Banks (excluding RRBs and Local Area Banks) and All – India Financial Institutions (FIs) permitted by RBI.

14. Entry (q): Funeral, burial, crematorium or mortuary services

Funeral, burial, crematorium or mortuary services including transportation of the deceased are included in this entry and hence, are not liable to service tax.

1.12 Declared services [Section 66E]

Declared service means any activity carried out by a person for another person for consideration and declared as such under section 66E [Section 65B(22)]. These services are amply covered by the definition of service, but have been declared with a view to remove any ambiguity for the purpose of uniform application of law all over the country.

As per section 66E, the following shall constitute declared services, namely:—

(a) renting of immovable property

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

Explanation. — For the purposes of this clause,—

(I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force

and in case of non-requirement of such certificate from such authority, from any of the following, namely :—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

(g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;

(h) service portion in the execution of a works contract;

(i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity.

Elaborate description of each service

1. Renting of immovable property

Renting of all immovable properties is chargeable to service tax. However, the immovable properties which have been specifically covered by the negative list or which are specifically exempt would not be taxable.

Taxability of few renting transactions

S.No.	Renting transaction	Taxability
1.	Permitting use of immoveable property for placing vending/ dispensing machines	Chargeable to service tax as permitting usage of space is covered in the definition of renting
2.	Allowing erection of a communication tower on a building for consideration	
3.	Permitting usage of a property for conduct of a marriage or any other social function	

4.	Renting of land or building for entertainment or sports	Chargeable to service tax as there is no specific exemption.
5.	Renting of theatres by owners to film distributors (including under a profit-sharing arrangement)	Chargeable to service tax as the arrangement amounts to renting of immovable property.
6.	Hotels/restaurants/convention centres letting out their halls, rooms etc. for social, official or business or cultural functions	Covered within the scope of renting of immovable property and would be taxable if other elements of taxability are present.

Renting means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property [Section 65B(41)].

2. Construction services

This entry covers the services provided by builders or developers or any other person, where building complexes, civil structure or part thereof are offered for sale but the payment for such building or complex or part thereof is received before the issuance of completion certificate by a competent authority.

SERVICE TAX LEVIABILITY ON CONSTRUCTION SERVICES UNDER VARIOUS BUSINESS MODELS

(a) Model-I: In this model, two important transactions are identifiable: (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers: (a) from landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.

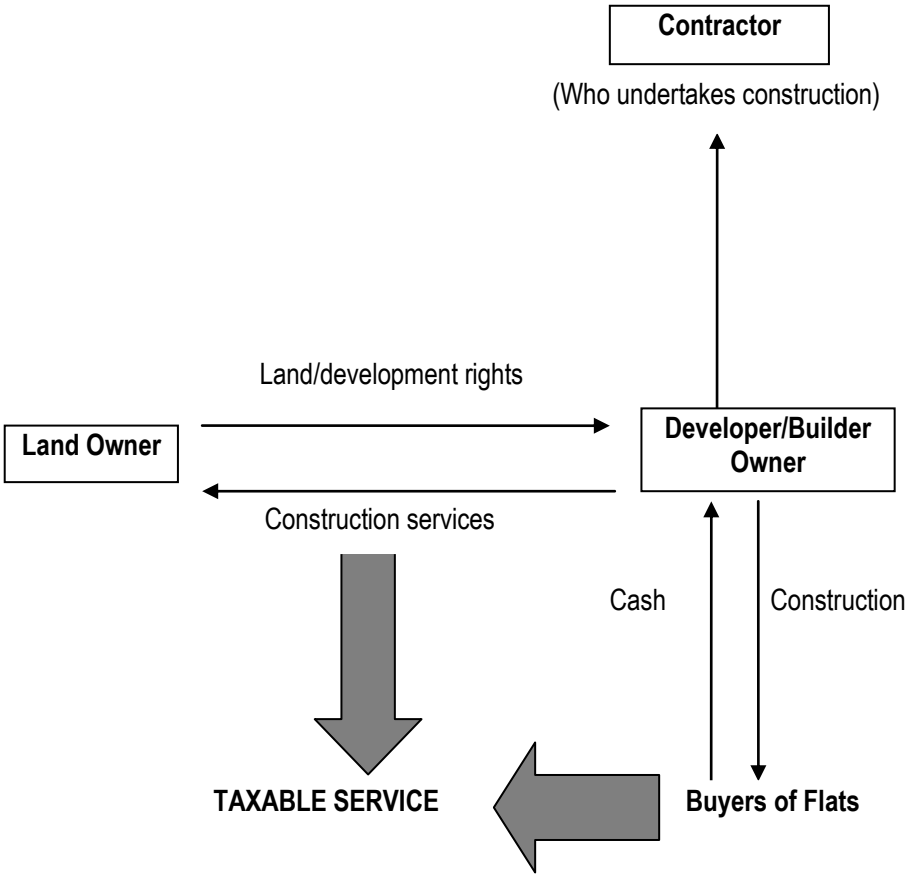
Parties in the model: (i) landowner; (ii) builder or developer; and (iii) contractor who undertakes construction).

Issue: Whether service tax is liable to be paid on flats/houses agreed to be given by builder/developer to the land owner towards the land /development rights and to other buyers?

Clarification:

I. Taxability: Construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner.

II. Valuation: Value, in the case of flats given to first category of service receiver will be the value of the land when the same is transferred and the point of taxation will also be determined accordingly.



(b) Model-II: In this model, land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment. When it becomes necessary after the lapse of a certain period, society/its flat owners may engage a builder/developer for undertaking re-construction.

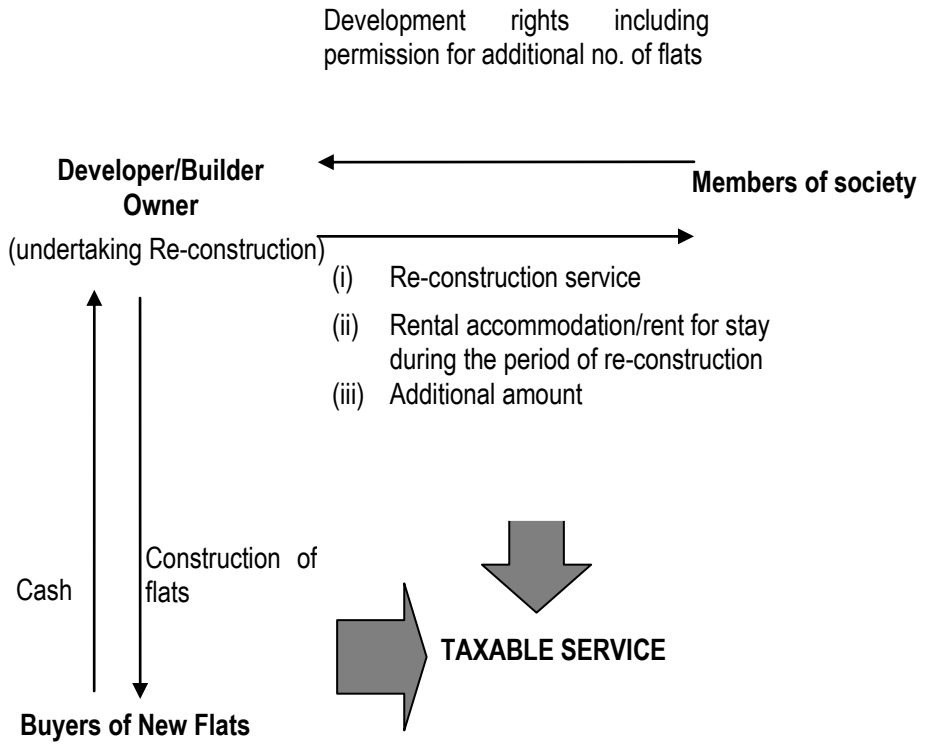
Society /individual flat owners give 'No Objection Certificate' (NOC) or permission to the builder/developer, for re-construction. The builder/developer makes new flats with same or different carpet area for original owners of flats and additionally may also be involved in one or more of the following:

(i) construct some additional flats for sale to others;

(ii) arrange for rental accommodation or rent payments for society members/original owners for stay during the period of re-construction;

(iii) pay an additional amount to the original owners of flats in the society.

Re-construction undertaken by a building society by directly engaging a builder/developer will be chargeable to service tax as works contract service for all the flats built now.



(c) Model-III: Conversion of any hitherto untaxed construction /complex or part thereof into a building or civil structure to be used for commerce or industry, after lapse of a period of time is a mere change in the use of the building. Hence, it does not involve any taxable service. If the renovation activity is done on such a complex on contract basis the same would be a works contract, which would also be taxable if other ingredients of taxability are present.

(d) Model-IV: In certain States, completion certificates have been waived or are considered as not required for certain specified types of buildings. In terms of Explanation to clause (b) of section 66E in such cases the completion certificate issued by an architect or a chartered engineer or a licensed surveyor of the respective local body or development or planning authority would be treated as completion certificate for the purposes of determining chargeability of service tax.

(e) Model-V-Build- Operate - Transfer (BOT) Projects: Generally under BOT model, transactions involving taxable service take place usually at three different levels: Firstly, between Government and the concessionaire; secondly, between concessionaire and the contractor and thirdly, between concessionaire and users, all in terms of specific agreements.

First level: Government transfers the right to use and/or develop the land, to the concessionaire, for a specific period, for construction of a building for furtherance of

business or commerce (partly or wholly). Consideration for this taxable service may be in the nature of upfront lease amount or annual charges paid by the concessionaire to the Government. Such services provided by the "Government' would be in the negative list entry contained in clause (a) of section 66D unless these services qualify as 'support services[9] provided to business entities' under exception sub-clause (iv) to clause (a) of section 66D. Support services have been defined in clause (49) of section 65B as infrastructural, operational, administrative, logistic marketing or any other support of any kind comprising functions that entities carry out in the ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable property, security, testing and analysis[10]. If the nature of concession is such that it amounts to 'renting of immovable property service' then the same would be taxable. The tax is required to be paid by the government as there is no reverse charge for services relating to renting of immovable property.

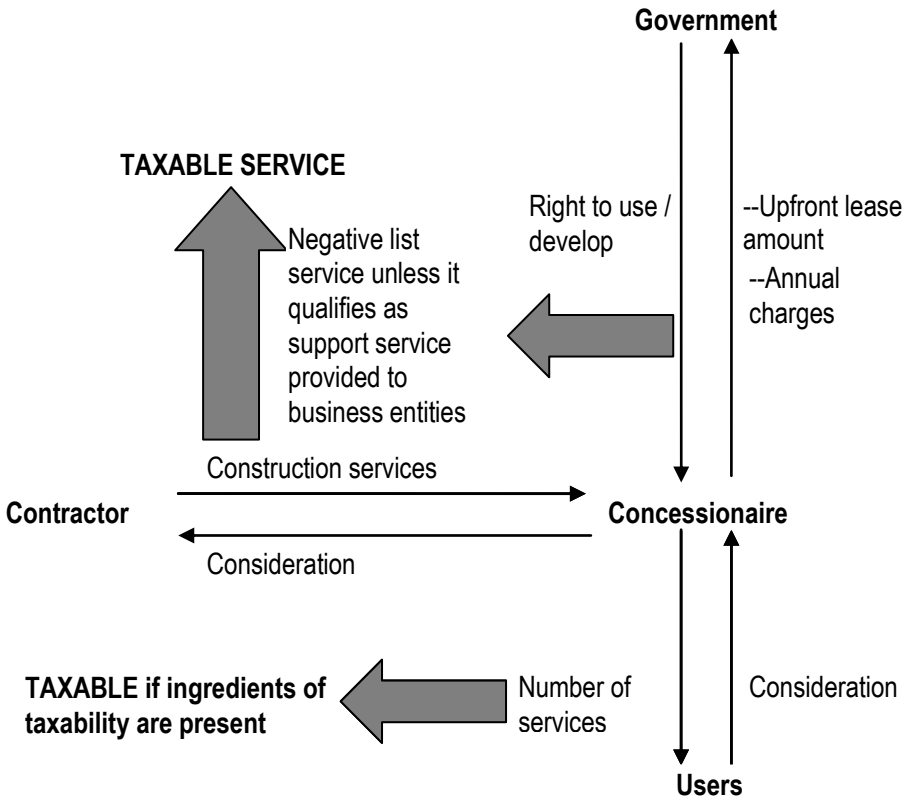
In this model, though the concessionaire is undertaking construction of a building to be used wholly or partly for furtherance of business or commerce, he will not be treated as a service provider since such construction has been undertaken by him on his own account and he remains the owner of the building during the concession period.

Second level: In case an independent contractor is engaged by a concessionaire for undertaking construction for him, then service tax is payable on the construction service provided by the contractor to the concessionaire.

Third level: Concessionaire enters into agreement with several users for commercially exploiting the building developed/constructed by him, during the lease period. At this level, concessionaire is the service provider and user of the building is the service receiver. The concessionaire may provide to the users, taxable services such as 'renting of immovable property service', 'business support service', 'management, maintenance or repair service', 'sale of space for advertisement', etc. Service tax is leviable on the taxable services provided by the concessionaire to the users.

[9] The words "support services" are to be substituted with the words "any service" from a date to be notified by the Central Government. However, no such date has been notified as yet.

[10] Definition of "support service" as provided under section 65B(49) is to be omitted with effect from a date to be notified by the Central Government. However, no date has been notified as yet.



(g) Model-VI: This covers the case where the builder instead of receiving consideration for the sale of an apartment receives a fixed deposit, which it converts after the completion of the building into sales consideration.

This may be a colorable device wherein the consideration for provision of construction service is disguised as fixed deposit, which is unlikely to be returned. In any case, the interest earned by the builder on such fixed deposits will be a significant amount received prior to the completion of the immovable property. Interest in such cases would be considered as part of the gross amount charged for the provision of service and the service of construction will be taxable.

(h) Model-VII: In this model, the person who has entered into a contract with the builder for a flat for which payments are to be made in 12 installments depending on the stage of construction and the person transfers his interest in the flat to a buyer after paying 7 installments.

Such transfer does not fall in this declared service entry as the said person is not providing any construction service. In any case transfer of such an interest would be transfer of a benefit to arise out of land which as per the definition of immoveable property given in the General Clauses Act, 1897 is part of immoveable property. Such transfer would therefore be outside the ambit of 'service' being a transfer of title in

immoveable property. Needless to say that service tax would be chargeable on the seven installments paid by the first allottee and also on subsequent installments paid by the transferee.

3. Temporary transfer/ permitting the use or enjoyment of any intellectual property right

'Intellectual property right' has not been defined in the Act. The phrase has to be understood as in normal trade parlance as per which intellectual property right includes the following:-

- Copyright
- Patents
- Trademarks
- Designs
- Any other similar right to an intangible property

There is no condition that the intellectual right must be registered in India. Temporary transfer of a patent registered outside India would also be covered in this entry. However, it will become taxable only if the place of provision of service of temporary transfer of intellectual property right is in taxable territory.

4. Development, design, programming, customization, adaptation, upgradation, enhancement, implementation of the information technology software

(a) Sale of pre-packaged or canned software: It is a settled position of law that pre-packaged or canned software which is put on a media is in the nature of goods. Sale of pre-packaged or canned software is, therefore, in the nature of sale of goods and is not covered in this entry.

(b) Site development of software: On site development of software is covered under the category of development of information technology software and hence, taxable.

(c) Providing advice, consultancy and assistance on matters relating to information technology software: These services may not be covered under the declared list entry relating to information technology software. However, such activities when carried out by a person for another for consideration would fall within the definition of service and hence chargeable to service tax if other requirements of taxability are satisfied.

(d) Providing a license to use pre-packaged software: As per the decision of the Supreme Court in the case of Tata Consultancy Services vs. State of Andhra Pradesh 2002(178) ELT 22(SC), in case a pre-packaged or canned software or shrink wrapped software is sold then the transaction would be in the nature of sale of goods and no service tax would be leviable. This judgement is applicable in case the pre-packaged software is put on a media before sale. In such a case the transaction will go out of the ambit of definition of service as it would be an activity involving only a transfer of title in goods.

However, if a pre-packaged or canned software is not sold but is transferred under a license to use such software, the terms and conditions of the license to use such

software would have to be seen to come to the conclusion as to whether the license to use packaged software involves transfer of 'right to use' such software in the sense the phrase has been used in sub-clause (d) of article 366(29A) of the Constitution.

(e) Information technology software means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment [Section 65B(28)].

5. Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act

In terms of this entry, the following activities if carried out by a person for another for consideration would be treated as provision of service:-

- Agreeing to the obligation to refrain from an act.
- Agreeing to the obligation to tolerate an act or a situation.
- Agreeing to the obligation to do an act.

Non-compete agreements

By virtue of a non-compete agreement one party agrees, for consideration, not to compete with the other in any specified products, services, geographical location or in any other manner. Such action on the part of one person is also an activity for consideration and will be covered by the declared services.

6. Transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods

The Apex Court in case of *BSNL v. UOI 2006 (2) STR 161 (SC)* has laid down the following test to determine whether a transaction involves transfer of right to use goods:-

- There must be goods available for delivery;
- There must be a consensus ad idem as to the identity of the goods;
- The transferee should have legal right to use the goods – consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;
- For the period during which the transferee has such legal right, it has to be the exclusion to the transferor – this is the necessary concomitant of the plain language of the statute, viz., a 'transfer of the right to use' and not merely a license to use the goods
- Having transferred, the owner cannot again transfer the same right to others.

  Whether a transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction.

Whether the following transactions involve transfer of right to use goods?

S.No.	Nature of transaction	Whether transaction involves transfer of right to use?
1.	A car is given in hire by a person to a company along with a driver on payment of charges on per month/mileage basis	Right to use is not transferred as the car owner retains the permissions and licenses relating to the cab. Therefore possession and effective control remains with the owner The service is, therefore covered in the declared list entry.
2.	Supply of equipment like excavators, wheel loaders, dump trucks, cranes, etc for use in a particular project where the person to whom such equipment is supplied is subject to such terms and conditions in the contract relating to the manner of use of such equipment, return of such equipment after a specified time, maintenance and upkeep of such equipment.	The transaction will not involve transfer of right to use such equipment as in terms of the agreement the possession and effective control over such equipment has not been transferred even though the custody may have been transferred along with permission to use such equipment. The receiver is not free to use such equipment in any manner as he likes and conditions have been imposed on use and control of such equipment.
3.	Hiring of bank lockers	The transaction does not involve the right to use goods as possession of the lockers is not transferred to the hirer even though the contents of the locker would be in the possession of the hirer
4.	Hiring out of vehicles where it is the responsibility of the owner to abide by all the laws relating to motor vehicles	No transfer of right to use goods as effective control and possession is not transferred
5.	Hiring of audio visual equipment where risk is of the owner	No transfer of right to use goods as effective control and possession is not transferred.
6.	Activity of preparation of place for organizing event or function by way of erection/laying of pandal and shamiana	The activity of providing pandal and shamiana along with erection thereof is generally coupled with other incidental activities like supply of crockery, furniture, sound system, lighting arrangements, etc. It is a reasonably specialized job and is

		carried out by the supplier with the help of his own labour. For a transaction to be regarded as "transfer of right to use goods", the transfer has to be coupled with effective control and possession *[Rashtriya Ispat Nigam Ltd.]*. Moreover, if pandal is given to the customers for use only after having been erected, then it is not transfer of right to use goods *[Harbans Lal vs. State of Haryana].* Applying the ratio of these judgments and the test formulated by SC in case of *BSNL v. UOI* [discussed above], CBEC clarified that pandal/shamiana erection activities do not amount to transfer of right to use goods because effective possession and control over the pandal or shamiana remains with the service provider, even after the erection is complete and the specially made–up space for temporary use handed over to the customer. Hence, the activity by way of erection of pandal or shamiana is a declared service, under section 66E(f) *[Circular No. 168/3/2013-ST dated 15.04.2013]*

7. Activities in relation to delivery of goods on hire purchase or any system of payment by installments

Hire-purchase is different from the normal purchase because in a mere hiring agreement, the hirer has no option to purchase the goods hired and the risks and rewards incidental to ownership of goods remain with the owner and are not transferred to the hirer, while in a hire-purchase agreement the hirer has an option or an obligation to purchase goods.

Although the delivery of goods on hire purchase or any system of payment on installment is not chargeable to service tax because as per Article 366(29A) of the Constitution of India such delivery of goods is deemed to be a sale of goods. However, activities or services provided in relation to such delivery of goods have been covered in this declared list entry. Consequently, they shall be deemed to be services.

(a) Key ingredients of delivery of goods on hire-purchase or any system of payment by installments: Key ingredients of the deemed sale category of **'delivery of goods on hire-purchase or any system of payment by installments'** are-

- Transfer of possession (and not just of custody)

- The hirer has the option or obligation to purchase the goods in accordance with the terms of the agreement.

Hire purchase agreement is an agreement under which goods are let out on hire and under which the hirer has the option to purchase them in accordance with the terms of the agreement and includes an agreement under which-

(i) possession of goods is delivered by the owner thereof to a person on condition that such person pays the agreed amount in periodical installments, and

(ii) the property in the goods is to pass to such person on the payment of the last of such installments, and

(iii) such person has a right to terminate the agreement at any time before the property so passes [Section 2 of the Hire Purchase Act, 1972].

(b) Whether 'finance leases', 'operating leases' and 'capital leases' covered as 'delivery of goods on hire purchase or any system of payment of installments': Such leases would be covered only if the terms and conditions of such leases have the ingredients as explained in (a) above. Normally in an 'operating lease', the lease is for a term shorter than property's useful life and the lessor is typically responsible for taxes and other expenses on the property. The lessee does not have an option to purchase the property at the end of the period of lease. Such arrangements do not qualify as 'delivery of goods on hire purchase or any system of payment of installments'.

On the other hand 'financial leases' or 'capital leases' strongly resemble security arrangements and are entered into for financing the asset. The lessee pays maintenance costs and taxes and has the option of purchasing the lease end. Such arrangements resemble a hire-purchase agreement and would fall under the said 'deemed sale' category. The essence of this deemed sale category is that the arrangement under which the goods are 'delivered' should be in the nature of a financing arrangement wherein the lessee pays maintenance costs and taxes and has the option of purchasing the asset so delivered at lease end.

It may, however, be pointed out that in case an 'operating lease' has elements of transfer of 'right to use' then the same would be covered in the other 'deemed sale' category pertaining to 'transfer of right to use any goods'.

(c) Activities in relation to such delivery which are covered in the declared service: In equipment leasing/hire purchase agreements there are two different and distinct transactions, viz., the financing transaction and the equipment leasing/hire-purchase transaction and that the financing transaction, consideration for which was represented by way of interest or other charges like lease management fee, processing fee, documentation charges and administrative fees, which is chargeable to service tax. Therefore, such financial services that accompany a hire purchase agreement fall in the ambit of this entry of declared services.

8. Service portion in execution of a works contract

Works contract is a contract for the provision of service as well as supply of materials. As decided by Apex Court in *BSNL v. UOI 2006 (2) S.T.R. 161 (S.C.),* a works contract can be segregated into a contract of sale of goods and contract of provision of service. This declared list entry has been incorporated to capture this position of law in simple terms.

In terms of Article 366 (29A) of the Constitution of India transfer of property in goods involved in execution of works contract is deemed to be a sale of such goods. Prior to insertion of clause (29A) in article 366 of the Constitution defining certain categories of transactions as 'deemed sale' of goods the position of law, as declared by the Supreme Court in Gannon Dunkerley's case was that a works contract was essentially a contract of service and no sales tax could be levied on goods transferred in the course of execution of works contract. It is only after the constitutional amendment that VAT or sales tax is leviable on such goods. The remaining portion of the contract remains a contract for provision of service.

Whether the following contracts would be treated as a works contract?

S.No.	Nature of contracts	Whether covered under works contract?
1.	Labour contracts in relation to a building or structure	No, labour Contracts do not fall in the definition of works contract. It is necessary that there should be transfer of property in goods involved in the execution of such contract which is leviable to tax as sale of goods. Pure labour contracts are therefore not works contracts and would be leviable to service tax like any other service and on full value.
2.	Contracts for repair or maintenance of motor vehicles	Yes, contracts for repair or maintenance of moveable properties are also works contracts if property in goods is transferred in the course of execution of such a contract. Service tax has to be paid in the service portion of such a contract.
3.	Contracts for construction of a pipe line or conduit	Yes, as pipeline or conduits are structures on land contracts for construction of such structure would be covered under works contract.
4.	Contracts for erection commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise	Such contracts would be treated as works contracts if transfer of property in goods is involved in such a contract.
5.	Contracts for painting of a building, repair of a building, renovation of a building, wall tiling, flooring	Yes, if such contracts involve provision of materials as well.

Works contract means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property [Section 65(54)].

9. Service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as part of the activity

The following activities are illustration of activities covered in this entry-

- Supply of food or drinks in a restaurant;
- Supply of foods and drinks by an outdoor caterer.

In terms of article 366(29A) of the Constitution of India, supply of any goods being food or any other article of human consumption or any drink (whether or not intoxicating) in any manner as part of a service for cash, deferred payment or other valuable consideration is deemed to be a sale of such goods. Such a service therefore cannot be treated as service to the extent of the value of goods so supplied. The remaining portion however constitutes a service. It is a well settled position of law, declared by the Supreme Court in BSNL's case, that such a contract involving service along with supply of such goods can be dissected into a contract of sale of goods and contract of provision of service. This declared list entry has been incorporated to capture this position of law in simple terms.

1.13 Principles of interpretation of specified descriptions of services or bundled services [Section 66F]

Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service [Sub-section (1)].

Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description [Sub-section (2)].

Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely:—

(a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;

(b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax [Sub-section (3)].

Illustration: The services by the Reserve Bank of India, being the main service within the meaning of clause (b) of section 66D, does not include any agency service provided or agreed to be provided by any bank to the Reserve Bank of India. Such agency service, being input service, used by the Reserve Bank of India for providing the main

service, for which the consideration by way of fee or commission or any other amount is received by the agent bank, does not get excluded from the levy of service tax by virtue of inclusion of the main service in clause (b) of the negative list in section 66D and hence, such service is leviable to service tax.

ANALYSIS: Although the negative list approach largely obviates the need for descriptions of services, such descriptions continue to exist in –

- Negative list of services.
- Declared list of services.
- Exemption notifications.
- Place of Provision of Service Rules, 2012
- In a few other rules and notifications e.g. CENVAT Credit Rules, 2004.

Section 66F lays down the principles of interpretation of specified descriptions of services and bundled services.

(a) Sub-section (1) - Sub-section (1) can be better understood with the help of the following examples:-

- 'Provision of access to any road or bridge on payment of toll' is a specified entry in the negative list in section 66D of the Act. Any service provided in relation to collection of tolls or for security of a toll road would be in the nature of service used for providing such specified service and will not be entitled to the benefit of the negative list entry.
- Transportation of goods on an inland waterway is a specified entry in the negative list in section 66D of the Act. Services provided by an agent to book such transportation of goods on inland waterways or to facilitate such transportation would not be entitled to the negative list entry.

(b) Sub-section (2) - Following examples may better explain sub-section (2):-

- The services provided by a real estate agent are in the nature of intermediary services relating to immovable property. As per the Place of Provision of Service Rule, 2012, the place of provision of services provided in relation to immovable property is the location of the immovable property. However in terms of the rule 9 pertaining to services provided by an intermediary the place of provision of service is where the intermediary is located. Since Rule 5 provides a specific description of 'estate agent', the same shall prevail.
- Pandal and Shamiana is an existing service and will remain a subject of taxation. Likewise service provided by way of catering is a taxable service and entitled to abatement. There is abatement when the two are provided in combination. Since the combination is more a specific entry than the two provided individually, there is no need to apply the later rule of bundled services, where the character could be judged by the service which provides it the essential character.

(c) Sub-section (3)-Taxability of bundled service

Two rules have been prescribed for determining the taxability of bundled services in sub-section (3).

These rules, which are explained below, are subject to the provisions of the rule contained in sub section (2) of section 66F, viz a specific description will be preferred over a general description. In other words, if a bundled service falls under a service specified by way of a description, then such service would be covered by the description so specified:-

(i) Services which are naturally bundled in the ordinary course of business: If various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character.

Illustrations

1. A hotel provides a 4 days-3 nights package with the facility of breakfast. This is a natural bundling of services in the ordinary course of business. The service of hotel accommodation gives the bundle the essential character and would, therefore, be treated as service of providing hotel accommodation.
2. A 5 star hotel is booked for a conference of 100 delegates on a lump sum package with the following facilities:
   - Accommodation for the delegates
   - Breakfast for the delegates,
   - Tea and coffee during conference
   - Access to fitness room for the delegates
   - Availability of conference room
   - Business centre

   As is evident a bouquet of services is being provided, many of them chargeable to different effective rates of tax. None of the individual constituents are able to provide the essential character of the service. However, if the service is described as convention service it is able to capture the entire essence of the package. Thus the service may be judged as convention service and chargeable to full rate. However, it will be fully justifiable for the hotel to charge individually for the services as long as there is no attempt to offload the value of one service on to another service that is chargeable at a concessional rate.

(ii) Services which are not naturally bundled in the ordinary course of business: If various elements of a bundled service are not naturally bundled in the ordinary course of business, it shall be treated as provision of a service which attracts the highest amount of service tax.

Illustration

A house is given on rent one floor of which is to be used as residence and the other for housing a printing press. Such renting for two different purposes is not naturally bundled in the ordinary course of business. Therefore, if a single rent deed is executed it will be treated as a service comprising entirely of such service which attracts highest liability of service tax. In this case renting for use as residence is a negative list service while renting for non-residence use is chargeable to tax. Since the latter category attracts highest liability of service tax amongst the two services bundled together, the entire bundle would be treated as renting of commercial property.

(iii) Manner of determining if the services are bundled in the ordinary course of business

Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –

- The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business.
- Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.
- The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. For example service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.

Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are –

- ❖ There is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use.
- ❖ The elements are normally advertised as a package.
- ❖ The different elements are not available separately.
- ❖ The different elements are integral to one overall supply – if one or more is removed, the nature of the supply would be affected.

No straight jacket formula can be laid down to determine whether a service is naturally bundled in the ordinary course of business. Each case has to be individually examined in the backdrop of several factors some of which are outlined above.

Bundled service means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.

Example of bundled service: Air transport services provided by airlines wherein an element of transportation of passenger by air is combined with an element of provision of catering service on board. Each service involves differential treatment as a manner of determination of value of two services for the purpose of charging service tax is different.

1.14 Date of determination of rate of tax, value of taxable service and rate of exchange [Section 67A]

Section 67A provides that the rate of service tax, value of a taxable service and rate of exchange will be the one as in force or as applicable at the time when the taxable service has been provided or agreed to be provided.

For the purposes of this section, **"rate of exchange"** means the rate of exchange determined in accordance with such rules as may be prescribed.

Rule 11 of Service Tax Rules, 1994 provides the manner of determination of rate of exchange. It lays down that the rate of exchange would be the rate applicable as per the generally accepted accounting principles on the date when point of taxation arises in terms of Point of Taxation Rules, 2011.

2

Place of Provision of Service

2.1 Introduction

Service tax is a consumption based tax. A service should be taxed in the jurisdiction of its consumption. However, it is not easy to determine the jurisdiction of consumption of services. There could be a case where services are provided by a person located at one location, actually performed at another while being delivered to a person located at a third location, and occasionally actually consumed at a another location or over a larger geographical territory, falling in more than one taxable jurisdiction.

Further, as per the charging section-section 66B, service tax is levied on the services, provided or agreed to be provided in the taxable territory. Hence, only those services which are provided in the taxable territory would be liable to service tax and the services provided in the non-taxable territory would not be taxed.

In the given scenario, it is of paramount importance to determine the place of provision of a service as the taxability of the service would be determined based on the place of its provision.

(a) Place of Provision of Service Rules, 2012 to determine the place where a service is deemed to be provided: Place of Provision of Service Rules specifies the manner to determine the taxing jurisdiction for a service. These rules would determine the place where a service shall be deemed to be provided, in terms of section 66C read with section 94(hhh) of Chapter V of the Finance Act, 1994. Thus, if a service is provided in the taxable territory as per the said rules, it shall be chargeable to service tax, otherwise not. These rules have been notified vide *Notification No. 28/2012-S.T. dated 20.06.2012*.

(b) Persons for whom the rules are relevant: Place of Provision of Service Rules are primarily meant for the persons who deal in cross border services. These rules are also applicable for those who have operations with suppliers or customers in the State of Jammu and Kashmir. Moreover, service providers operating within India from multiple locations, without having centralized registration would find these rules useful in determining the precise taxable jurisdiction applicable to their operations. The rules will be equally relevant for determining services that are wholly consumed within a SEZ, to avail the outright exemption.

(c) Import and export of services

Upto June 30, 2012: Upto June 30, 2012, the provisions relating to import and export of services were contained in the 'Taxation of Services (Provided from Outside India and

Received in India) Rules, 2006 and the Export of Services, Rules, 2005 respectively. These erstwhile rules used to handle the subject of place of provision of services indirectly, confining to define the circumstances in which a provision of service would constitute import or export.

With effect from July 1, 2012: With the advent of the Place of Provision of Service Rules, import of services is when any taxable service is provided or agreed to be provided by any person who is located in the non-taxable territory and received by any person located in the taxable territory. Further, a service would be considered as export of service in case the conditions specified by rule 6A of the Service Tax Rules, 1994 are fulfilled.

2.2 Power of the Central Government to frame the rules

Section 66C empowers the Central Government to frame rules having regard to the nature and description of various services, to determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided. Any rule made hereunder shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory.

Place of Provision of Service Rules, 2012 at a glance

Rule	Applicability	Place of provision of service shall be
3	General rule	location of the recipient of service
4	In case where services are provided in respect of goods that are required to be made physically available to the service provider	location where the services are actually performed
	In case of services which require the physical presence of the receiver or the person acting on behalf of the receiver, with service provider	
5	In case of services provided directly in relation to an immovable property	place where the immovable property is located or intended to be located.
6	In case of services provided by way of admission to, or organization of, a cultural, artistic, sporting, scientific, educational, or entertainment event, or a celebration, conference, fair, exhibition, or similar events, and of services ancillary to such admission	the place where the event is actually held.
7	Where any service referred to in rules 4, 5, or 6 is provided at more than one location, including a location in the taxable territory	location in the taxable territory where the greatest proportion of the service is provided

8	Where the location of the service provider well as that of service receiver is in the taxable territory	location of the recipient of service
9	In case of (a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders; (b) Online information and database access or retrieval services; (c) Intermediary services; (d) Service consisting of hiring of all means of transport other than aircrafts and vessels (except yacht), upto a period of one month	location of the service provider
10	In case of services of transportation of goods, other than by way of mail or courier	place of destination of the goods
11	In respect of a passenger transportation service	place where the passenger embarks on the conveyance for a continuous journey
12	In case of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board	the first scheduled point of departure of that conveyance for the journey
13	In order to prevent double taxation or non-taxation of the provision of a service, or for the uniform application of rules, the Central Government shall have the power to notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service.	
14	Notwithstanding anything stated in any rule, where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration.	

2.3 Rule 3 - Main rule-Location of the service receiver

The place of provision of a service shall be the location of service receiver.

However, **in case the location of the service receiver is not available** in the ordinary course of business, the place of provision shall be the location of the service provider.

(A) **ANALYSIS OF THE MAIN RULE:** The default rule provides that a service shall be deemed to be provided where the service receiver is located. **The main rule would apply when none of the later rules apply.** Thus, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver's location will determine whether the service is leviable to tax in the taxable territory.

Note: The address of the service receiver should be available in the ordinary course of business and the service provider is not required to make any extraordinary efforts to trace his address.

Place of provision to be the location of the service provider if the location of receiver is not ascertainable in the ordinary course of business

Generally, in case of a service provided to a person who is in business, the service provider will have the location of the recipient's registered location, or his business establishment, or his fixed establishment etc, as the case may be.

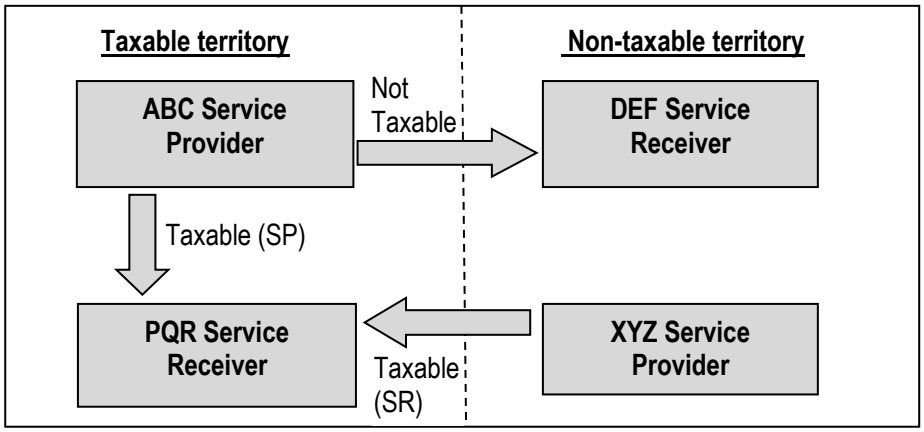
However, in case of certain services (which are not covered by the exceptions to the main rule), the service provider may not have the location of the service receiver, in the ordinary course of his business. This will also be the case where a service is provided to an individual customer who comes to the premises of the service provider for availing the service and the provider has to, more often than not, rely on the declared location of the customer. In such cases, the place of provision will be the location of the service provider.

(B) IMPLICATION OF THE RULE

(i) Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.

(ii) Where the location of receiver of a service is outside the taxable territory, no service tax will be payable on the said service.

Under normal circumstances, a service provider is liable to pay service tax. However, if he is located outside the taxable territory and the place of provision of service is in the taxable territory, the person liable to pay service tax is service receiver in the taxable territory.



2.3.1 Determination of the Location of the Service Receiver/Service Provider: "Location of the service provider/service receiver" is determined by applying the following steps sequentially-

A. Where the service provider/service receiver has obtained a **single registration**, whether centralized or otherwise, the premises for which such registration has been obtained.

It implies that in case the service provider/receiver has more than one unit, he must have obtained centralized registration in order to be covered under this clause.

B. Where the service provider/service receiver is **not covered under point A above**:

(i) The location of his **business establishment**; or

> **Business establishment:** is the place where the essential decisions concerning the general management of the business are adopted, and where the functions of its central administration are carried out.
>
> This could be head office, or a factory, or a workshop, or shop/ retail outlet. However, a service provider or receiver can have only one business establishment.
>
> **For instance**, head office of M/s ABC Enterprises is in India, and its branches are in Malaysia, Singapore and London. The business establishment of M/s ABC Enterprises is in India.

(ii) Where the services are provided from/used at a place other than the business establishment, that is to say, a **fixed establishment** elsewhere, the location of such establishment; or

> **Fixed establishment:** is a place (other than the business establishment) where there is a permanent and adequate human and technical resources to provide the services that are to be supplied by it, or to enable it to receive and use the services supplied to it for its own needs.
>
> It may be noted that in case the staff is temporarily available by way of a short visit to a place, such place cannot be termed as fixed establishment.
>
> **For instance**, George Telecoms of USA sets up an office with staff in India to provide services to Indian customers. Fixed establishment of George Telecoms is in India.

(iii) Where services are provided from/used at more than one establishment, whether business or fixed, the **establishment most directly concerned** with the provision/use of the service; and

> Whether the **establishment is most directly concerned** with the provision/use of the service depends on the facts and supporting documentation, specific to each case. The documentation will include the following:-
>
> - written contract(s) or any written correspondence which sets out in detail their understanding of the oral contract between the service provider and receiver;
> - in particular, for suppliers, from which establishment the services are actually provided;

- in particular, for receivers, at which establishment the services are actually consumed, effectively used or enjoyed;
- details of how the business fits into any larger corporate structure;
- the establishment whose staff is actually involved in the execution of the job;
- performance agreements (which may be indicative both of the substance and actual nature of work performed at a particular establishment);

Thus, normally in the case of multiple establishments of a person, it will be the establishment that actually provides, or receives, a service that would be treated as 'directly concerned' with the provision of service, notwithstanding the contractual position, or invoicing or payment.

For instance, Shubham Ltd. is incorporated in India. However, it provides its services entirely from London. In the instant case, the location of Shubham Ltd. is London, being the place where the establishment most directly concerned with the supply is located.

(iv) In the absence of such places, the **usual place of residence** of the service provider/service receiver.

Usual place of residence:

In case of	Usual place of residence
(i) A body corporate	of service provider/service receiver is the place where it is incorporated or otherwise legally constituted.
(ii) Telecommunication services	of service receiver is the billing address of service receiver.
(iii) An Individual	of service provider/service receiver is the place (country, state etc) where the individual spends most of his time for the period in question. Hence, an individual cannot have more than one usual place of residence.

2.4. Rule 4 - Place of provision of performance based services

The place of provision of following services shall be the location where the services are actually performed, namely:-

(a) Services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service.

However, when such services are provided from a remote location by way of electronic means, the place of provision shall be the location where goods are situated at the time of provision of service.

Further, clause (a) of this rule shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair.

(b) Services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service.

Analysis of the rule

Clause (a): The nature of services covered here are the services that are related to goods, and which require such goods to be made available to the service provider/person acting on behalf of the service provider so that the service can be rendered. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service. The place of provision of such services shall be the location where the services are actually performed.

1. Only those services would be covered here, the provision of which requires the goods to temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered.
2. Service involves movable objects or things that can be touched, felt or possessed.
3. Examples of such services are:-
   - repair, reconditioning, or any other work on goods (not amounting to manufacture)
   - storage and warehousing
   - courier service
   - cargo handling service (loading, unloading, packing or unpacking of cargo)
   - technical testing/inspection/certification/ analysis of goods
   - dry cleaning
4. Sometimes, services are provided by electronic means in relation to tangible goods located distantly from a remote location. In such a case, the actual place of performance of the service would be quite different from the actual location of the tangible goods. The place of provision here shall be the actual location of the goods and not the place of performance.
5. If the goods imported for repair are exported after repair without being put to any use other than that which is required for such repair, the said repair service would be excluded from the purview of rule 4(a).

   However, such exclusion would not apply to goods that arrive in the taxable territory in the usual course of business and are subject to repair while such goods remain in the taxable territory. For instance, any repair provided in the taxable territory to containers arriving in India in the course of international trade in goods will be governed by rule 4.

Clause (b): The nature of services covered here are the services which are rendered in person and in the physical presence of the service receiver. The place of provision of such services shall be the location where the services are actually performed.

Though these are generally rendered at the service provider's premises, they could also be provided at the customer's premises, or occasionally while the receiver is on the move.

1. Examples of such services are:-
   - cosmetic or plastic surgery
   - personal security service
   - health and fitness services
   - photography service (to individuals)
   - internet café service,
   - classroom teaching
2. It shall also include the service actually rendered by the provider to a person other than the receiver, who is acting on behalf of the receiver, in terms of the contractual arrangement between the provider and the receiver.

   For instance, a film producer contracts with a make-up expert for make-up of the lead actors of his film. In the given case, the film producer is the receiver of the service, but the service is rendered to the actors, who are receiving the make-up service on behalf of the film producer. Hence, notwithstanding that film producer does not qualify as the individual receiver in whose presence the service is rendered, the nature of the service is such as can be rendered only to an individual, thereby qualifying to be covered under this rule.

2.5 Rule 5 - Place of provision of services relating to immovable property

The place of provision of services provided directly in relation to an immovable property **including**:-

- services provided in this regard by experts and estate agents
- provision of hotel accommodation by a hotel, inn, guest house, club or campsite, by whatever, name called
- grant of rights to use immovable property
- services for carrying out or co-ordination of construction work, including architects or interior decorators

shall be the place where the immovable property is located or intended to be located.

Analysis of the rule

In case of a service that is 'directly in relation to immovable property', the place of provision is where the immovable property (land or building) is located, irrespective of where the provider or receiver is located.

Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth [Section 3(26) of the General Clauses Act].

Thus, properties such as buildings and fixed structures on land would be covered by the definition of immovable property.

1. **Applicability of this rule:** This rule applies if the service is directly in relation to immovable property located in taxable territory. The immovable property must be clearly identifiable to be the one from where, or in respect of which, a service is being provided. In other words, there needs to be a very close link or association between the service and the immovable property.

   Following criteria will be used to determine if a service is in respect of immovable property located in the taxable territory:-

   (i) The service consists of lease, or a right of use, occupation, enjoyment or exploitation of an immovable property;

   (ii) The service is physically performed or agreed to be performed on an immovable property (e.g. maintenance) or property to come into existence (e.g. construction);

   (iii) The direct object of the service is the immovable property in the sense that the service enhances the value of the property, affects the nature of the property, relates to preparing the property for development or redevelopment or the environment within the limits of the property (e.g. engineering, architectural services, surveying and sub-dividing, management services, security services etc);

   (iv) The purpose of the service is:

   (a) the transfer or conveyance of the property or the proposed transfer or conveyance of the property (e.g., real estate services in relation to the actual or proposed acquisition, lease or rental of property, legal services rendered to the owner or beneficiary or potential owner or beneficiary of property as a result of a will or testament);

   (b) the determination of the title to the property.

   Examples of land related services

   - Renting of immovable property
   - The surveying (such as seismic, geological or geomagnetic) of land or seabed
   - Legal services such as dealing with applications for planning permission
   - The supply of hotel accommodation or warehouse space

2. **Non-applicability of this rule:** This rule does not apply if a provision of service has only an indirect connection with the immovable property, or if the service is only an incidental component of a more comprehensive supply of services.

   Examples of services which are not land related

   - Advice or information relating to land prices or property markets because they do not relate to specific sites.
   - Services of an agent who arranges finance for the purchase of a property.
   - Repair and maintenance of machinery which is not permanently installed. This is a service related to goods.

2.6. Rule 6 - Place of provision of services relating to events

The place of provision of services provided by way of admission to, or organization of, a cultural, artistic, sporting, scientific, educational, or entertainment event, or a celebration, conference, fair, exhibition, or similar events, and of services ancillary to such admission, shall be the place **where the event is actually held**.

For instance, a well-known singer from USA intends to organize a Concert in Delhi and Mumbai. Any service provided by an event manager, or the right to entry will be taxable in India.

1. **Example of a service ancillary to organization of an event:** Provision of sound engineering for an artistic event is a prerequisite for staging of that event and should be regarded as a service ancillary to its organization.
2. **Example of a service ancillary to admission to an event:** A service of hiring a specific equipment to enjoy the event at the venue (against a charge that is not included in the price of entry ticket) is an example of a service that is ancillary to admission.
3. **Event-related services that would be treated as not ancillary to admission to an event:** A service of courier agency used for distribution of entry tickets for an event is a service that is not ancillary to admission to the event.

2.7 Rule 7 - Place of provision of services provided at more than one location

Where any service referred to in rules 4, 5, or 6 is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory **where the greatest proportion of the service is provided**.

Analysis of the rule

This rule covers situations where the actual performance of a service is at more than one location, and occasionally one (or more) such locations may be outside the taxable territory.

1. This rule is applicable in case of performance-based services or location-specific services (immovable property related or event-linked).

2. It does not intend to capture insignificant portion of a service rendered in any part of the taxable territory like mere issue of invoice, processing of purchase order or recovery, which are not by way of service actually performed on goods.

For instance, an Indian firm provides a 'technical inspection and certification service' for a newly developed product of an overseas firm (for a newly launched motorbike which has to meet emission standards in different States or countries). The testing is carried out in Maharashtra (20%), Kerala (25%), and Colombo (55%).

Notwithstanding the fact that the greatest proportion of service is outside the taxable territory, the place of provision will be the place in the taxable territory where the greatest proportion of service is provided, which in this case is Kerala.

2.8 Rule 8 - Place of provision of services where provider and recipient are located in taxable territory

Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the **location of the recipient of service.**

Analysis of the rule

This rule is applicable in a situation where on application of one of the earlier rules i.e. rule 4 to 6, the place of provision of service provided in the taxable territory may be determinable to be outside the taxable territory. However, both service provider and the service receiver are located in the taxable territory.

In this case, the place of provision of service is the location of the service receiver, i.e. the place of provision will be deemed to be in the taxable territory, notwithstanding the earlier rules.

For instance, a machinery of Bahara India Ltd of Bangalore develops a technical problem in London. Bharat Machineries of Delhi deputes some engineers to undertake repairs at the site in London. But for this rule, rule 4(1) would apply in this case, and the place of provision would be London i.e. outside the taxable territory.

However, by application of rule 7, since the service provider, as well as the receiver, are located in the taxable territory, the place of provision of this service will be within the taxable territory.

2.9 Rule 9 - Place of provision of specified services

The place of provision of the specified services shall be the **location of the service provider**.

Specified services are as follows:-

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) Online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of all means of transport other than,-

(i) aircrafts, and

(ii) vessels except yachts,

upto a period of one month.

Analysis of the rule

Specified services in rule 9 are as follows:-

(a) Banking services provided to account holders: Banking services provided to persons other than account holders will be covered under the main rule-rule 3.

Example of services provided by a banking company/financial institution etc. to account holders in the normal course of business:-

(i) Services linked to or requiring opening and operation of bank accounts such as lending, deposits, safe deposit locker etc.

(ii) Transfer of money including telegraphic transfer, mail transfer, electronic transfer etc.

Financial leasing services including equipment leasing and hire-purchase, merchant banking services, asset management services, advisory and other auxiliary financial services are few instances of the services that are generally **NOT** provided by a banking company or financial institution to an account holder in the ordinary course of business.

1. **Account** means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account [Rule 2(b)].
2. **Banking company** has the meaning assigned to it in section 45A(a) of the Reserve Bank of India Act, 1934 [Rule 2(c)]. *Refer Chapter 6 of this Module for detailed explanation.*
3. **Financial institution** has the meaning assigned to it in section 45-I(c) of the 4. Reserve Bank of India Act, 1934 [Rule 2(e)]. *Refer Chapter 6 of this Module for detailed explanation.*
4. **Non-banking financial company** means-
   (i) a financial institution which is a company; or
   (ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or
   (iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette specify [Rule 2(k)].

(b) Online information and database access or retrieval services: As per rule 2(l), "online information and database access or retrieval services" means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network.

1. These services must be delivered over the internet or an electronic network which relies on the internet or similar network for their provision.
2. They should be completely automated, and require minimal human intervention.
3. Examples of these services are:-
   - Web-based services providing access or download of digital content
   - digitized content of books and other electronic publications
   - online news, flight information and weather reports.
4. Sale or purchase of goods, articles etc over the internet, repair of software, or of hardware through the internet from a remote location, telecommunication services provided over the internet etc. shall not be included in the said services.

(c) Intermediary: As per rule 2(f), intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the main 'service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account.

Accordingly, intermediary of goods, such as a commission agent or consignment agent are also included and a person who provides the main service or supplies the goods on his own account is excluded.

(i) Guiding principles to determine whether a person is an intermediary or not

In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered:-

1. An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price.

2. The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging.

3. The service provided by the intermediary on behalf of the principal is clearly identifiable.

(ii) Services qualifying as 'intermediary services'

Services provided by the following persons will qualify as 'intermediary services':-

(i) Travel Agent (any mode of travel)

(ii) Tour Operator

(iii) Commission agent (for service or goods)

(iv) Recovery Agent

Any other service wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined above.

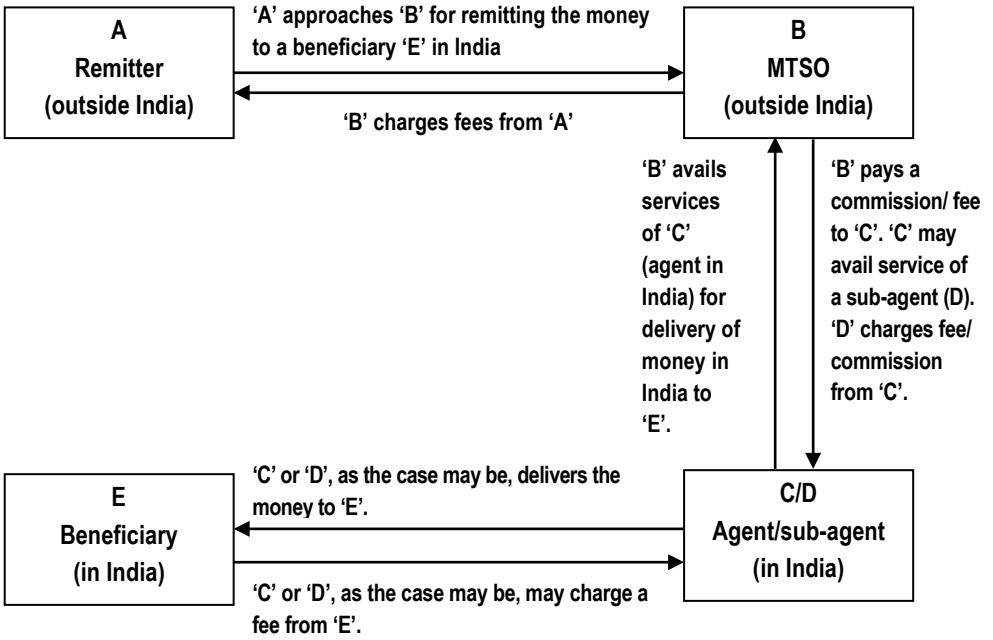
Inward remittances from abroad to beneficiaries in India through MTSOs: *The remittances of money from overseas through the Money Transfer Service Operator (MTSO) route involves the following sequence of transactions:*

Step 1: Remitter located outside India (say 'A') approaches a MTSO/bank (say B) located outside India for remitting the money to a beneficiary in India; 'B' charges a fee from 'A'.

Step 2: 'B' avails the services of an Indian entity (agent) (say 'C') for delivery of money to the ultimate recipient of money in India (say 'E'); 'C' is paid a commission/fee by 'B'.

Step 3: 'C' may avail service of a sub-agent (D). 'D' charges fee/commission from 'C'.

Step 4: 'C' or 'D', as the case may be, delivers the money to 'E' and may charge a fee from 'E'.



Circular No.180/06/2014 ST dated 14.10.2014 has clarified following issues in this regard:

S. No	*Issues*	*Clarification*
1.	*Whether service tax is payable on remittance received in India from abroad?*	*No service tax is payable per se on the amount of foreign currency remitted to India from overseas. As the remittance comprises money, it does not in itself constitute any service in terms of the definition of 'service' [Section 65B(44)].*

2.	*Whether the service of an agent or the representation service provided by an Indian entity/ bank to a foreign MTSO in relation to money transfer falls in the category of intermediary service?*	*Yes. The Indian bank or other entity acting as an agent to MTSO in relation to money transfer, facilitates in the delivery of the remittance to the beneficiary in India. In performing this service, the Indian Bank/entity facilitates the provision of money transfer service by the MTSO to a beneficiary in India. For their service, agent receives commission or fee. Hence, the agent falls in the category of intermediary as defined in rule 2(f) of the Place of Provision of Service Rules, 2012.*
3.	*Whether service tax is leviable on the service provided, as mentioned in point 2 above, by an intermediary/ agent located in India (in taxable territory) to MTSOs located outside India?*	*Service provided by an intermediary is covered by rule 9(c) of the Place of Provision of Service Rules, 2012. As per this rule, the place of provision of service is the location of service provider. Hence, service provided by an agent, located in India (in taxable territory), to MTSO is liable to service tax.* *The value of intermediary service provided by the agent to MTSO is the commission or fee or any similar amount, by whatever name called, received by it from MTSO and service tax is payable on such commission or fee.*
4.	*Whether service tax would apply on the amount charged separately, if any, by the Indian bank/entity/agent/sub-agent from the person who receives remittance in the taxable territory, for the service provided by such Indian bank/entity/agent/sub-agent.*	*Yes. As the service is provided by Indian bank/entity/agent/sub-agent to a person located in taxable territory, the place of provision is in the taxable territory. Therefore, service tax is payable on amount charged separately, if any.*
5.	*Whether service tax would apply on the services provided by way of currency conversion by a bank /entity located in India (in the taxable territory) to the*	*Any activity of money changing comprises an independent taxable activity. Therefore, service tax applies on currency conversion in such cases in terms of the Service Tax (Determination of Value) Rules. Service provider has an*

	recipient of remittance in India?	***option to pay service tax at prescribed rates in terms of Rule 6(7B) of the Service Tax Rules 1994.***
6.	***Whether services provided by sub-agents to such Indian Bank/entity located in the taxable territory in relation to money transfer is leviable to service tax?***	***Sub-agents also fall in the category of intermediary. Therefore, service tax is payable on commission received by sub-agents from Indian bank/entity.***

(d) Service consisting of hiring of all means of transport other than aircrafts and vessels (except yacht), upto a period of one month: Following will constitute means of transport:-

- Land vehicles such as motorcars, buses, trucks;
- Vehicles designed specifically for the transport of sick or injured persons;
- Mechanically or electronically propelled invalid carriages;
- Trailers, semi-trailers and railway wagons.

The following are not 'means of transport' for the purpose of clause (d) of this rule:-

- Aircrafts
- Vessels (except yacht)
- Racing cars;
- Containers used to store or carry goods while being transported;
- Dredgers, or the like.

Means of transport means any conveyance designed to transport goods or persons from one place to another [Rule 2(j)].

Hiring of vessels or aircraft, whether for upto one month or more, will be covered by the general rule 3, i.e., the location of the service receiver. Hiring of yachts would, however, be governed by rule 9(d) i.e., in case of hiring of yachts upto one month, the place of provision of service would be the location of service provider.

The above can also be understood with the help of the following example:

Service consisting of hiring of -		**Place of provision of service**	
		Location of service provider	**Location of service receiver**
(i)	Aircraft up to a period of 20 days		✓

(ii)	Aircraft up to a period of 90 days		✓
(iii)	Vessel up to a period of 20 days		✓
(iv)	Vessel up to a period of 90 days		✓
(v)	Yachts up to a period of 20 days	✓	
(vi)	Yachts up to a period of 90 days		✓
(vii)	Trucks up to a period of 20 days	✓	
(viii)	Trucks up to a period of 90 days		✓

2.10 Rule 10 - Place of provision of goods transportation services

The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the **place of destination of the goods**.

However, the place of provision of services of goods transportation agency shall be the **location of the person liable to pay tax**.

Analysis of the rule: This rule covers the service of transportation of goods, by any mode of transport (air, vessel, rail or by a goods transportation agency). However, it does not cover the transportation of goods by courier or mail.

For instance, a consignment of polished diamonds is consigned from Mumbai to New Jersey. The place of provision of goods transportation service will be New Jersey (outside India, hence not liable to service tax).

Conversely, if a consignment of glassware is consigned from New York to Chennai, the place of provision will be Chennai.

Exception to the rule: Rule 2(1)(d) of Service Tax Rules, 1994 provides that where a service of transportation of goods is provided by a 'goods transportation agency', and the consignor or consignee is covered under any of the specified categories prescribed therein, the person liable to pay tax is the person who pays, or is liable to pay freight (either himself or through his agent) for the transportation of goods by road in a goods carriage. The place of provision of services of goods transportation agency shall be the location of the person liable to pay tax.

Person liable to pay tax shall mean the person liable to pay service tax under section 68 of the Act or under rule 2(1)(d) of the Service Tax Rules, 1994 [Rule 2(m)].For instance, a goods transportation agency ABC located in Delhi transports a consignment of new motorcycles from the factory of XYZ in Gurgaon (Haryana), to the premises of a dealer in Bhopal, Madhya Pradesh. XYZ is a registered assessee and is also the person liable to pay freight and hence person liable to pay tax, in this case. Here, the place of provision of the service of transportation of goods will be the location of XYZ i.e. Haryana.

2.11 Rule 11- Place of provision of passenger transportation service

The place of provision in respect of a passenger transportation service shall be the place **where the passenger embarks on the conveyance for a continuous journey**.

Analysis of the rule

A **"continuous journey"** means a journey for which:-

(i) a single ticket has been issued for the entire journey; or

(ii) more than one ticket or invoice has been issued for the journey, by one service provider, or by an agent on behalf of more than one service providers, at the same time, and there is no scheduled **stopover** between any of the **legs of the journey** [Rule 2(d)].

Stopover means a place where a passenger can disembark either to transfer to another conveyance or break his journey for a certain period in order to resume it at a later point of time. All stopovers do not cause a break in continuous journey. Only such stopovers will be relevant for which one or more separate tickets are issued.

Leg of journey means a part of the journey that begins where passengers embark or disembark the conveyance, or where it is stopped to allow for its servicing or refueling, and ends where it is next stopped for any of those purposes [Rule 2(g)].

For instance, a travel on Delhi-London-New York-London-Delhi on a single ticket with a halt at London on either side, or even both, will be covered by the definition of continuous journey. However if a separate ticket is issued, say New York-Boston-New York, the same will be outside the scope of a continuous journey.

2.12 Rule 12 - Place of provision of services provided on board a conveyance

Place of provision of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the **first scheduled point of departure of that conveyance for the journey**.

Analysis of the rule

This rule covers the service which has been provided on a conveyance (aircraft, vessel, rail, or roadways bus) during the course of a passenger transport operation. The place of provision in such a case would be the first scheduled point of departure of that conveyance for the journey.

Such services must be provided against a specific charge, and not supplied as part of the fare.

For instance, a video game or a movie-on-demand is provided as on-board entertainment during the Kolkata-Delhi leg of a Bangkok-Kolkata-Delhi flight. The place of provision of this service will be Bangkok (outside taxable territory, hence not liable to tax).

If the above service is provided on a Delhi-Kolkata-Bangkok-Jakarta flight during the Bangkok-Jakarta leg, then the place of provision will be Delhi (in the taxable territory, hence liable to tax).

2.13 Rule 13 - Powers to notify description of services or circumstances for certain purposes

In order to prevent double taxation or non-taxation of the provision of a service, or for the uniform application of rules, the Central Government shall have the power to notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service.

Analysis of the rule

The rule is an enabling power to correct any injustice being met due to the applicability of rules in a foreign territory in a manner which is inconsistent with these rules leading to double taxation. Due to the cross border nature of many services, it is also possible in certain situations to set up businesses in a non-taxable territory while the effective enjoyment, or in other words consumption, may be in taxable territory.

This rule is also meant as an anti-avoidance measure where the intent of the law is sought to be defeated through ingenious practices unknown to the ordinary ways of conducting business.

2.14 Rule 14 - Order of application of rules

Rule 14 of the said rules provide that notwithstanding anything stated in any rule, where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration. Hence, in case where the nature of a service, or the business activities of the service provider, may be such that two or more rules may appear equally applicable, later rule would prevail.

For instance, an architect based in Mumbai provides his service to an Indian Hotel Chain (which has business establishment in New Delhi) for its newly acquired property in Dubai. If Rule 5 (Property rule) were to be applied, the place of provision would be the location of the property i.e. Dubai (outside the taxable territory). With this result, the service would not be taxable in India.

Whereas, by application of Rule 8, since both the provider and the receiver are located in taxable territory, the place of provision would be the location of the service receiver i.e. New Delhi. Place of provision being in the taxable territory, the service would be taxable in India.

By application of Rule 14, the later of the Rules i.e. Rule 8 would be applied to determine the place of provision.

2.15 Export of services [Rule 6A of the Service Tax Rules, 1994]

(i) Conditions to be fulfilled for service to be treated as export of service [Sub-rule (1)]:-The provision of any service provided or agreed to be provided shall be treated as export of service when,-

(a) the service provider is located in the taxable territory,

(b) the service receiver is located outside India and the place of provision of the service is outside India,

(c) the service is not a service specified in the negative list (Section 66D) of the Act,

(d) the payment for such service has been received by the service provider in convertible foreign exchange, and

(e) the service provider and service receiver are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act.

> As per item (b) of Explanation 3 of clause (44) of section 65B an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

(ii) Central Government empowered to grant rebate on inputs/input services used in providing service exported [Sub-rule (2)]: Where any service is exported [in terms of sub-rule (1) above] to any country other than Nepal and Bhutan, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

Safeguards, conditions and limitations for claiming rebate on inputs and input services: In exercise of this power, the Central Government has issued *Notification No. 39/2012-ST dated 20.06.2012* providing the safeguards, conditions and limitations for claiming rebate on inputs and input services:-

Conditions and limitations:-

1. Service has been exported in terms of rule 6A.
2. Duty on the inputs/service tax on input services, rebate of which has been claimed, has been paid to the supplier/service provider respectively. Duty will include National Calamity Contingent Duty also.

   If the exporter himself is liable to pay for any input services; he should have paid the service tax to the Central Government.
3. No CENVAT credit has been availed of on inputs and input services on which rebate has been claimed.
4. In case any of the aforesaid conditions is not fulfilled, rebate paid, if any, shall be recoverable with interest in accordance with the provisions of section 73 and section 75 of the Finance Act, 1994.
5. Amount of rebate claimed is not less than ₹ 1,000.

The Notification also prescribes the procedure for claiming the rebate on inputs and input services.

3
Point of Taxation

3.1 Introduction

Point of taxation means the point in time when a service shall be deemed to have been provided. Point of Taxation Rules, 2011 determine the point of taxation.

As per these rules, point of taxation is –

- the time when the invoice for the service provided or agreed to be provided is issued;
- if invoice is not issued within prescribed time period (30 days except for specified financial sector where it is 45 days) of completion of provision of service, then the date of completion of service;
- the date of receipt of payment where payment is received before issuance of invoice or completion of service.

Therefore, liability to pay service tax will arise on issuance of invoice or date of completion of service if invoice is not issued within prescribed period of completion or on receipt of payment, whichever is earlier.

3.2 Determination of point of taxation-General rule [Rule 3]

For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be-

(a) the time when the invoice for the service provided/ agreed to be provided is issued.

However, in case the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994 (30 or 45 days, as the case may be) of the completion of the provision of the service, the point of taxation shall be date of such completion.

(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment.

For the purposes of clauses (a) and (b), -

(i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

(ii) wherever the provider of taxable service receives a payment up to ₹ 1,000 in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a) [Proviso to rule 3].

Point of taxation in case of advance received by service provider

For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be **the date of receipt of each such advance**.

ANALYSIS

As per rule 3 of the said rules, point of taxation would be determined as follows:-

S.No.	In case	Point of taxation would be
1.	the invoice is issued within the prescribed period of 30 days* from the date of completion of provision of service	(a) Date of invoice or (b) Date of payment whichever is earlier
2.	the invoice is not issued within the prescribed period of 30 days* from the date of completion of provision of service	(a) Date of completion of service or (b) Date of payment whichever is earlier

The principle of point of taxation can be better understood with the help of the following tabular summary followed by an illustration:-

Case	In case where	Point of Taxation	
I	Invoice is issued within 30 days* from the completion of service and payment is received after invoice	Date of invoice	
II	Invoice is issued within 30 days* from the completion of service, but payment is received before invoice	Date on which payment is received.	
III	Invoice is not issued within 30 days* from the completion of service and payment is received after completion of service	Date of completion of service	
IV	Invoice is not issued within 30 days* from the completion of service. However, part payment is received before the completion of	**For the payment received**	**Point of taxation is**

	service and remaining payment is received after the completion of service.	before the date of completion of service	the date on which payment is received.
		after the date of completion of service	the date of completion of service.

*45 days in case of in case of banking and other financial institutions including NBFCs.

Illustration

In case of provision of the taxable services other than banking and other financial institution including NBFCs, point of taxation would be determined as under:-

Case	Date of completion of service	Date of invoice	Date on which payment received	Point of Taxation
I	August 5, 20XX	August 28, 20XX	September 10, 20XX	August 28, 20XX
II	August 5, 20XX	September 01, 20XX	August 20, 20XX	August 20, 20XX
III	August 5, 20XX	September 8, 20XX	August 25, 20XX	August 5, 20XX
IV	August 5, 20XX	September 8, 20XX	Amount received partly on August 3, 20XX and remaining on August 20, 20XX	August 3, 20XX and August 5, 20XX for respective amounts

Determination of date of completion of service

(i) Date of completion of service in cases other than continuous supply of services: CBEC vide *Circular No. 144/13/2011- ST dated 18.07.2011* has clarified that the test for the determination whether a service has been completed would be the completion of all the related activities that place the service provider in a situation to be able to issue an invoice. The Service Tax Rules, 1994 require that invoice should be issued within a period of 30 days from the completion of the taxable service. The invoice needs to indicate inter alia the value of service so completed. Thus, it is important to identify the service so completed. This would include not only the physical part of providing the service but also the completion of all other auxiliary activities that enable the service provider to be in a position to issue the invoice. Such auxiliary activities could include activities like measurement, quality testing etc. which may be essential pre-requisites for identification of completion of service. However, it has been clarified that such activities do not include flimsy or irrelevant grounds for delay in issuance of invoice.

(ii) Date of completion of service in case of continuous supply of services: The Board has elucidated that the above interpretation also applies to determination of the date of completion of provision of service in case of "continuous supply of service".

Further, in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service.

Point of taxation in case where payment upto ₹ 1,000 received in excess of the invoiced amount: Wherever the provider of taxable service receives a payment up to ₹ 1,000 in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined on the basis of invoice or completion of service, as the case may be, rather than payment.

Purpose of the aforesaid provision:-As a measure of added facilitation, an option has been provided to determine the point of taxation in respect of small advances up to ₹ 1000, in excess of the amount indicated in the invoice, on the basis of invoice or completion of service rather than payment. Such provision is expected to address the accounting problems faced by service providers in telecommunications, credit card businesses who regularly receive minor excess payments from their customers.

3.3 Determination of point of taxation in case of change in effective rate of tax [Rule 4]

Notwithstanding anything contained in rule 3, the point of taxation in cases where there is a **change in effective rate of tax** in respect of a service, shall be determined in the manner laid down in the following table namely:-

In case a taxable service has been provided	Invoice has been issued	Payment received for the invoice	Point of taxation shall be
(i) **BEFORE** the change in effective rate of tax.	**AFTER** the change in effective rate of tax	**AFTER** the change in effective rate of tax	(a) date of issuance of invoice or (b) date of receipt of payment whichever is earlier
	PRIOR to the change in effective rate of tax	**AFTER** the change in effective rate of tax	date of issuance of invoice
	AFTER the change in effective rate of tax	**PRIOR** to the change in effective rate of tax	date of receipt of payment
(ii) **AFTER** the change in effective rate of tax.	**PRIOR** to the change in effective rate of tax	**AFTER** the change in effective rate of tax	date of receipt of payment

	PRIOR to the change in effective rate of tax	**PRIOR** to the change in effective rate of tax	(a) date of issuance of invoice or (b) date of receipt of payment whichever is earlier
	AFTER the change in effective rate of tax	**PRIOR** to the change in effective rate of tax	date of issuance of invoice

3.4 Payment of tax in cases of new services [Rule 5]

Where a service is taxed for the first time, then,—

(a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;

(b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within 14 days of the date when the service is taxed for the first time.

ANALYSIS

This rule specifically discusses the situation where a service is charged to tax for the first time i.e. becomes taxable for the first time.

The rule provides that:-

(a) If an invoice has been issued and payment is received before a service becomes taxable, no tax would be charged even if the service is provided after the same has become taxable. This provision is consistent with the other similar provisions in these rules, and ensures that a financial transaction which has achieved finality before a service was taxable shall not be reopened for collection of tax.

(b) If any payment has been received prior to a service being chargeable to tax, no tax shall be chargeable if an invoice has also been issued within 14 days of the date when the service is taxed for the first time.

3.5 Determination of point of taxation in case of person liable to pay service tax under reverse charge or in case of associated enterprises [Rule 7]

Notwithstanding anything contained in rules 3, 4, and 8, the point of taxation in respect of the persons required to pay tax as recipients under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Finance Act, 1994 shall be the date on which payment is made.

However, where the payment is not made within a period of three months of the date of

invoice, the point of taxation shall be the date immediately following the said period of three months.

Moreover, in case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.

Associated enterprise shall have the meaning assigned to it in section 92A of the Income-tax Act, 1961 [Section 65B(13)].

ANALYSIS

(i) Point of taxation in case of services taxed under reverse charge mechanism[1]: In respect of the persons liable to pay service tax under reverse charge mechanism, the point of taxation shall be the date on which payment is made subject to the condition that the payment is made within a period of three months of the date of invoice.

However, if the payment is NOT made within a period of three months of the date of invoice, point of taxation will be the first day that occurs immediately after the expiry of said three months. In other words, point of taxation in respect of services taxed under reverse charge will be the payment date or the first day that occurs immediately after a period of three months from the date of invoice, whichever is earlier.

(ii) Point of taxation in case of import of services by "associated enterprises" In case of **"associated enterprises"**, where the person providing the service is located outside India, the point of taxation shall be:-

(a) the date of debit in the books of account of the person receiving the service

or

(b) date of making the payment

whichever is earlier.

3.6 Determination of point of taxation in case of copyrights, etc. [Rule 8]

Rule 8 applies where in case of royalties and payments pertaining to copyrights, trademarks, designs or patents, the whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed, and subsequently the use or the benefit of these services by a person other than the provider gives rise to any payment of consideration.

In such a case, the service shall be treated as having been provided each time when:-

(a) a payment in respect of such use/benefit is received by the provider in respect thereof

or

[1] The concept of reverse charge has been discussed in Chapter 6: Service Tax Procedures.

(b) an invoice is issued by the provider

whichever is earlier.

3.7 Determination of point of taxation in other cases [Rule 8A]

Rule 8A is the residual rule to determine the point of taxation by way of best judgment to handle situations where the tax-payer is unable to furnish one or more of the details needed i.e. date of payment or date of invoice or both to determine point of taxation. It provides as follows:-

Where the point of taxation cannot be determined as per these rules as the date of invoice or the date of payment or both are not available, the Central Excise Officer, may, require the concerned person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account such material and the effective rate of tax prevalent at different points of time, shall, by an order in writing, after giving an opportunity of being heard, determine the point of taxation to the best of his judgment.

1. Definitions under rule 2

In these rules, unless the context otherwise requires,

(a) Act means the Finance Act, 1994.

(b) Continuous supply of service means

(i) any service which is provided, or agreed to be provided continuously or on recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or from time to time,

or

(ii) where the Central Government, by a notification in the Official Gazette, prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition.

Services notified by the Central Government

In this regard the Central Government has prescribed the provision of following services to be a continuous supply of service:-

(i) Telecommunication Services

(ii) Works Contract Services

(c) Invoice means the invoice referred to in rule 4A of the Service Tax Rules, 1994 and shall include any document as referred to in the said rule.

(d) Point of taxation means the point in time when a service shall be deemed to have been provided.

(e) "Change in effective rate of tax" shall include a change in the portion of value on which tax is payable in terms of a notification issued in the Official Gazette under the provisions of the Act, or rules made there under.

2. Definition of date of payment under rule 2A

Date of payment shall be:-

(a) date on which the payment is entered in the books of accounts

or

(b) date on which payment is credited to the bank account of the person liable to pay tax

whichever is earlier.

(A) Date of payment in case of change in effective rate of tax or a new levy between the above two dates

In case,

(i) there is a change in effective rate of tax or when a service is taxed for the first time during the period between such entry in books of accounts and its credit in the bank account;

(ii) the bank account is credited after four working days from the date when there is change in effective rate of tax or a service is taxed for the first time; and

(iii) the payment is made by way of an instrument which is credited to a bank account,

the date of payment shall be the date of credit in the bank account instead of the date of recording of payment in the books of accounts.

(B) If any rule requires determination of the time or date of payment received: the expression "date of payment" shall be construed to mean such date on which the payment is received.

4

Valuation of Taxable Service

4.1 Valuation of taxable services for charging service tax [Section 67]

Section 67 provides for the valuation of taxable services. The provisions of this section are discussed below:

(1) Consideration in terms of money: If the consideration for a taxable service is in terms of money, the value of such service shall be the gross amount charged by the service provider for such service provided or to be provided by him.

(2) Consideration not wholly or partly in terms of money: If the consideration for a taxable service is not wholly or partly in terms of money, then the value of such service shall be such amount in money, with the addition of service tax charged, is equivalent to the consideration.

(3) Consideration not ascertainable: If the consideration for a taxable service is not ascertainable, the value of such service shall be the amount as may be determined in the prescribed manner.

(4) Where the gross amount charged is inclusive of service tax payable: Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

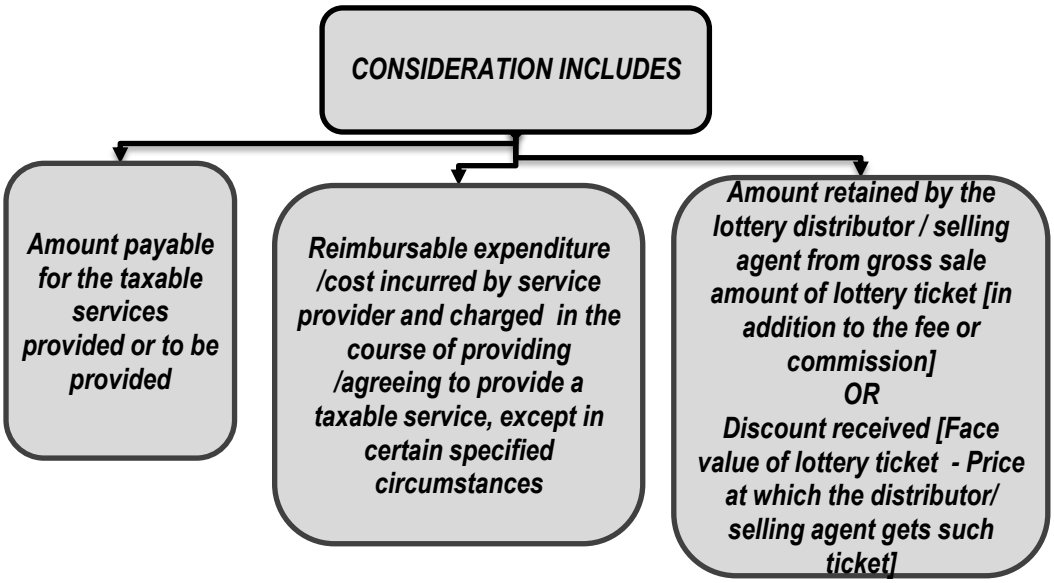
Illustration

Rishabh provides a taxable service to Padam for a consideration of ₹ 10,000 inclusive of service tax at 14%. The value, in such case, shall be computed as $\frac{10,000}{1.14}$ or $\left\lfloor 10,000 \times \frac{100}{114} \right\rfloor$ = ₹ 8,772.

(5) Gross amount charged includes amount received before/during/after the provision of such service: The gross amount charged for the taxable service shall include any amount received towards the taxable service either before, during or after the provision of such service.

(6) Subject to the aforementioned provisions, the value of a taxable service shall be determined in such manner as may be prescribed [prescribed in the Service Tax (Determination of Value) Rules, 2006].

1. **Gross amount charged** includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.
2. ***Consideration includes–***
   - ***(i) any amount that is payable for the taxable services provided or to be provided;***
   - ***(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;***
   - ***(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.***

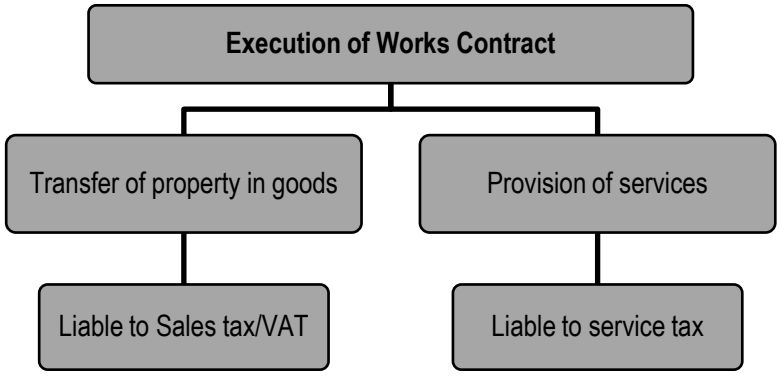


4.2 Service Tax (Determination of Value) Rules, 2006

Notification No.12/2006-ST, dated 19.04.2006 has notified the Service Tax (Determination of Value) Rules, 2006. They came into force from 19.04.2006.

The words and expressions used in these rules and not defined but defined in the Finance Act, 1994 shall have the meaning respectively assigned to them in the Act.

(1) Determination of value of services involved in the execution of a works contract [Rule 2A]



Works contract is a contract for the provision of service as well as supply of materials. As decided by Apex Court in *BSNL v. UOI 2006 (2) S.T.R. 161 (S.C.)*, a works contract can be segregated into a contract of sale of goods and contract of provision of service.

Subject to the provisions of section 67, the value of service portion in the execution of a works contract shall be determined in the following manner, namely:-

A. Determination of value of service portion on the basis of value of property in goods transferred, adopted for State VAT purposes

Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Particulars	₹
Gross amount charged for the works contract	xxxx
Less: Value of transfer of property in goods transferred, computed for State VAT purpose**	xxxx
Less: VAT/Sales tax, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract.	xxxx
Value of the works contract service	xxxx

****Note: Value of transfer of property in goods involved in the execution of the said works contract in case VAT/sales tax is paid/payable on their actual value:** Where VAT/sales tax has been paid/payable on the actual value of property in goods transferred in the execution of the works contract (and not using standard rate of deduction) then, such value adopted for the purposes of payment of VAT/sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.

Inclusions

Value of works contract service shall include -

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services.

B. Simplified scheme for determining the value of service portion in a works contract

Where the value has not been determined as per the aforementioned method, the person liable to pay tax on the taxable service involved in the execution of the works contract shall determine the value of service portion in the following manner, namely:-

S. No.	Works contract	Value of service portion
(A)	in case of works contracts entered into for execution of original works	**40% of the total amount charged for the works contract**
(B)	in case of works contract, not covered under sub-clause (A), including works contract entered into for,- (i) maintenance or repair or reconditioning or restoration or servicing of any goods; or (ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property	**70% of the total amount charged for the works contract**

Points which merit consideration

1. Original works means

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise.

2. Meaning of total amount

Particulars		₹	₹
Gross amount charged for the works contract			**xxxx**
Add: Value of all goods and services supplied by the service receiver in /in relation to the execution of the works contract (whether or not supplied under the same contract or any other contract)	FMV of such goods & services (determined in accordance with the generally accepted accounting principles)	xxxx	
	Less:		
	(i) the amount charged for such goods or services, if any, by service receiver; and	xxxx	
	(ii) VAT/sales tax, if any, levied thereon	xxxx	xxxx
Total amount			xxxx

3. No credit on inputs: It is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

Illustration: Mahavir Enterprises (ME) has entered into a contract for construction of a building with Sambhav Constructions Ltd (SCL). As per the agreement, the amount payable (excluding all taxes) by ME to SCL is ₹ 95,00,000 in addition to the steel and cement to be supplied by ME for which it charged ₹ 5,00,000 from SCL. Fair market value of the steel and cement (excluding VAT) is ₹ 10,00,000. Compute the 'total amount charged' pertaining to the said works contract for execution of 'original works'.

Particulars	₹
Gross amount received excluding taxes **(A)**	95,00,000
Fair market value of steel and cement supplied by ME excluding taxes **(B)**	10,00,000
Amount charged by service receiver for steel and cement **(C)**	5,00,000
Total amount charged **[(A) + (B) - (C)]**	1,00,00,000
Value of service portion (40% of total amount charged in case of original works)	40,00,000

Note: When the service provider pays partially or fully for the materials supplied by the service receiver, gross amount charged would inevitably go higher by that much amount.

(2) Determination of value of service in relation to money changing [Rule 2B]

Rule 2B provides the manner of determination of the value of taxable service provided so far as the services so provided pertains to purchase or sale of foreign currency, including money changing. The value of service shall be determined as follows:-

(a) For a currency, when exchanged from, or to, Indian Rupees (INR): For a currency, when exchanged from, or to, Indian Rupees (INR), the value shall be equal to the difference in the buying rate or the selling rate, as the case may be, and the Reserve Bank of India (RBI) reference rate for that currency at that time*, multiplied by the total units of currency.

***Note: Where the RBI reference rate for a currency is not available**

Where the RBI reference rate for a currency is not available, the value shall be 1% of the gross amount of Indian Rupees provided or received, by the person changing the money.

Illustration I: US$ 1,000 are sold by a customer at the rate of ₹ 45 per US$.

RBI reference rate for US$ is ₹ 45.50 for that day.

Value of taxable service= (RBI reference rate for $ – Selling rate for $) × Total units

= ₹ (45.50 - 45) × 1,000 =₹ 0.50 × 1,000

The taxable value shall be ₹ 500.

Illustration II: INR 70,000 is changed into Great Britain Pound (GBP) and the exchange rate offered is ₹ 70, thereby giving GBP 1000.

RBI reference rate for that day for GBP is ₹ 69.

The taxable value shall be ₹ 1,000.

(b) Where neither of the currencies exchanged is Indian Rupee: Where neither of the currencies exchanged is Indian Rupee, the value shall be equal to 1% of the lesser of the two amounts the person changing the money would have received by converting any of the two currencies into Indian Rupee on that day at the reference rate provided by RBI.

(3) Determination of value of service portion involved in supply of food or any other article of human consumption or any drink in a restaurant or as outdoor catering [Rule 2C]

Subject to the provisions of section 67, the value of service portion, in an activity wherein goods being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity at a restaurant or as outdoor catering, shall be the specified percentage of the total amount charged for such supply, in terms of the following table, namely:-

S. No	Description	Value of taxable service
1.	Service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity, at a restaurant	**40% of the total amount**
2.	Service portion in outdoor catering wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of such outdoor catering	**60% of the total amount**

1. Meaning of total amount

Particulars			Amount
Gross amount charged			xxxx
Add: Value of all goods and services supplied in or in relation to the supply of food or any other article of human consumption or any drink (whether or not intoxicating), whether or not supplied under the same contract or any other contract	FMV of all goods & services supplied by the service receiver (determined in accordance with the generally accepted accounting principles)	xxxx	
	Less: (i) the amount charged for such goods or services, if any, by the service receiver; and	xxxx	
	(ii) VAT/sales tax, if any, levied thereon	xxxx	xxxx
Total amount			**xxxx**

2. No credit on goods falling under Chapter 1 to 22 of Central Excise Tariff: It is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985.

(4) Manner of determination of value when such value is not ascertainable [Rule 3]

The value of taxable service, where such value is not ascertainable, shall be determined by the service provider in the manner described below.

Subject to the provisions of section 67, the value of taxable service, where such value is not ascertainable, shall be determined by the service provider in the following manner:-

(a) Value of similar services: The value of taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person subject to fulfillment of the conditions below:

1. Such service is in the ordinary course of trade.
2. The gross amount charged is the sole consideration.

(b) When value of similar services cannot be ascertained: Where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration. However, such value shall, in no case be less than the cost of provision of such taxable service.

(5) Rejection of value by Central Excise Officer and its determination thereon [Rule 4]

(a) Central Excise Officer empowered to verify the value adopted by the service provider: The Central Excise Officer shall have the power to satisfy himself as to the accuracy of any information furnished or document presented for valuation. In other words, where there are adequate reasons warranting verification of the value adopted by

the service provider for payment of service tax, rule 4 specifically enables verification of records in such cases. The provisions contained in rule 3 shall not restrict or put to question such power of the Central Excise Officer.

(b) Issue of show cause notice (SCN): A show cause notice (SCN) shall be issued to the service provider, if the Central Excise Officer is satisfied that the value determined by such service provider is not in accordance with the provisions of the Act or these rules. Such show cause notice will specify the value of taxable service fixed by the Central Excise officer.

(c) Provision of opportunity of being heard and determination of value of taxable service: The Central Excise Officer shall provide a reasonable opportunity of being heard, to the service provider. Thereafter, he shall determine the value of such taxable service for the purpose of charging service tax in accordance with the provisions of the Act and these rules.

(6) Inclusion in or exclusion from value of certain expenditure or costs [Rule 5]

(a) General provision: The expenditure or costs incurred by the service provider in the course of providing taxable service forms integral part of the taxable value of the service provided or to be provided. Therefore, they shall be included in the value for the purpose of charging service tax on the said service. It shall not be relevant that various expenditure or costs are separately indicated in the invoice or bill issued by the service provider to his client.

This is a general rule which makes it clear that even when such expenditure or costs are recovered separately by service provider from the service receiver, the same are includible for discharging the service tax.

(b) Value of taxable service for the telecommunication service: For the telecommunication service, the value of the taxable service shall be the gross amount paid by the person to whom telecom service is provided by the telegraph authority.

Hence, in case of service provided by way of recharge coupons or prepaid cards or the like, the value shall be the gross amount charged from the subscriber or the ultimate user of the service and not the amount paid by the distributor or any such intermediary to the telegraph authority.

(c) Individual components of total consideration even if indicated separately in invoice would also form part of value of taxable service: It is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice.

Illustration 1 - In the course of providing a taxable service, a service provider incurs costs such as travelling expenses, postage, telephone, etc., and may indicate these items separately on the invoice issued to the recipient of service. In such a case, the service provider is not acting as an agent of the recipient of service but procures such inputs or input service on his own account for providing the taxable service. Such

expenses do not become reimbursable expenditure merely because they are indicated separately in the invoice issued by the service provider to the recipient of service.

Illustration 2 - A contracts with B, an architect for building a house. During the course of providing the taxable service, B incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc., to enable him to effectively perform the provision of services to A. In such a case, in whatever form B recovers such expenditure from A, whether as a separately itemised expense or as part of an inclusive overall fee, service tax is payable on the total amount charged by B. Value of the taxable service for charging service tax is what A pays to B.

Illustration 3 - Company X provides a taxable service of rent-a-cab by providing chauffeur-driven cars for overseas visitors. The chauffeur is given a lump sum amount to cover his food and overnight accommodation and any other incidental expenses such as parking fees by the Company X during the tour. At the end of the tour, the chauffeur returns the balance of the amount with a statement of his expenses and the relevant bills. Company X charges these amounts from the recipients of service. The cost incurred by the chauffeur and billed to the recipient of service constitutes part of gross amount charged for the provision of services by the Company X.

(d) Amounts paid to the third party by the service provider as a "pure agent" of the client not to be included in the taxable value: There could be situations where the client of the service provider specifically engages the service provider, as his agent, to contract with the third party for supply of any goods or services on his behalf. In those cases, such goods or services so procured are treated as supplied to the client rather than to the contracting agent. The service provider in such cases incurs the expenditure purely on behalf of his client in his capacity as an agent, i.e. "pure agent" of the client. Amounts paid to third party by the service provider as a pure agent of his client can be treated as reimbursable expenditure and shall not be included in taxable value.

Conditions to be satisfied in this regard:- Subject to the provisions mentioned in point (a) above, the expenditure or costs incurred by the service provider as a pure agent of the recipient of service shall be excluded from the value of the taxable service if all the following conditions are satisfied:

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has

been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

"Pure agent" means a person who–

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services.

Illustration – X contracts with Y, a real estate agent to sell his house and thereupon Y gives an advertisement in television. Y billed X including charges for Television advertisement and paid service tax on the total consideration billed. In such a case, consideration for the service provided is what X pays to Y. Y does not act as an agent on behalf of X when obtaining the television advertisement even if the cost of television advertisement is mentioned separately in the invoice issued by X. Advertising service is an input service for the estate agent in order to enable or facilitate him to perform his services as an estate agent.

Above illustration provides the distinction between payment made as "pure agent" and payment made as "principal".

(e) Value of taxable service for Custom House Agent's service: The principal job of a custom house agent (CHA) is to get the import/export consignments cleared through customs. However, at times they also provide services for packing, unpacking, loading, unloading, bringing or removing the goods to or from the customs area, vessels or aircrafts for their customers (i.e. importers or exporters). CHAs initially pay the service charges to these agencies and later recover these charges from the customer along with their own charges. Similar arrangement can occur for payment of statutory levies like custom duties, port charges, cesses etc. leviable on the said goods.

The aforesaid reimbursable charges would be excluded from the value of taxable service if all the following conditions are satisfied, -

(i) The activity/service for which a charge is made should be in addition to provision of CHA service.

(ii) There should be arrangement between the customer & the CHA which authorizes or allows the CHA to:-

(a) arrange for such activities/services for the customer; and

(b) make payments to other service providers on his behalf;

(iii) The CHA does not use the activities/services for his own benefit or for the benefit of his other customers;

(iv) The CHA recovers the reimbursements on 'actual' basis i.e. without any mark-up or margin.

(v) CHA should provide evidence to prove nexus between such other than CHA services provided and the reimbursable amounts. Similar would be the case for statutory levies, charges by carriers and custodians, insurance agencies and the like.

(vi) Each charge for separate activities/services is to be covered either by a separate invoice or by a separate entry in a common invoice.

Any other miscellaneous/out of pocket expenses charged by the CHA would not be excluded *[Circular No. 119/13/2009 ST dated 21.12.2009].*

(7) Service specific inclusion/exclusion of certain items from the value of taxable service [Rule 6]

(A) Inclusions: Subject to the provisions of section 67, the value of the taxable services shall include–

(i) the commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;

(ii) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;

(iii) the amount of premium charged by the insurer from the policy holder;

(iv) the commission received by the air travel agent from the airline;

(v) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;

(vi) the reimbursement received by the authorised service station, from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer;

(vii) the commission or any amount received by the rail travel agent from the Railways or the customer;

(viii) the remuneration or commission, by whatever name called, paid to such agent by the client engaging such agent for the services provided by a clearing and

forwarding agent to a client rendering services of clearing and forwarding operations in any manner; and

(ix) the commission, fee or any other sum, by whatever name called, paid to such agent by the insurer appointing such agent in relation to insurance auxiliary services provided by an insurance agent.

(x) The amount realised as demurrage or by any other name whatever called for the provision of a service beyond the period originally contracted or in any other manner relatable to the provision of service.

(B) Exclusions: Subject to the provisions contained in sub-rule (1), the value of any taxable service, as the case may be, does not include–

(i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telegraph or telex or for leased circuit;

(ii) the airfare collected by air travel agent in respect of service provided by him;

(iii) the rail fare collected by rail travel agent in respect of service provided by him;

(iv) interest on delayed payment of any consideration for the provision of services or sale of property, whether moveable or immoveable and

(v) the taxes levied by any Government (including foreign Governments, where a passenger disembarks) on any passenger travelling by air, if shown separately on the ticket, or the invoice for such ticket, issued to the passenger.

(vi) accidental damages due to unforeseen actions not relatable to the provision of service.

(vii) subsidies and grants disbursed by the Government, not directly affecting the value of service.

5
Exemptions and Abatements

5.1 Introduction

After confirming the taxability of an activity in terms of section 66B of the Finance Act, 1994, the next step is to determine if the service tax is payable on the said service. For that, one needs to ascertain whether the service is eligible for any exemption under the service tax law. Service tax will not be payable on taxable services, if the taxable service is covered under any of the exemption notifications issued under section 93 of the Finance Act, 1994.

There are certain exemption notifications that have been issued under section 93 of which the main exemption notification is *Notification No 25/2012 ST dated 20.06.2012* [also referred to as Mega Exemption Notification].

If the service fits into the nature and description of services specified in these notifications then it is an exempted service. Declared services are also covered by these exemptions as all services, whether declared or not, which are covered under section 66B of the Act are taxable, if elements of taxability are present.

Exempted services vs. Services included in the negative list

An exempted service is a **taxable service** which has been exempted by the Central Government by issuing a notification under section 93(1) of the Finance Act, 1994 whereas a negative list service is **not taxable** at all as it is outside the scope of the charging section-section 66B of the Finance Act, 1994.

Further, any change in the existing exemptions or any new exemption can be granted by the Central Government by issuing a notification in the Official Gazette whereas for amending the negative list of services under section 66D, Finance Act, 1994 has to be amended seeking approval from both houses of the Parliament.

This Chapter discusses in detail the exemptions and abatements available in respect of various services under the negative list regime.

EXEMPTIONS

5.2 Mega exemption notification

Notification No. 25/2012 ST dated 20.06.2012 is the mega exemption notification wherein most of the exemptions have been consolidated at one place for ease of reference. The various exemptions provided by the notification are discussed hereunder:

(1) Services to United Nations/specified international organization: Services provided **TO** the United Nations and specified international organisations are exempt. However, it is important to note that services provided **BY** these organizations are chargeable to service tax.

Specified International Organization means an international organization declared by the Central Government in pursuance of section 3 of the United Nations (Privileges and Immunities) Act, 1947, to which the provisions of the Schedule to the said Act apply.

Illustrative list of specified international organisations is as follows:

(a) International Civil Aviation Organisation

(b) World Health Organisation

(c) International Labor Organisation

(d) Food and Agriculture Organisation of the United Nations

(e) UN Educational, Scientific and Cultural Organisation (UNESCO)

(f) International Monetary Fund (IMF)

(2) Health/Clinical Establishment related services

A. Health care services: Health care services provided **BY** a clinical establishment, an authorized medical practitioner or para-medics are exempt from service tax.

B. Ambulance service: Services provided by way of transportation of a patient in an ambulance, other than those specified in (a) above are exempt from service tax.

C. Veterinary services: Services provided **BY** a veterinary clinic in relation to health care of animals or birds are exempt from service tax.

D. Stem cell banking services: Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation are exempt from service tax.

E. Common bio-medical waste treatment: Services provided by operators of the common bio-medical waste treatment facility to a clinical establishment by way of treatment or disposal of bio-medical waste or the processes incidental thereto are exempt from service tax.

ANALYSIS

(i) Meaning of health care services: Health care services

- **means** any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any **recognised system of medicines** in India and
- **includes** services by way of transportation of the patient to and from a clinical establishment, but
- **does not include** hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma.

Hence, the definition of health care services is both an inclusive and exhaustive.

(ii) Only recognized systems of medicines exempt: Only services in recognized systems of medicines in India provided by the persons specified under this head are exempt. In terms of the clause (h) of section 2 of the Clinical Establishments Act, 2010, the following systems of medicines are recognized systems of medicines:-

- Allopathy
- Yoga
- Naturopathy
- Ayurveda
- Homeopathy
- Siddha
- Unani
- Any other system of medicine that may be recognized by Central Government.

(iii) Transportation of a patient to and from a clinical establishment is exempt from service tax under health care services [point A] only when the said service is provided by a clinical establishment or an authorised medical practitioner or paramedics.

However, the said service provided by an entity which is not a clinical establishment or an authorised medical practitioner or paramedics is also exempt from service tax under ambulance services [point B]. In fact, under ambulance services, the said exemption has been extended to ambulance services provided by all service providers.

1. **Authorised medical practitioner** means a medical practitioner registered with any of the councils of the recognized system of medicines established or recognized by law in India and includes a medical professional having the requisite qualification to practice in any recognized system of medicines in India as per any law for the time being in force.
2. **Clinical establishment** means a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases.
3. **Para-medics** are trained health care professionals, for example nursing staff, physiotherapists, technicians, lab assistants etc. Services by them in a clinical establishment would be in the capacity of employee and not provided in independent capacity and will thus be considered as services by such clinical establishment. Similar services in independent capacity are also exempted. Thus, paramedics need not be medical professionals possessing professional qualifications.

(3) Services by an entity registered under section 12AA of the Income tax Act, 1961 by way of charitable activities

In order to claim exemption under this head, following two conditions must be satisfied:-

(i) The entity is registered with income tax authorities under section 12AA of the Income tax Act, 1961, and

(ii) The entity carries out one or more of the **specified charitable activities**.

It implies that any service other than by way of charitable activities to any other person for consideration (not covered in negative list) provided by an entity registered under section 12AA of the Income tax Act, 1961 is chargeable to service tax.

Charitable activities means activities relating to -

(i) public health by way of -
  (a) care or counseling of
    (i) terminally ill persons or persons with severe physical or mental disability,
    (ii) persons afflicted with HIV or AIDS, or
    (iii) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or
  (b) public awareness of preventive health, family planning or prevention of HIV infection;

(ii) advancement of religion or spirituality;

(iii) advancement of educational programmes or skill development relating to,-
  (a) abandoned, orphaned or homeless children;
  (b) physically or mentally abused and traumatized persons;
  (c) prisoners; or
  (d) persons over the age of 65 years residing in a rural area

(iv) preservation of environment including watershed, forests and wildlife.

(4) Religion related services

A. Religious places/ceremonies: Services **BY** a person by way of-

(i) renting of precincts of a religious place meant for general public; or

(ii) conduct of any religious ceremony

are exempt from service tax.

1. **Religious place** means a place which is primarily meant for conduct of prayers or worship pertaining to a religion, meditation, or spirituality.
2. **General public** means the body of people at large sufficiently defined by some common quality of public or impersonal nature.

3. **Religious ceremonies** are life-cycle rituals including special religious poojas conducted in terms of religious texts by a person so authorized by such religious texts. Occasions like birth, marriage, and death involve elaborate religious ceremonies.

B. Pilgrimage services: ***Services provided by a specified organisation in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement, are exempt from service tax.***

Specified organisation means:

1. ***Kumaon Mandal Vikas Nigam Limited, a Government of Uttarakhand Undertaking; or***
2. ***Haj Committee of India and State Haj Committees constituted under the Haj Committee Act, 2002, for making arrangements for the pilgrimage of Muslims of India for Haj.***

Thus, the religious pilgrimage organized by the Haj Committee and Kumaon Mandal Vikas Nigam Ltd. are not liable to service tax.

(5) Legal services: Services provided **BY -**

(a) an arbitral tribunal to -

(i) any person other than a business entity; or

(ii) a business entity with a turnover up to ₹ 10 lakh in the preceding financial year.

(b) an individual as an advocate or a partnership firm of advocates by way of legal services to-

(i) an advocate or partnership firm of advocates providing legal services ;

(ii) any person other than a business entity; or

(iii) a business entity with a turnover up to ₹ 10 lakh in the preceding financial year.

(c) a person represented on an arbitral tribunal to an arbitral tribunal

are exempt from service tax.

ANALYSIS

Legal service means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority.

Advocates can provide services either as individuals or as firms. Under this head, legal services provided by advocates or partnership firms of advocates are exempt from service tax when provided to the following:-

- an advocate or partnership firm of advocates providing legal services (Here the services are being provided to the same class of persons)

- any person other than a business entity
- a business entity with a turnover up to ₹ 10,00,000 in the preceding financial year

However, in respect of services provided to business entities, with a turnover exceeding ₹ 10 lakh in the preceding financial year, tax is required to be paid on reverse charge by the business entities. Business entity is defined in section 65B of the Finance Act, 1994 as 'any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession'. Thus, it includes sole proprietors as well. The business entity can, however, take input tax credit of such tax paid in terms of the CENVAT Credit Rules, 2004, if otherwise eligible. The provisions relating to arbitral tribunal are also on similar lines.

1. **Arbitral tribunal** means a sole arbitrator or a panel of arbitrators.
2. **Advocate** means an advocate entered in any roll under the provisions of the Advocates Act, 1961.

(6) Recreational coaching or training: Services by way of training or coaching in recreational activities relating to arts, culture or sports are exempt from service tax.

The term 'recreational activities' is very wide. However, under this head, the scope of training or coaching in recreational activities is restricted to the area of:-

(i) Arts

(ii) Culture

(iii) Sports

Hence, the training or coaching in recreational activities in the areas other than arts, culture or sports shall be chargeable to service tax.

Further, training or coaching relating to all forms of arts, culture or sports is covered under this head. In other words, the said exemption is available to coaching or training relating to all forms of dance, music, painting, sculpture making, theatre, sports etc.

(7) Educational services: Services provided-

(a) **BY** an educational institution to its students, faculty and staff;

(b) **TO** an educational institution, by way of,-

(i) transportation of students, faculty and staff;

(ii) catering, including any mid-day meals scheme sponsored by the Government;

(iii) security or cleaning or house-keeping services performed in such educational institution;

(iv) services relating to admission to, or conduct of examination by, such institution.

are exempt from service tax.

Educational institution means an institution providing services specified in clause (l) of section 66D of the Finance Act, 1994.

(8) Skill development services: Services provided by:-

(i) the National Skill Development Corporation (NSDC) set up by the Government of India;

(ii) a Sector Skill Council (SSC) approved by the NSDC;

(iii) an assessment agency approved by the SSC or the NSDC;

(iv) a training partner approved by the NSDC or the SSC

in relation to:-

(a) the National Skill Development Programme implemented by the NSDC; or

(b) a vocational skill development course under the National Skill Certification and Monetary Reward Scheme; or

(c) any other Scheme implemented by the NSDC

are exempt from service tax.

(9) Sports related services

A. Sports services: Services provided **TO** a recognized sports body **BY**-

(i) an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organized by a recognized sports body;

(ii) another recognized sports body

are exempt from service tax.

Whether the following services are exempt under this head or taxable?

S. No.	Service provided	Whether exempt under this head or otherwise taxable?
1.	Services provided to a recognized sports body by an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organized by a recognized sports body	Exempt under this head
2.	Service of a player to a franchisee which is not a recognized sports body	Taxable
3.	Services by a recognized sports body to another recognized sports body	Exempt under this head
4.	Services by individuals such as selectors, commentators, curators, technical experts	Taxable
5.	Services of an individual as umpire, referee when provided directly to a recognized sports body	Exempt under this head

Recognized sports body means –

(i) Indian Olympic Association

(ii) Sports Authority of India

(iii) A national sports federation recognised by the Ministry of Sports and Youth Affairs of the Central Government, and its affiliate federations

(iv) National sports promotion organisations recognised by the Ministry of Sports and Youth Affairs of the Central Government

(v) International Olympic Association or a federation recognised by the International Olympic Association, or

(vi) A federation or a body which regulates a sport at international level and its affiliated federations or bodies regulating a sport in India.

B. Sponsorship of sports events: Services by way of sponsorship of sporting events organised,-

(i) by a national sports federation, or its affiliated federations, where the participating teams or individuals represent any district, State, zone or country;

(ii) by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympic Committee of India or Special Olympics Bharat;

(iii) by Central Civil Services Cultural and Sports Board;

(iv) as part of national games, by Indian Olympic Association; or

(v) under Panchayat Yuva Kreeda Aur Khel Abhiyaan (PYKKA) Scheme

are exempt from service tax.

(10) Construction services

A. Construction services provided to Government: Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(i) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958;

(ii) canal, dam or other irrigation works;

(iii) pipeline, conduit or plant for

(a) water supply

(b) water treatment, or

(c) sewerage treatment or disposal

are exempt from service tax.

ANALYSIS

It is important to note here that exemption would be available only if the aforesaid specified services have been provided **TO** the Government or local authority or Governmental authority. Such services provided to any other person would not be eligible for exemption.

Local authority means—

(i) Panchayat as referred to in clause (d) of article 243 of the Constitution.

(ii) Municipality as referred to in clause (e) of article 243P of the Constitution.

(iii) Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund.

(iv) Cantonment Board as defined in section 3 of the Cantonments Act, 2006.

(v) Regional council or a district council constituted under the Sixth Schedule to the Constitution.

(vi) Development board constituted under article 371 of the Constitution.

(vii) Regional council constituted under article 371A of the Constitution [Section 65B(31)].

B. Construction of specific buildings/structures: Services provided by way of construction**,** erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(i) a road, bridge, tunnel, or terminal for road transportation for use by general public;

Thus, construction of roads which are not for general public use e.g. construction of roads in a factory, residential complex would be taxable.

(ii) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;

(iii) a building owned by an entity registered under section 12AA of the Income tax Act, 1961 and meant predominantly for religious use by general public;

(iv) a pollution control or effluent treatment plant, except located as a part of a factory; or a structure meant for funeral, burial or cremation of deceased;

are exempt from service tax.

C. Construction of original works relating to specific structures/buildings/infrastructure: Services by way of construction, erection, commissioning, or installation of original works pertaining to,-

(i) railways, including monorail or metro;

Repair, maintenance of airports, ports and railways would be liable to service tax and the same is available as input tax credit to railways, port or airport authority, if other conditions are met.

(ii) a single residential unit otherwise than as a part of a residential complex;

(iii) low- cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

(iv) post- harvest storage infrastructure for agricultural produce including a cold storage for such purposes; or

(v) mechanized food grain handling system, machinery or equipment for units processing agricultural produce as food stuff* excluding alcoholic beverages;

are exempt from service tax.

1. **Residential complex** means any complex comprising of a building or buildings, having more than one single residential unit.
2. **Single residential unit** means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family.
3. **Original works** means
   (i) all new constructions;
   (ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
   (iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise.

Illustrations:

Determine whether the service tax is payable in the following cases:-

1. Sambhav Contractors is constructing a two - floor house for Mr. Ravi Mukherjee.

Service tax is payable on construction of a residential complex having more than one single residential unit. Single residential unit is defined in the notification and means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family.

If each of the floors of Mr. Ravi's house is a single residential unit in terms of the definition, Sambhav Contractors is liable to pay service tax. If the title of each of floors is capable of being transferred to another person by mutation in land/ municipal records, both the floors may be considered as separate single residential units.

2. Mojani Ltd. is engaged in the erection and installation of machineries and equipments in the wheat flour mill for Rajul Enterprises.

There is no service tax liability on erection or installation of machineries or equipments for units processing agricultural produce as food stuff excluding alcoholic beverages. Rajul Enterprises is processing wheat (an agricultural produce) to make flour. Thus, service tax is not payable in this case.

(11) Copyright services: Services provided by way of temporary transfer or permitting the use or enjoyment of a copyright,-

(a) covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957, relating to original literary, dramatic, musical or artistic works; or

(b) of cinematograph films for exhibition in a cinema hall or cinema theatre

are exempt from service tax.

Illustrations

1. Sur Music Company (SMC) recorded a song for which they have the copyright. Whether SMC would be taxable for its activity of distributing music?

   The music company would be required to pay service tax as the copyright relating to sound recording falls under clause (c) of sub-section (1) of section 13 of the Indian Copyright Act, 1957 i.e. sound recording.

2. Ram Prasad is a composer of a song having the copyright for his song. He allowed the recording of the song on payment of some royalty by Kaveri Music Company for further distribution, is he required to pay service tax on the royalty amount received from Kaveri Music Company?

   No, as the copyright relating to original work of composing song falls under clause (a) of subsection (1) of section 13 of the Indian Copyright Act, 1957 which is exempt from service tax.

An author having copy right of a book written by him would not be required to pay service tax on royalty amount received from the publisher for publishing the book. A person having the copyright of a cinematographic film would also not be required to pay service tax on the amount received from the film exhibitors for exhibiting the cinematographic film in cinema theatres.

The provisions relating to copyrights are governed by the Indian Copyright Act, 1957. Section 13(1) of the Indian Copyrights Act, 1957 provides that the **copyright** subsists in the following classes of works:-

(a) Original literary, dramatic, musical and artistic works;

(b) Recording of cinematographic films;

(c) Sound recordings.

(12) Artist performance: ***Services by an artist by way of a performance in folk or classical art forms of (i) music, or (ii) dance, or (iii) theatre are exempt from service tax, if the consideration charged for such performance is not more than ₹ 1,00,000.***

However, exemption will not apply to service provided by such artist as a brand ambassador.

Whether the following activities are exempt under this head or taxable?

S.No.	Activities	Taxable or exempt
1.	Activities by a performing artist in folk or classical art forms of music, dance, or theatre if the consideration therefor is up to ₹ 1,00,000	Exempt
2.	All other activities by an artist in other art forms e.g. western music or dance, modern theatres, performance of actors in films or television serials	Taxable
3.	Activities of artists in still art forms e.g. painting, sculpture making etc.	Taxable
4.	Services provided by an artist as brand ambassador	Taxable
5.	Activities by a performing artist in folk or classical art forms of music, dance, or theatre if the consideration therefor exceeds ₹ 1,00,000	Taxable

Brand ambassador means a person engaged for promotion or marketing of a brand of goods, service, property or actionable claim, event or endorsement of name, including a trade name, logo or house mark of any person.

(13) Services by way of collecting or providing news: Services by way of collecting or providing news by an independent journalist, Press Trust of India or United News of India are exempt from service tax.

(14) Accommodation services: Services by a hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purposes, having declared tariff of a unit of accommodation below ₹ 1,000 per day or equivalent.

Significance of declared tariff: The relevance of declared tariff is in determining the liability to pay service tax on renting of a hotel, inn, guest house, club, campsite for residential or lodging purposes as exemption is available where declared tariff of a unit of accommodation is below ₹ 1,000 per day or equivalent. However, the tax will be liable to be paid on the amount actually charged i.e. declared tariff minus any discount offered.

Thus if the declared tariff is ₹ 1100/-, but actual room rent charged is ₹ 800/-, tax will be required to be paid on ₹ 800/-.

When the declared tariff is revised as per the tourist season, the liability to pay tax shall be only on the declared tariff for the accommodation where the published/printed tariff is taxable. However, the revision in tariff should be made uniformly applicable to all customers and declared when such change takes place.

Declared tariff includes charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air-conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit.

(15) Services provided in relation to serving of food or beverages:

A. Serving of food/beverages by restaurant: Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year are exempt from service tax.

Therefore, services provided in relation to serving of food or beverages by a restaurant, eating joint or mess, having the facility of air-conditioning or central air heating in any part of the establishment, at any time during the year (hereinafter referred as 'specified restaurant') would attract service tax. In this regard following points have been clarified by *Circular No.173/8/2013 – ST dated 07.10.2013*:

(i) If specified restaurant in a hotel provides services in other areas of the hotel (e.g. swimming pool or an open area attached to the restaurant), such services are also liable to service tax.

(ii) In a complex, air-conditioned as well as non-air-conditioned restaurants are operational. These restaurants are clearly demarcated and separately named, but food is sourced from a common kitchen. In such a case, only services provided in a specified restaurant are liable to service tax. However, services provided in a non air-conditioned or non centrally air- heated restaurant will be treated as exempted service and thus, will not be liable to service tax.

(iii) If goods sold on MRP basis (fixed under the Legal Metrology Act) across the counter as part of the Bill/invoice, they have to be excluded from total amount for the determination of value of service portion.

B. Serving of food/beverages by canteen: Services provided, in relation to serving of food or beverages, by a canteen have been exempted from service tax provided such canteen:-

(i) is maintained in a factory covered under the Factories Act, 1948, and

(ii) has facility of air-conditioning/central air-heating at any time during the year.

(16) Transportation related services

A. Transportation of specified goods by road/rail/vessel: Exemptions granted to transport of goods through rail or a vessel or a goods carriage are presented in the following table: -

Transportation of the following goods by rail / vessel is exempt from service tax	Transportation of the following goods in a goods carriage by a goods transport agency is exempt from service tax
Railway equipments or materials	(i) goods where gross amount charged for the transportation of goods on a consignment transported in a single goods carriage does not exceed ₹ 1500; or
	(ii) goods, where gross amount charged for transportation of all such goods for a single consignee does not exceed ₹ 750.
Transportation of the following goods by rail / vessel / goods carriage is exempt from service tax	
(a) agricultural produce ***(b) milk, salt and food grain including flours, pulses and rice*** (c) chemical fertilizer, oilcakes and organic manure (d) newspaper or magazines registered with the Registrar of Newspapers (e) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap (f) defence or military equipments (g) cotton, ginned or bailed	

Goods carriage means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods.

B. Passenger transportation services: Transport of passengers, with or without accompanied belongings, by -

(a) air, embarking from or terminating in an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, or Tripura or at Bagdogra located in West Bengal;

(b) non air-conditioned contract carriage other than radio taxi, for the transportation of passengers, excluding tourism, conducted tour, charter or hire; or

(c) ropeway, cable car or aerial tramway

is exempt from service tax.

1. **Contract carriage means** a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorised by him in this behalf

on a fixed or an agreed rate or sum-

(a) on a time basis, whether or not with reference to any route or distance; or

(b) from one point to another, and in either case, without stopping to pick up or set down passengers not included in the contract anywhere during the journey,

and includes-

(i) a maxicab; and

(ii) a motorcar notwithstanding the separate fares are charged for its passengers.

2. **Radio taxi** means a taxi including a radio cab, by whatever name called, which is in two-way radio communication with a central control office and is enabled for tracking using Global Positioning System (GPS) or General Packet Radio Service (GPRS).

C. Services of giving on hire means of passenger and goods transportation: Services by way of giving on hire -

(a) to a state transport undertaking, a motor vehicle meant to carry more than 12 passengers; or

(b) to a goods transport agency, a means of transportation of goods

are exempt from service tax.

State transport undertaking means any undertaking providing road transport service, where such undertaking is carried on by,-

(i) the Central Government or a State Government;

(ii) any Road Transport Corporation established under section 3 of the Road Transport Corporations Act, 1950;

(iii) any municipality or any corporation or company owned or controlled by the Central Government or one or more State Governments, or by the Central Government and one or more State Governments.

(iv) Zila Parishad or any other similar local authority.

Explanation.-For the purposes of this clause, **"road transport service"** means a service of motor vehicles carrying passengers or goods or both by road for hire or reward.

(17) Insurance business and pension related services

A. General Insurance: Services of general insurance business provided under following schemes are exempt from service tax:

(a) Hut Insurance Scheme;

(b) Cattle Insurance under Swarnajaynti Gram Swarozgar Yojna (earlier known as Integrated Rural Development Programme);

(c) Scheme for Insurance of Tribals;

(d) Janata Personal Accident Policy and Gramin Accident Policy;

(e) Group Personal Accident Policy for Self-Employed Women;

(f) Agricultural Pumpset and Failed Well Insurance;

(g) Premia collected on export credit insurance;

(h) Weather Based Crop Insurance Scheme or the Modified National Agricultural Insurance Scheme, approved by the Government of India and implemented by the Ministry of Agriculture;

(i) Jan Arogya Bima Policy;

(j) National Agricultural Insurance Scheme (Rashtriya Krishi Bima Yojana);

(k) Pilot Scheme on Seed Crop Insurance;

(l) Central Sector Scheme on Cattle Insurance;

(m) Universal Health Insurance Scheme;

(n) Rashtriya Swasthya Bima Yojana;

(o) Coconut Palm Insurance Scheme;

(p) Pradhan Mantri Suraksha Bima Yojna.

General insurance business means fire marine or miscellaneous insurance business, whether carried on singly or in combination with one or more of them, but does not include capital redemption business and annuity certain business.

B. Life Insurance: Services of life insurance business provided under following schemes are exempt from service tax-

(a) Janashree Bima Yojana (JBY);

(b) Aam Aadmi Bima Yojana (AABY);

(c) life micro-insurance product as approved by the Insurance Regulatory and Development Authority, having maximum amount of cover of ₹ 50,000;

(d) Varishtha Pension Bima Yojna;

(e) Pradhan Mantri Jeevan Jyoti Bima Yojna;

(f) Pradhan Mantri Jan Dhan Yojna.

1. Life insurance business: As per section 2(11) of Life Insurance Act, 1938, life insurance business means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of money is assured on death (except death by accident only) or the happening of any contingency

dependent on human life, and any contract which is subject to payment of premiums for a term dependent on human life and shall be deemed to include—

(a) the granting of disability and double or triple indemnity accident benefits, if so provided in the contract of insurance;

(b) the granting of annuities upon human life; and

(c) the granting of superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment or of the dependents of such persons.

Further, life insurance business shall include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a component of investment and a component of insurance issued by an insurer referred to in clause (9) of this section.

2. **Life micro-insurance product:** As per clause (e) of regulation 2 of the Insurance Regulatory and Development Authority (Micro-insurance) Regulations, 2005, life micro insurance product means any term insurance contract with or without return of premium, any endowment insurance contract or health insurance contract, with or without an accident benefit rider, either on individual or group basis, as per terms stated in Schedule-II appended to these regulations.

C. ***Pension related services:*** ***Services by way of collection of contribution under Atal Pension Yojna are exempt from service tax.***

(18) **Incubatee services:** Services provided by an incubatee up to a total turnover of ₹ 50 lakh in a financial year subject to the following conditions, namely:-

(a) the total turnover had not exceeded ₹ 50 lakh during the preceding financial year; and

(b) a period of three years has not elapsed from the date of entering into an agreement as an incubate

are exempt from service tax.

Incubatee means an entrepreneur located within the premises of a Technology Business Incubator (TBI) or Science and Technology Entrepreneurship Park (STEP) recognized by the National Science and Technology Entrepreneurship Development Board (NSTEDB) of the Department of Science and Technology, Government of India and who has entered into an agreement with the TBI or the STEP to enable himself to develop and produce hi-tech and innovative products.

(19) **Service by an unincorporated body/non- profit entity:** Service by an unincorporated body or a non- profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution -

(a) as a trade union;

(b) for the provision of carrying out any activity which is exempt from the levy of service tax; or

(c) up to an amount of ₹ 5,000 per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex

is exempt from service tax.

1. **Trade union** means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions.

2. **Residential complex** means any complex comprising of a building or buildings, having more than one single residential unit.

Points to note: *Circular No.175/01/2014 ST dated 10.01.2014* has clarified the following in relation to exemption available to services provided by a Resident Welfare Association (RWA) to its own members:

(i) If per month per member contribution of any or some members of a RWA exceeds ₹ 5,000, entire contribution of such members whose per month contribution exceeds ₹ 5,000 would be ineligible for the exemption under the said notification. Service tax would then be leviable on the aggregate amount of monthly contribution of such members.

(ii) Services provided by a RWA in the name of its members, acting as a 'pure agent' of its members, are excluded from value of taxable service available for the purposes of SSP exemption or exemption provided under mega exemption notification. For example, where the payment for an electricity bill raised by an electricity transmission or distribution utility in the name of the owner of an apartment in respect of electricity consumed thereon, is collected and paid by the RWA to the utility, without charging any commission or a consideration by any other name, the RWA is acting as a pure agent and hence exclusion from the value of taxable service would be available. However, in the case of electricity bills issued in the name of RWA, in respect of electricity consumed for common use of lifts, motor pumps for water supply, lights in common area, etc., since there is no agent involved in these transactions, the exclusion from the value of taxable service would not be available.

(iii) RWA may avail CENVAT credit and use the same for payment of service tax, in accordance with the CENVAT Credit Rules, 2004.

(20) Specific services provided to Government: Services provided to Government, a local authority or a Governmental authority by way of -

(a) water supply, public health, sanitation conservancy, solid waste management or slum improvement and upgradation; or

(b) repair or maintenance of a vessel

are exempt from service tax.

(21) Services by specific persons in their respective capacities: Services by the following persons in respective capacities are exempt from service tax -

(a) sub-broker or an authorized person to a stock broker;

(b) authorized person to a member of a commodity exchange;

(c) selling agent or a distributor of SIM cards or recharge coupon vouchers;

(d) business facilitator or a business correspondent to a banking company or an insurance company, in a rural area; or

(e) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt.

1. **Banking company means** a banking company as defined in section 5 of the Banking Regulation Act, 1949, and **includes** the State Bank of India any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959, any corresponding new bank constituted by section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, and any other financial institution notified by the Central Government in this behalf.

   As per section 5 of the Banking Regulation Act, 1949, "banking company" means any company which transacts the business of banking in India.

   Explanation. — Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause.

2. **Business facilitator or business correspondent** means an intermediary appointed under the business facilitator model or the business correspondent model by a banking company or an insurance company under the guidelines issued by Reserve Bank of India.

3. **Commodity exchange** means an association an association to which recognition for the time being has been granted by the Central Government under section 6 of the Forward Contracts (Regulation) Act, 1952 in respect of goods or classes of goods specified in such recognition.

4. **Insurance company** means a company carrying on life insurance business or general insurance business.

5. **Rural area** means the area comprised in a village as defined in land revenue records, excluding-
   (a) the area under any municipal committee, municipal corporation, town area committee, cantonment board or notified area committee; or
   (b) any area that may be notified as an urban area by the Central Government or a State Government.
6. **Sub-broker** means any person not being a member of stock exchange who acts on behalf of a stock broker as an agent or otherwise for assisting the investors in buying, selling or dealing in securities through such stock brokers.
7. **Authorised person** means any person who is appointed as such either by a stock broker (including trading member) or by a member of a commodity exchange and who provides access to trading platform of a stock exchange or a commodity exchange as an agent of such stock broker or member of a commodity exchange.

(22) Job work: Carrying out an intermediate production process as job work in relation to -

(a) agriculture, printing or textile processing;

(b) cut and polished diamonds and gemstones; or plain and studded jewellery of gold and other precious metals, falling under Chapter 71 of the Central Excise Tariff Act, 1985;

(c) any goods ***excluding alcoholic liquor for human consumption*** on which appropriate duty is payable by the principal manufacturer; or

(d) processes of electroplating, zinc plating, anodizing, heat treatment, powder coating, painting including spray painting or auto black, during the course of manufacture of parts of cycles or sewing machines upto an aggregate value of taxable service of the specified processes of ₹ 150 lakh in a financial year subject to the condition that such aggregate value had not exceeded ₹ 150 lakh rupees during the preceding financial year

is exempt from service tax.

1. **Appropriate duty** means duty payable on manufacture or production under a Central Act or a State Act, but shall not include 'Nil' rate of duty or duty wholly exempt.
2. **Principal manufacturer** means any person who gets goods manufactured or processed on his account from another person.

Paddy milled into rice, on job work basis is exempt from service tax since such milling of paddy is an intermediate production process in relation to agriculture *[Circular No.177/03/2014 ST dated 17.02.2014].*

(23) Business Exhibition services: Services by an organizer to any person in respect of a business exhibition held outside India are exempt from service tax.

(24) Slaughtering of animals: Services by way of slaughtering of animals are exempt from service tax.

(25) Receipt of services from non-taxable territory by specific entities: Services received from a provider of service located in a non- taxable territory by -

(a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;

(b) an entity registered under section 12AA of the Income tax Act, 1961 for the purposes of providing charitable activities; or

(c) a person located in a non-taxable territory

are exempt from service tax.

(26) Public library services: Services of public libraries by way of lending of books, publications or any other knowledge- enhancing content or material are exempt from service tax.

(27) ESIC services: Services by Employees' State Insurance Corporation to persons governed under the Employees' Insurance Act, 1948 are exempt from service tax.

(28) Transfer of going concern: Services by way of transfer of a going concern, as a whole or an independent part thereof are exempt from service tax.

(29) Services by way of public conveniences: Services by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets are exempt from service tax.

(30) Services by Governmental Authority: Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243W of the Constitution are exempt from service tax.

For the purpose of this notification, governmental authority means an authority or a board or any other body;

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by Government,

with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution.

(31) Loading/unloading/packing/storage/warehousing of rice and cotton: Services by way of loading, unloading, packing, storage or warehousing of rice, cotton ginned or baled are exempt from service tax.

(32) Services received by RBI: Services received by RBI, from outside India in relation to management of foreign exchange reserves are exempt from service tax. Therefore, specialized financial services received by Reserve Bank of India from global financial institutions in the course of management of foreign exchange reserves, e.g., external asset management, custodial services, securities lending services, etc. will be exempt from service tax.

(33) Tour operator services: Services provided by a tour operator to a foreign tourist in relation to a tour wholly conducted outside India are exempt from service tax. For example, service provided by an Indian tour operator to a Chinese National for a tour conducted in Sri Lanka will be exempt from service tax under this entry.

(34) Treatment of effluent: Services by operator of Common Effluent Treatment Plant by way of treatment of effluent are exempt from service tax.

(35) Pre-conditioning/pre-cooling/ripening/waxing/retail packing/labelling of fruits and vegetables: Services by way of pre-conditioning, pre-cooling, ripening, waxing, retail packing, labelling of fruits and vegetables, which do not change or alter the essential characteristics of the said fruits or vegetables, are exempt from service tax.

(36) Admission to museum/animal habitats/entertainment events:

A. Admission to museum/animal habitats: Services by way of admission to a museum, zoo, national park, wild life sanctuary and a tiger reserve are exempt from service tax.

1. ***National park has the meaning assigned to it in the clause (21) of the section 2 of The Wild Life (Protection) Act, 1972.***
2. ***Wildlife sanctuary means sanctuary as defined in the clause (26) of the section 2 of The Wild Life (Protection) Act, 1972.***
3. ***Zoo has the meaning assigned to it in the clause (39) of the section 2 of the Wild Life (Protection) Act, 1972.***

   Section 2(39) of the Wild Life (Protection) Act, 1972 provides that "Zoo" means an establishment, whether stationary or mobile, where captive animals are kept for exhibition to the public but does not include a circus and an establishment of a licenced dealer in captive animals.
4. ***Tiger reserve has the meaning assigned to it in clause (e) of section 38K of the Wild Life (Protection) Act, 1972.***

B. Admission to entertainment events: Services by way of right to admission to-

(i) exhibition of cinematographic film, circus, dance, or theatrical performance including drama or ballet;

(ii) recognized sporting event;

(iii) award function, concert, pageant, musical performance or any sporting event other than a recognised sporting event, where the consideration for admission is not more than ₹ 500 per person

are exempt from service tax.

Therefore, service tax would be levied on service by way of admission to entertainment event of concerts, pageants, musical performance, award functions and sporting events other than the recognized sporting event, if the amount charged is more than ₹ 500 for right to admission to such an event.

Recognised sporting event means any sporting event-

(i) organised by a recognised sports body where the participating team or individual represent any district, state, zone or country;

(ii) covered under entry 11.

Entry 11 of the notification covers services by way of sponsorship of sporting events as described in point 9(B) above.

(37) <u>Exhibition of movie:</u> Service provided by way of exhibition of movie by an exhibitor to the distributor or an association of persons consisting of the exhibitor as one of its members are exempt from service tax.

5.3 Small service provider's (SSP) exemption

Central Government has exempted the taxable services of aggregate value not exceeding ₹10 lakh in any financial year from the whole of the service tax leviable thereon under section 66B of the Finance Act, 1994 in case the aggregate value of taxable services rendered by the service provider from one or more premises, does not exceed ₹ 10 lakh in the preceding financial year.

A. Services in respect of which SSP exemption is not available

(i) Taxable services provided under brand name: SSP exemption is not available to the taxable services provided by a person under a brand name or trade name, whether registered or not, of another person.

(ii) Services taxed under reverse charge mechanism: SSP exemption is not available to such value of taxable services in respect of which service tax is payable on reverse charge mechanism by a person.

B. Availability of the CENVAT credit on inputs, input services and capital goods

(i) CENVAT credit on input services

(a) The provider of taxable service shall not avail the CENVAT credit of service tax paid on any input services used for providing the said taxable service, for which SSP exemption is availed of. The said restriction is applicable to service tax paid under rule 3 and rule 13 of the CENVAT Credit Rules, 2004.

(b) The provider of taxable service shall avail the CENVAT credit only on such input services received, on or after the date on which the service provider starts paying service tax, and used for the provision of taxable services for which service tax is payable.

(ii) CENVAT credit on inputs

(a) Service provider shall avail the CENVAT credit only on such inputs received, on or after the date on which the service provider starts paying service tax, and used for the provision of taxable services for which service tax is payable.

(b) A service provider who starts availing SSP exemption shall be required to pay an amount equivalent to the CENVAT credit taken by him, if any, in respect of such inputs lying in stock or in process on the date on which he starts availing the said exemption. Balance credit shall not be utilised in terms of rule 3(4) of the CENVAT Credit Rules, 2004 and shall lapse on the day such service provider starts availing SSP exemption.

(iii) CENVAT credit on capital goods: Service provider shall not avail the CENVAT credit on capital goods received, during the period in which the service provider avails SSP exemption.

C. Other points which merit consideration

(i) Exemption is optional: Service provider has an option not to avail the SSP exemption and pay service tax. Option, once exercised in a financial year, shall not be withdrawn during the remaining part of such financial year.

(ii) Aggregate value of all taxable services provided from all premises to be considered: Where a taxable service provider provides one or more taxable services from one or more premises, the exemption under this notification shall apply to the aggregate value of all such taxable services and from all such premises and not separately for each premises or each services.

D. Aggregate value of taxable services in case of Goods Transport Agency: In case of goods transport agency (GTA), for the purposes of determining the aggregate value not exceeding ₹ 10 lakh, to avail exemption under this notification, the payment received towards the gross amount charged by the GTA under section 67 of the said Finance Act for which the person liable for paying service tax is the consignor or consignee shall not be taken into account.

[Notification No. 33/2012-S.T. dated 20.06.2012]

1. **Brand name or trade name** means a brand name or a trade name, whether registered or not, that is to say, a name or a mark, such as symbol, monogram, logo, label, signature, or invented word or writing which is used in relation to such specified services for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified services and some person using such name or mark with or without any indication of the identity of that person.
2. **Aggregate value** means the sum total of value of taxable services charged in the first consecutive invoices issued during a financial year but does not include value charged in invoices issued towards such services which are exempt from whole of service tax leviable thereon under section 66B of the said Finance Act under any other notification.

5.4 Exemption from service tax equal to R&D cess payable on import of technology

The amount of Research and development cess payable shall be allowed as a deduction from the service tax payable on the taxable service involving the import of technology.

Conditions to be fulfilled:-

(a) The Research & Development Cess is paid at the time of or before payment for the service subject to maximum of 6 months period from the **date of invoice***.

*****In case of associated enterprises, the date of credit in the books of account.

(b) Necessary records will have to be maintained so as to establish a linkage between the invoice or the credit entry (as the case may be) and the cess payment challan.

Research and development cess

Research and Development cess is levied, on the payment of technical fees/consultancy/ royalty or know-how etc. involving the 'import of technology', under section 3 of the Research & Development Act, 1986. The purpose of levying this cess is to encourage the commercial application of indigenously developed technology.

Rate of cess: Rate of research and development cess is 5%.

[Notification No. 14/2012 ST dated 17.03.2012]

5.5 Refund of service tax paid on services used in the export of goods

I. Refund of service tax where service tax is paid by exporter himself under reverse charge mechanism: The exemption would be available on:

(i) Transport of goods by road from any container freight station (CFS) or inland container depot (ICD) to port/airport ***/ land customs station,*** as the case may be, from where the goods are exported; or

(ii) Transport of goods by road directly from place of removal, to an ICD, a CFS, ***a*** port/airport ***/ land customs station***, as the case may be, from where the goods are exported;

[Notification No. 31/2012 ST dated 20.06.2012]

II. Rebate of service tax paid on specified services used in the export of goods: Under this scheme, the exporters of goods have been provided with an option to claim refund electronically through ICES scheme. Otherwise, they can claim rebate on the basis of documents.

The rebate shall be granted by way of refund of service tax paid on the "**specified services**".

Specified services means-

(i) in the case of excisable goods, taxable services that have been used beyond the place of removal, for the export of said goods;

(ii) in the case of goods other than (i) above, taxable services used for the export of said goods;

but shall not include any service mentioned in sub-clauses (A), (B), (BA) and (C) of rule 2(l) of the CENVAT Credit Rules, 2004.

Manner of claiming rebate

The exporters now have a choice to opt either of the following options:

A. Electronic rebate through ICES system, which is based on the notified 'schedule of rates' on the lines of duty drawback, or

B. Rebate on the basis of documents, by approaching the Central Excise/Service Tax formations.

It may be noted that the rebate on the basis of documents shall not be claimed wherever the difference between the amount of rebate under ICES system and amount of rebate on the basis of documents is less than 20% of the rebate under ICES system.

A. Procedure for electronic rebate through ICES system

(a) An exporter should

(i) have a bank account and also a central excise registration or service tax code number** and the same should be registered with Customs ICES, and

(ii) declare his option to avail service tax rebate on the electronic shipping bill/bill of export while presenting the same to the proper officer of Customs.

**Note: If the exporter does not have Service tax code number referred to in clause (i) above, it should be obtained by filing a declaration in Form A-2 to the jurisdictional Assistant Commissioner / Deputy Commissioner of Central Excise.

(b) Service tax paid on the specified services eligible as rebate under this exemption shall be calculated electronically by the ICES system, by applying the rate specified in the schedule against the said goods, as a percentage of the FOB value.

(c) Rebate shall be deposited in the bank account of the exporter.

(d) An exporter who has claimed the rebate electronically cannot claim the refund again on the basis of documents.

(e) Minimum service tax rebate for an electronic shipping bill is ₹ 50.

B. Procedure for refund on the basis of documents

(a) Actual payment of service tax: For claiming rebate, the exporter has to actually pay the service tax on the specified service used for export of goods.

(b) No rebate to service provider: The service provider which provides the specified services to the exporter claiming rebate of the service tax paid on such services, will not be eligible to claim rebate.

(c) Time-limit for filing the rebate claim: Time-limit for filing the rebate claim shall be one year from the date of export of the said goods.

The **date of export** shall be the date on which the proper officer of Customs makes an order permitting clearance and loading of the said goods for exportation under section 51 of the Customs Act, 1962.

(d) Minimum amount of rebate: is ₹ 500.

(e) Realization of export proceeds: Sale proceeds in respect of exported goods must be received by or on behalf of the exporter, in India, within the period allowed by the RBI, including any extension thereof.

Where any rebate of service tax paid on specified service utilized for export of said goods has been allowed to an exporter but the sale proceeds in respect of said goods are not received by or on behalf of the exporter, in India, within the period allowed by the Reserve Bank of India including any extension thereof, such rebate shall be deemed never to have been allowed and recovered under the provisions of the said Act and the rules made thereunder.

(f) Documents to be submitted for rebate claim

1. Exporter registered under Central Excise Act, 1944 shall file a claim for rebate of service tax in Form A-1 to the jurisdictional Assistant Commissioner/Deputy Commissioner of Central Excise. Where the exporter is not so registered, he shall first file a declaration in Form A-2, seeking allotment of service tax code to the jurisdictional Assistant Commissioner/Deputy Commissioner of Central Excise and on obtaining the service tax code, file refund claim in Form A-1.
2. Relevant invoice/ bill/ challan/ any other document for each specified service, in original, evidencing payment for the specified service used for export of the said goods and the service tax payable needs to be attached with the application.

(g) Certification of the documents enclosed with the rebate claim [mentioned in clause 2. of point (f) above]: The documents enclosed with the rebate claim have to be certified in the manner depicted in the diagram given in the next page.

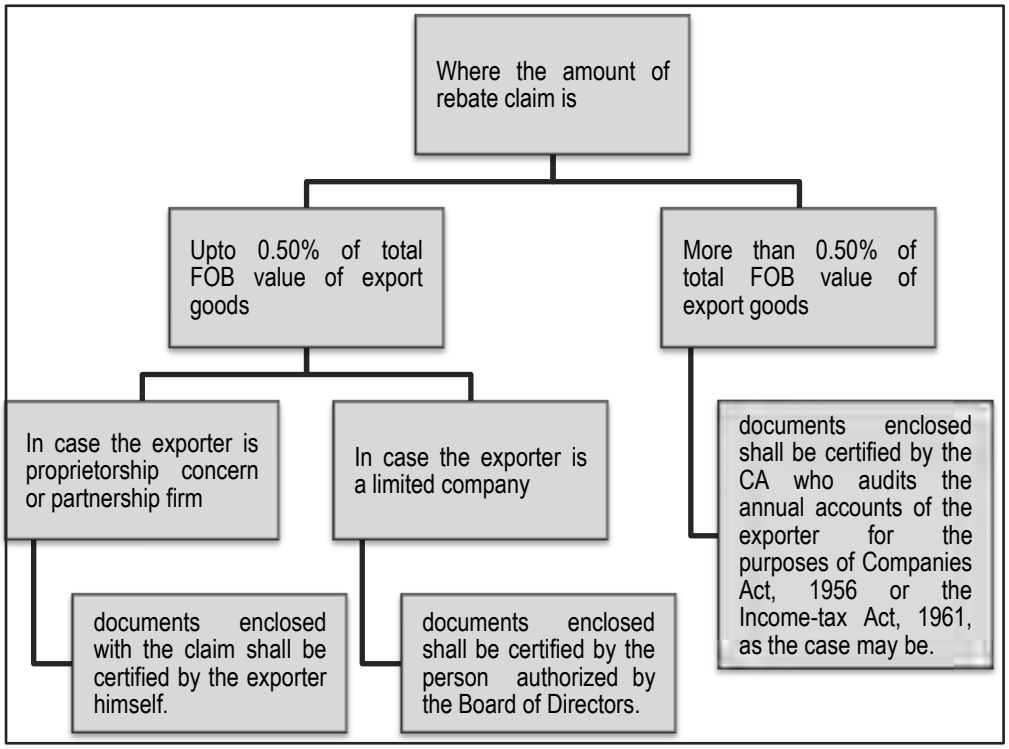
(h) Grant of refund: Assistant Commissioner/Deputy Commissioner of Central Excise, shall, after satisfying himself, shall grant the rebate to the exporter within a period of one month from the receipt of the said claim.

Points to be noted:-

(a) No CENVAT credit on the specified services used for export: No CENVAT credit of service tax paid on the specified services used for export of the said goods can be taken under the CENVAT Credit Rules, 2004.

(b) No exemption to SEZ: The aforesaid exemption cannot be claimed by a Unit or Developer of a Special Economic Zone.

[Notification No. 41/2012 ST dated 29.06.2012]



5.6 Exemption to services for use of foreign Diplomatic Mission/consular post in India or family members of diplomatic agents or career consular officers posted therein

Following services are exempt from service tax:-

(i) All taxable services provided by any person to foreign diplomatic missions or consular posts in India for their **official use.**

(ii) All taxable services provided by any person for **personal use** or for the use of the family members of diplomatic agents or career consular officers posted therein.

The Notification also prescribes the procedure for availing the said exemption.

[Notification No. 27/2012 ST dated 20.06.2012]

5.7 Deduction of property tax allowed from gross amount to arrive at value of taxable service

The taxable service of renting of immovable property is exempt from so much of the service tax leviable thereon as is in excess of the service tax calculated on a value which is equivalent to the gross amount charged for renting of such immovable property less taxes on such property, namely property tax levied and collected by local bodies.

Interest and penalty paid to the local authority not to be treated as property tax: However, any amount such as interest, penalty paid to the local authority by the service provider on account of delayed payment of property tax or any other reasons shall not be treated as property tax for the purposes of deduction from the gross amount charged.

Property tax to be computed on proportionate basis: Further, wherever the period for which property tax paid is different from the period for which service tax is paid, property tax proportionate to the period for which service tax is paid shall be calculated and the amount so calculated shall be excluded from the gross amount charged for renting of the immovable property for the said period, for the purposes of levy of service tax.

Renting of immovable property: means any service provided or agreed to be provided by renting of immovable property or any other service in relation to such renting [Rule 2(f) of the Service Tax Rules, 1994].

Example

Property tax paid for April to September	= ₹ 12,000/-
Rent received for April	= ₹ 1,00,000/-
Service tax payable for April	=₹ 98,000/- (1,00,000 – 2,000) × Applicable rate of service tax

[Notification No. 29/2012 ST dated 20.06.2012]

5.8 Exemption to services provided by TBI/ STEP

All taxable services provided or to be provided by Technology Business Incubators (TBI)/Science and Technology Entrepreneurship Parks (STEP) recognized by National Science and Technology Entrepreneurship Board (NSTEBD) of the Department of Science & Technology have been exempted from the whole of service tax leviable thereon.

Conditions to be satisfied

(i) The STEP or the TBI, who intends to avail the exemption, shall furnish the requisite information containing the details of the incubator along with the information received from each incubatee to the concerned Assistant/Deputy Commissioner of Central Excise before availing the exemption; and

(ii) The STEP or the TBI shall thereafter furnish the information in the formats mentioned above in the same manner before the 30th day of June of each financial year.

[Notification No. 32/2012 ST dated 20.06.2012]

5.9 Exemption to services received by a developer/units of a SEZ

Notification No. 12/2013 ST dated 01.07.2013 exempts services received by a unit located in Special Economic Zone (SEZ) or a Developer of SEZ - which are used for the authorized operations - from whole of service tax leviable thereon. The significant provisions of the exemption notification are:

(A) Eligibility for exemption: The taxable services received and used for the authorized operations by any of the following are eligible for exemption under this notification:-

- a unit located in a Special Economic Zone (hereinafter referred to as 'SEZ unit')
- developer of SEZ (hereinafter referred to as 'Developer').

(B) Refund route and Upfront exemption: Exemption under this notification is provided in two ways – one by way of exemption and other by way of refund.

(i) Option not to pay service tax ab-intio in case the specified services are used exclusively for the authorized operations: Where the services received by SEZ Unit or Developer are used exclusively for the authorized operations, the person liable to pay service tax has the option not to pay the service tax *ab initio*.

(ii) Refund route available for specified services not exclusively used for the authorized operations or specified services on which *ab initio* exemption though admissible, is not claimed: In the following two cases, exemption shall be provided by way of refund i.e., SEZ Unit/Developer will have to first pay service tax on the specified services and then claim refund:

(a) when the specified services are not exclusively used for authorised operation, or

(b) when the *ab initio* exemption though admissible is not claimed on the specified services

Hence, *ab initio* exemption will not be available in this case.

(C) Quantum of refund when specified services are not exclusively used for the authorized operations

(a) the service tax paid on the specified services that are common to the authorised operation in an SEZ and the operation in domestic tariff area [DTA unit(s)] shall be distributed amongst the SEZ Unit or the Developer and the DTA unit (s) in the manner as prescribed in rule 7 of the CENVAT Credit Rules. For the purpose of distribution, the turnover of the SEZ Unit or the Developer shall be taken as the turnover of authorised operation during the relevant period.

(b) the SEZ Unit or the Developer shall be entitled to refund of the service tax paid on (i) the specified services on which *ab-initio* exemption is admissible but not claimed, and (ii) the amount distributed to it in terms of clause (a).

Points to be noted:-

1. SEZ Unit or the Developer shall have the option not to avail of this exemption and instead take CENVAT credit on the specified services in accordance with the CENVAT Credit Rules, 2004.
2. The SEZ unit/Developer shall maintain proper account of receipt and use of the specified services on which exemption is claimed, for authorised operations in the SEZ.

The Notification also prescribes the procedure for availing the said exemption.

5.10 Exemption to taxable services provided against duty credit scrips - MEIS and SEIS

The taxable services provided/agreed to be provided by a person located in the taxable territory against Merchandise Exports from India Scheme (MEIS) duty credit scrips and Service Exports from India Scheme (SEIS) duty credit scrips issued to an exporter, are exempt from service tax subject to the fulfillment of the following major conditions:

(a) Conditions prescribed for claiming exemption from basic customs duty, CVD and special CVD on goods imported into India against SEIS and MEIS duty credit scrips are complied with and the said scrips have been registered with the Customs Authority.

(b) Holder of the scrip, to whom taxable services are provided or agreed to be provided is located in the taxable territory.

(c) Holder of the scrip presents the scrip to the Customs Authority along with a letter and an invoice, challan etc. issued by the service provider indicating details of his jurisdictional Central Excise Officer (hereinafter referred to as the said Officer) and the description, value of the taxable service provided or agreed to be provided and service tax leviable thereon.

(d) Customs Authority shall debit the service tax leviable, but for this exemption, in or on reverse of the scrip and send a written advice of the action taken to the said officer. The date of debit of service tax leviable, in the scrip, shall be taken as the date of payment of service tax.

(e) Holder of the scrip presents the scrip debited by the said Customs Authority within 30 days to the said Officer, along with an undertaking addressed to the said Officer, that in case of any service tax short debited in the scrip, he shall pay such service tax along with applicable interest.

(f) Based on the said written advice and undertaking the said Officer shall verify and validate on the reverse of the scrip, the details of the service tax leviable, which were debited by the said Customs Authority, and keep a record of payment of such service tax and interest, if any.

(g) Service provider retains a copy of the scrip, debited by the said Customs Authority and verified by the said Officer and duly attested by the holder of the scrip, in support of the provision of taxable services under this notification.

(h) Holder of the scrip, to whom the taxable services were provided/agreed to be provided shall be entitled to avail drawback or CENVAT credit of the service tax leviable under section 66B of the said Act, against the service tax debited in the scrip and validated by the said Officer.

[Notification Nos. 10 & 11/2015 ST dated 08.04.2015]

ABATEMENT

5.11 Abatements in respect of various taxable services

When full exemption from service tax is not granted but only a part of the tax is exempted, it is generally referred to as abatement (partial exemption). *Notification No. 26/2012 ST dated 20.06.2012* extends such abatements to taxable services subject to fulfillment of certain conditions as given hereunder:

S. No.	Description of taxable service	%of abatement	Conditions
1.	Services in relation to financial leasing including hire purchase	90	Nil.
2.	Transport of goods by rail	70	***CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of CENVAT Credit Rules, 2004.***
3.	Transport of passengers, with or without accompanied belongings by rail	70	***Same as above***
4.	Transport of goods in a vessel	***70***	Same as above.
5.	Services of goods transport agency in relation to transportation of goods	***70***	CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken by the service provider under the provisions of the CENVAT Credit Rules, 2004.
6.	***Transport of passengers by air, with or without accompanied belongings in*** ***(i) economy class***	***60***	CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.
	(ii) other than economy class	***40***	
7.	Transport of passengers, with or without accompanied belongings, by- a. a contract carriage other than motor cab b. a radio taxi	60	CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of CENVAT Credit Rules, 2004.
8.	Renting of motorcab	60	(i) CENVAT credit on inputs and capital goods, used for

			providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004; (ii) CENVAT credit on input service of renting of motorcab has been taken under the provisions of the CENVAT Credit Rules, 2004, in the following manner: (a) Full CENVAT credit of such input service received from a person who is paying service tax on 40% of the value; or (b) Up to 40% CENVAT credit of such input service received from a person who is paying service tax on full value; (iii) CENVAT credit on input services other than those specified in (ii) above, has not been taken under the provisions of the CENVAT Credit Rules, 2004.
9.	Bundled service by way of supply of food or any other article of human consumption or any drink, in a premises (including hotel, convention center, club, pandal, shamiana or any other place, specially arranged for organizing a function) together with renting of such premises	30	CENVAT credit on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985 used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.
10.	Renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes.	40	CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.
11.	Services by a tour operator in relation to,- (i) a package tour	75	(i) CENVAT credit on inputs, capital goods and input services other than the input

			service of a tour operator, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. (ii) The bill issued for this purpose indicates that it is inclusive of charges for such a tour.
	(ii) a tour, if the tour operator is providing services solely of arranging or booking accommodation for any person in relation to a tour	90	(i) CENVAT credit on inputs, capital goods and input services other than the input service of a tour operator, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. (ii) The invoice, bill or challan issued indicates that it is towards the charges for such accommodation. (iii) This exemption shall not apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, only includes the service charges for arranging or booking accommodation for any person and does not include the cost of such accommodation.
	(iii) any services other than specified at (i) and (ii) above.	60	(i) CENVAT credit on inputs, capital goods and input services other than the input service of a tour operator, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. (ii) The bill issued indicates that the amount charged in the bill is the gross amount charged for such a tour.

12.	Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority:-		(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004. (ii)The value of land is included in the amount charged from the service receiver.
	(a) for a residential unit satisfying both the following conditions, namely:– (i) the carpet area of the unit is less than 2000 square feet; and (ii) the amount charged for the unit is less than rupees one crore;	75	
	(b) for other than the (a) above.	70	

Notes:

A. For the purpose of exemption under S.No. 1. above:-

(i) Amount charged is an amount, forming or representing as interest.

Amount charged	—	Installments paid towards repayment of the lease amount	—	Principal amount contained in such installments

(ii) The exemption shall not apply to an amount other than an amount forming or representing as interest, charged by the service provider such as:-

- lease management fee
- processing fee
- documentation charges
- administrative fee

which shall be added to the amount calculated in terms of (i) above.

B. For the purposes of exemption at S.No. 9, the amount charged shall be computed as follows:-

Particulars			Amount
Gross amount charged			xxxx
Add: Value of all goods & services supplied in or in relation to the supply of food or any	FMV of such goods & services (determined in accordance with generally accepted accounting principles)	xxxx	

other article of human consumption or any drink (whether or not intoxicating) and whether or not supplied under the same contract or any other contract	Less: (i) the amount charged for such goods or services supplied to the service provider, if any; and (ii) VAT/sales tax, if any, levied thereon	xxxx xxxx	xxxx
Amount charged			xxxx

C. For the purposes of exemption at S.No. 12, the amount charged shall be computed as follows:-

Particulars			Amount
Amount charged for the construction service			xxxx
Add: Value of all goods & services supplied by the recipient(s) in/in relation to the service, whether or not supplied under the same contract or any other contract	FMV of such goods & services (determined in accordance with the generally accepted accounting principles) Less: (i) the amount charged for such goods or services, if any; and (ii) VAT/sales tax, if any, levied thereon	xxxx xxxx xxxx	xxxx
Amount charged			xxxx

Important definitions

1. **Package tour** means a tour wherein transportation, accommodation for stay, food, tourist guide, entry to monuments and other similar services in relation to tour are provided by the tour operator as part of the package tour to the person undertaking the tour.
2. **Tour operator** means any person engaged in the business of planning, scheduling, organizing, arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours.
3. **Motorcab** means any motor vehicle constructed or adapted to carry not more than six passengers excluding the driver for hire or reward [Section 2(25) of Motor Vehicles Act, 1988].

6
Service Tax Procedures

6.1 Introduction

We have already understood the concept of service, negative list of services, declared services, principles of interpretation of specified description of services or bundled services, point of taxation, place of provision of service, valuation, exemptions and abatement in respect of various taxable services. In this chapter, discussion is focused on procedures to be followed for complying with the provisions of the law.

6.2 Registration [Section 69 & rule 4 of the Service Tax Rules, 1994]

(1) Persons requiring registration: Every person liable to pay service tax is required to register himself by making an application to the Superintendent of Central Excise [Section 69(1)].

Further, Central Government may also notify such other person or class of persons who will be required to obtain registration [Section 69(2)]. The following persons/class of persons have been notified under section 69(2):-

(i) an input service distributor[1]; and

(ii) any provider of taxable service whose aggregate value of taxable service in a financial year exceeds ₹ 9,00,000.

(2) Procedure for registration: The procedure for registration has been laid down under rule 4 of the Service Tax Rules, 1994. It prescribes the time, manner and form for registration.

Application: Application for registration is to be made by every person liable for paying the service tax in **Form ST-1**:

(i) within 30 days from the date on which service tax is levied

or

(ii) within 30 days from the date of commencement of business

whichever is later,

to the concerned Superintendent of Central Excise having jurisdiction.

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[1] The concept of Input Service distributor has been discussed in Chapter 4: CENVAT Credit of Module-1: Central Excise.

Application by input service distributor: The input service distributor shall make an application to the jurisdictional Superintendent of Central Excise in the prescribed form for registration within a period of 30 days of the commencement of business.

Application by provider of taxable service whose aggregate value of taxable service in a financial year exceeds ₹ 9,00,000: The provider of taxable service whose aggregate value of taxable service in a financial year exceeds ₹ 9,00,000 shall make an application to the jurisdictional Superintendent of Central Excise in the prescribed form for registration within a period of 30 days of exceeding the aggregate value of taxable service of ₹ 9,00,000.

Points to be noted:

(a) "Aggregate value of taxable service" means the sum total of first consecutive payments received during a financial year towards the gross amount, as prescribed under section 67, charged by the service provider towards taxable services but does not include payments received towards such gross amount which are exempt from the whole of service tax under any notification other than *Notification No. 6/2005-ST dated 01.03.2005***.

(b) Service provider providing one or more taxable services from one or more premises: Where a provider of taxable service provides one or more taxable services from one or more premises, the aggregate value of all such taxable services and from all such premises and not separately for each services or each premises shall be taken into account for computation of aggregate value of taxable service.

**In view of the fact that the negative list approach of taxation of services has been introduced and *Notification No. 6/2005 ST dated 01.03.2005* has been superseded by *Notification No. 33/2012 ST dated 20.06.2012,* the said definition needs to be revisited.

Grant of Registration Certificate: The Superintendent of Central Excise shall after due verification of the application form (Form ST-1), or an intimation of change in any information or details under sub-rule (5A), as the case may be, grant a certificate of registration **in Form ST-2 within 7 days** from the date of receipt of the application or intimation.

If the registration certificate is not granted within the said period, the registration applied for shall be deemed to have been granted. This may not be a solution for non-granting of the certificate since the registration number is required for payment of service tax, filing of returns, etc. [Sub-rule (5)].

(3) Centralised registration: Where a person, liable for paying service tax on a taxable service:

(i) provides such service from more than one premises or offices; or

(ii) receives such service in more than one premises or offices; or

(iii) is having more than one premises or offices, which are engaged in relation to such service in any other manner, making such person liable for paying service tax,

and has **centralised billing system or centralised accounting system** in respect of such service, and such centralised billing or centralised accounting systems are located in one or more premises, he may, at his option, register such premises or offices from where centralised billing or centralised accounting systems are located [Sub-rule (2)].

Registration to be granted by the Commissioner having jurisdiction: Registration shall be granted by the Commissioner of Central Excise having jurisdiction over the premises/offices for which centralized registration is sought (i.e., the premises from where centralized billing/accounting is done) [Sub-rule (3)].

Separate applications in case the assessee does not have centralized billing/ accounting systems: Where an assessee providing taxable service from more than one premises or offices, who does not have any centralized billing systems or centralized accounting systems, as the case may be, shall make separate applications for registration in respect of each of such premises or offices to the jurisdictional Superintendent of Central Excise [Sub-rule (3A)].

(4) Single application in case of assessee providing more than one taxable service: Where an assessee is providing more than one taxable service, he may make a single application mentioning therein all the taxable services provided by him [Sub-rule (4)]. Certificate of registration in Form ST-2 should indicate the details of all the taxable services provided by the service provider. Thus, an assessee rendering multiple taxable services will be assessed by one Superintendent of Central Excise in respect of all the taxable services rendered by him.

(5) Intimation of change in any information or details in the registration certificate: Change in any information or details furnished by an assessee at the time of obtaining registration or any additional information or detail intended to be furnished should be intimated in **Form ST-1** in writing by the assessee to the jurisdictional Assistant/Deputy Commissioner of Central Excise. Such intimation should be made within a period of 30 days of such change [Sub-rule (5A)].

(6) Fresh registration certificate in case of transfer of business: When a registered assessee transfers his business to another person, the transferee shall obtain a fresh certificate of registration [Sub-rule (6)].

(7) Surrender of registration certificate: Every registered assessee who ceases to provide taxable service shall surrender his registration certificate immediately to the Superintendent of Central Excise [Sub-rule (7)].

On receipt of the certificate under sub-rule (7), the Superintendent of Central Excise shall ensure that the assessee has paid all monies due to the Central Government under the provisions of the Act/Rules/Notifications and thereupon cancel the registration certificate [Sub-rule (8)].

***(8) Online Registration:* The registration granted under rule 4 will be subject to such conditions, safeguards and procedure as may be specified by an order issued by the Board [Sub-rule (9)]. In this regard, Order No. 1/15 ST dated 28.02.2015, effective from 01.03.2015 has been issued, prescribing documentation, time limits and procedure for registration. It has been prescribed vide the said order that with effect from 01.03.2015, registration for single premises will be granted online within two days of filing the application. The documentation, time limits and procedure for online registration is outlined below:**

General procedure

1. Applicants seeking registration for single premises shall file an online application for registration on ACES website in Form ST-1.

2. Following details are to be mandatorily furnished in the application form:

(a) Permanent Account Number (PAN) of the proprietor or the legal entity being registered (except Government Departments)

(b) E-mail and mobile number

3. Registration would be granted online within 2 days of filing the complete application form. On grant of registration, the applicant would be enabled to electronically pay service tax.

4. Registration Certificate downloaded from the ACES website would be accepted as proof of registration and there would be no need for a signed copy.

Documentation required

A self attested copy of the following documents will have to be submitted by registered post/ speed post to the concerned Division, within 7 days of filing the Form ST-1 online, for the purposes of verification:

1. *Copy of the PAN Card of the proprietor or the legal entity registered*
2. *Photograph and proof of identity of the person filling the application*
3. *Document to establish possession of the premises to be registered such as proof of ownership, lease or rent agreement, allotment letter from Government, No Objection Certificate from the legal owner*
4. *Details of the main Bank Account*
5. *Memorandum/Articles of Association/List of Directors*
6. *Authorisation by the Board of Directors/Partners/Proprietor for the person filing the application*
7. *Business transaction numbers obtained from other Government departments or agencies such as Customs Registration No. (BIN No), Import Export Code (IEC) number, State Sales Tax Number (VAT), Central Sales Tax Number, Company Index Number (CIN) which have been issued prior to the filing of the service tax registration application*

Verification of premises, if there arises any need for the same, will have to be authorised by an officer not below the rank of Additional/Joint Commissioner.

Revocation of registration certificate

The registration certificate may be revoked by the Deputy/Assistant Commissioner in any of the following situations, after giving the assessee an opportunity to represent

against the proposed revocation and taking into consideration the reply received, if any:

1. ***the premises are found to be non existent or not in possession of the assessee.***
2. ***no documents are received within 15 days of the date of filing the registration application.***
3. ***the documents are found to be incomplete or incorrect in any respect.***

6.3 Issue of invoice, bill or challan or consignment note [Rule 4A, 4B and 4C of the Service Tax Rules, 1994]

(1) Issue of Invoice, Bill or Challan [Rule 4A]

Rule 4A merits importance as the credit on invoices which are not in accordance with rule 4A can be denied. As per rule 4A, every person providing taxable service shall issue an invoice or a bill, or a challan signed by such person or a person authorized by him in respect of such taxable service provided or agreed to be provided. The invoice, bill or challan shall be serially numbered.

A. CONTENTS OF INVOICE/BILL/CHALLAN

The invoice, bill or challan shall be serially numbered and shall contain the following details, namely:

(i) Name, address and the registration number of such person;

(ii) Name and address of the person receiving taxable service;

(iii) Description of service provided or agreed to be provided;

(iv) Value of the taxable service provided or a agreed to be provided and

(v) Service tax payable thereon.

Relaxations:

(i) Banking companies and financial institution: A banking company or a financial institution including non-banking financial company providing services to any person enjoys the relaxation that invoice may not be serially numbered and may not contain the address of the service receiver.

1. Banking company: "Banking company" has the meaning assigned to it in section 45A(a) of the Reserve Bank of India Act, 1934 [Rule 2(1)(bb)].

As per section 45A(a) of the Reserve Bank of India Act, 1934, **banking company means** a banking company as defined in section 5 of the Banking Regulation Act, 1949, and **includes** the State Bank of India any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959, any corresponding new bank constituted by section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, and any

other financial institution notified by the Central Government in this behalf.As per section 5 of the Banking Regulation Act, 1949, "banking company" means any company which transacts the business of banking in India.

Explanation. — Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause.

2. Financial institution: Financial institution has the meaning assigned to it in section 45-I(c) of the Reserve Bank of India Act, 1934 [Rule 2(1)(bd)].

As per section 45-I(c) of the Reserve Bank of India Act, 1934, **financial institution means** any non-banking institution which carries on as its business or part of its business any of the following activities, namely:–

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own:

(ii) the acquisition of shares, stock, bonds, debentures or securities issued by a Government or local authority or other marketable securities of a like nature:

(iii) letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in clause (c) of section 2 of the Hire-Purchase Act, 1972*:

(iv) the carrying on of any class of insurance business;

(v) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which is for the time being in force in any State, or any business, which is similar thereto;

(vi) collecting, for any purpose or under any scheme or arrangement by whatever name called, monies in lumpsum or otherwise, by way of subscriptions or by sale of units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or kind, or disbursing monies in any other way, to persons from whom monies are collected or to any other person,

but does not include any institution, which carries on as its principal business,–

(a) agricultural operations; or

(aa) industrial activity; or

(b) the purchase or sale of any goods (other than securities) or the providing of any services; or

(c) the purchase, construction or sale of immovable property, so however, that no portion of the income of the institution is derived from the financing of purchases, constructions or sales of immovable property by other persons.

* It may be noted that the Hire-Purchase Act, 1972 has been repealed.

3. Non-banking financial company: Non-banking financial company has the meaning assigned to it in section 45-I(f) of the Reserve Bank of India Act, 1934 [Rule 1(ccc)].

As per section 45-I(f) of the Reserve Bank of India Act, 1934, **non-banking financial company means–**

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) such other non-banking institution or class of such institutions, as the RBI may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

(ii) Goods transport agency: In case the service provider is a goods transport agency, an invoice, a bill or, a challan shall include a document containing the details of the consignment note number and date, gross weight of the consignment and other required information. It implies that the document issued by a goods transport agency need not necessarily be nomenclatured as "challan".

(iii) Passenger transport service: In case of transport of passengers [by any mode of transport], the ticket (in any form, including electronic form, whatever may be the name) would be deemed to be the invoice/bill/challan for the purposes of the rule. The ticket would be a valid invoice/ bill /challan even if it does not contain registration number of the service provider or address of the service receiver.

For instance, in case of air-travel, the airlines or the agent may not issue a separate invoice to the passenger but may issue the ticket showing the price of such ticket as well. In such a case, the ticket issued by the airlines would be a valid invoice.

(iv) Invoice not required in case where payment upto ₹ 1,000 received in excess of the invoiced amount: Wherever the provider of taxable service receives an amount ₹ 1,000 in excess of the amount indicated in the invoice and the provider of taxable service has opted to determine the point of taxation based on the option as given in the Point of Taxation Rules, 2011 (date of invoice or completion of service), no invoice is required to be issued to such extent.

Reminder letter to pay renewal premiums is not an invoice: Life insurance companies issue reminder notices/letters to the policy holders to pay renewal premiums. Such reminder notices only solicit furtherance of service which if accepted by policy holder by payment of premium results in a service. No tax point arises on account of such reminders. Thus, reminder letters/notices for insurance policies not being invoices would not invite levy of service tax *[Circular No. 166/1/2013 ST dated 01.01.2013].*

B. TIME LIMIT FOR ISSUE OF INVOICE/BILL/CHALLAN

Such an invoice has to be issued within 30 days from the date of:-

(i) completion of such taxable service

or

(ii) receipt of any payment towards the value of such taxable services

whichever is earlier.

Time limit for issue of invoice/bill/challan in case of:

(a) Continuous supply of service

In case of continuous supply of service, every person providing such taxable service shall issue an invoice, bill or challan, as the case may be, within 30 days of the date when each event specified in the contract, which requires the service receiver to make any payment to service provider, is completed.

(b) Banking and other financial institution including NBFC

The time-limit for issuance of invoice, bill or challan, as the case may be, shall be 45 days in case where the service provider is:

(i) A banking company

(ii) A financial institution including a non-banking financial company

providing service to any person.

C. DOCUMENTS TO BE ISSUED BY INPUT SERVICE DISTRIBUTOR

Every input service distributor distributing credit of taxable services shall, in respect of credit distributed, issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him, for each of the recipient of the credit distributed, and such invoice, bill or, as the case may be, challan shall be serially numbered.

(a) Contents of invoice/bill/challan: It shall contain the following details, namely: -

(i) Name, address and registration number of the person providing input services and the serial number and date of invoice, bill, or as the case may be, challan;

(ii) Name and address of the said input services distributor;

(iii) Name and address of the recipient of the credit distributed;

(iv) Amount of the credit distributed.

(b) Exemption to banking companies and financial institution*:* An input service distributor which is an office of a banking company or a financial institution including non-banking financial company providing services to any person enjoys the relaxation that invoice may not be serially numbered.

(c) Centralized registration and Input Service Distributor (ISD) being mutually exclusive: It may be noted that the centralized registration and ISD are mutually exclusive. One can be centrally registered, but still would have to be registered as ISD to enable credit from those locations where there is no service being provided. Further, one who is not centrally registered may like to accumulate the credits at one point and redistribute the same to the units whenever there is a need.

(2) Issue of Consignment Note [Rule 4B]

Provisions of rule 4B of the Service Tax Rules, 1994 are as follows:-

Any goods transport agency, which provides service in relation to transport of goods by road in a goods carriage, shall issue a **consignment note** to the recipient of service.

(a) "**Consignment note**" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered.

(b) Contents of consignment note

A consignment note shall contain the following details -

(i) Name of the consignor and consignee,

(ii) Registration number of the goods carriage in which the goods are transported,

(iii) Details of the goods transported,

(iv) Details of the place of origin and destination,

(v) Person liable for paying service tax whether consignor, consignee or the goods transport agency.

Relaxation for exempted goods: Where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note.

(3) Authentication by Digital Signature [Rule 4C]

Any invoice, bill or challan issued under rule 4A or consignment note issued under rule 4B may be authenticated by means of a digital signature. The Board may specify the conditions, safeguards and procedure to be followed by any person issuing digitally signed invoices, by way of a notification.

(i) The expression "authenticate" shall have the same meaning as assigned in the Information Technology Act, 2000.

(ii) The expression "digital signature" shall have the meaning as defined in the Information Technology Act, 2000 and the expression "digitally signed" shall be construed accordingly."

6.4 Person liable to pay service tax [Section 68 & Rule 2(1)(d) of the Service Tax Rules, 1994]

Section 68 of the Finance Act, 1994 is the principal section which fixes responsibility to pay service tax. The powers to decide time and manner of payment of service tax have been granted to the Central Government vide rule 6 of the Service Tax Rules, 1994.

Generally, it is the *service provider* rendering taxable services who is liable to pay service tax to the Central Government at regular intervals of time (normal charge). However, in certain

cases, Government finds it convenient to collect service tax from the *service receiver (reverse charge)* ***or any other person who is liable for paying service tax (other than service provider) e.g. an aggregator.***[2]

6.4.1 NORMAL CHARGE – Service provider to pay service tax: Every person providing taxable service to any person shall pay service tax at the **rate specified in section 66B** ***(14%)*** in the prescribed manner and within the prescribed period [Section 68(1)].

6.4.2 REVERSE CHARGE – Prescribed persons to pay service tax: When service tax is paid by service receiver it is known as reverse charge. Payment of service tax under reverse charge is effected in two ways – one where entire service tax is payable by the service receiver and the other where only a part of service tax is payable by the service receiver and the remaining part is payable by the service provider. The first one is referred to as full reverse charge and the latter as partial reverse charge.

Further, any other person may also be made liable to pay service tax e.g. an aggregator.

Section 68(2) empowers Central Government to notify taxable services in respect of which, service tax shall be paid by prescribed persons in the prescribed manner. Further, the extent of service tax which shall be payable by such person may also be notified and the provisions of service tax law shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.

In pursuance of this power, the Central Government has issued *Notification No. 30/2012 dated 20.06.2012* which provides as follows:

SERVICES WHERE ENTIRE SERVICE TAX IS PAYABLE BY ANY PERSON LIABLE FOR PAYING SERVICE TAX [OTHER THAN SERVICE PROVIDER]: -

1. **Insurance agent's services:** The taxable services provided or agreed to be provided by an insurance agent to any person carrying on the insurance business;
2. **Goods transport agency's services:** The taxable services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—
   (a) any factory registered under or governed by the Factories Act, 1948.
   (b) any society registered under the Societies Registration Act, 1860 or under any other law for the time being in force in any part of India.
   (c) any co-operative society established by or under any law.
   (d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 or the rules made thereunder.
   (e) any body corporate established, by or under any law, or

[2] Concept of Aggregator has been discussed in detail in subsequent pages of this Chapter.

(f) any partnership firm whether registered or not under any law including association of persons.

Note: *The person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as the person who receives the service for the purpose of this notification.*

3. **Sponsorship services:** The taxable services provided or agreed to be provided by way of sponsorship to anybody corporate or partnership firm located in the taxable territory.

4. **Legal services:** The taxable services provided or agreed to be provided to any business entity located in the taxable territory by,-

   (a) an arbitral tribunal, or

   (b) an individual advocate or a firm of advocates

   by way of legal services.

   Note*: Services provided to a business entity by an arbitral tribunal or by an individual advocate or a firm of advocates by way of legal services are exempt from service tax provided the turnover of such business entity in the preceding financial year does not exceed ₹ 10 lakh.*

5. **Support services by Government:** The taxable services provided or agreed to be provided to any business entity located in the taxable territory by Government or local authority ***by way of support services***[3] excluding,-

   (i) renting of immovable property, and

   (ii) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act,1994.

6. **Renting of a motor vehicle:** The taxable services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on **abated value** to any person who is not engaged in the similar line of business by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory.

7. **Services provided by a person located in non-taxable territory:** The taxable services provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory.

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[3] The words "by way of support services" are to be omitted from a date to be notified by the Central Government. However, no such date has been notified as yet.

8. **Director's services:** The taxable services provided or agreed to be provided by a director of a company or a body corporate to the said company or the body corporate.

9. **Recovery agent's services:** The taxable services provided or agreed to be provided by a recovery agent to a banking company or a financial institution or a non-banking financial company.

10. ***Supply of manpower services:*** ***The taxable services provided or agreed to be provided by way of supply of manpower for any purpose by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory.***

11. ***Security services:*** ***The taxable services provided or agreed to be provided by way of security services by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory.***

12. ***Mutual fund agent/distributor's services:*** ***The taxable services provided or agreed to be provided by a mutual fund agent or distributor, to a mutual fund or asset management company.***

13. ***Lottery selling or marketing agent's services:*** ***The taxable services provided or agreed to be provided by a selling or marketing agent of lottery tickets to a lottery distributor or selling agent.***

14. ***Services involving an aggregator:*** ***The taxable services provided or agreed to be provided by a person involving an aggregator in any manner.***

    The word 'aggregate' literally means a whole formed by combining several elements or a combination of many separate items or units. The aggregator is one, who therefore aggregates or causes aggregation of units, items, things or services.

    There are also many online websites that follow 'aggregator' model. Under this model, an entity collects or aggregates information on a particular service from several sources on a single platform and draws customers to its platform to connect them with the service provider. It may also facilitate the customers in comparing the prices and specifications of a particular service offered by multiple service providers.

    Therefore, companies which act as aggregator for service providers like travel portals, food portals or cab services will now be liable to pay service tax.

SERVICES WHERE SERVICE TAX IS PARTIALLY PAYABLE BY SERVICE PROVIDER AND PARTIALLY BY *ANY PERSON LIABLE FOR PAYING SERVICE TAX [OTHER THAN SERVICE PROVIDER]*:

S.No.	Service provided by any individual/ HUF/ partnership firm (whether registered or not) including association of persons, located in taxable territory to a business entity registered as body corporate, located in the taxable territory	% of service tax payable by the service provider	% of service tax payable by *any person liable for paying service tax (other than service provider)*
1	provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on **non abated value** to any person who is not engaged in the similar line of business	50%	50%
2.	provided or agreed to be provided in service portion in execution of works contract*	50%	50%

***Note:** In works contract services, where both service provider and service receiver are the persons liable to pay tax, service receiver has the option of choosing the valuation method as per choice, independent valuation method adopted by the service provider.

6.4.3 Definition of person liable to pay service tax under rule 2(1)(d): As per rule 2(1)(d)(i) of Service Tax Rules, 1994, person liable to pay service tax in respect of the taxable services notified under sub-section (2) of section 68 of the Act means -

(A) in relation to service provided or agreed to be provided by an insurance agent to any person carrying on the insurance business, the recipient of the service.

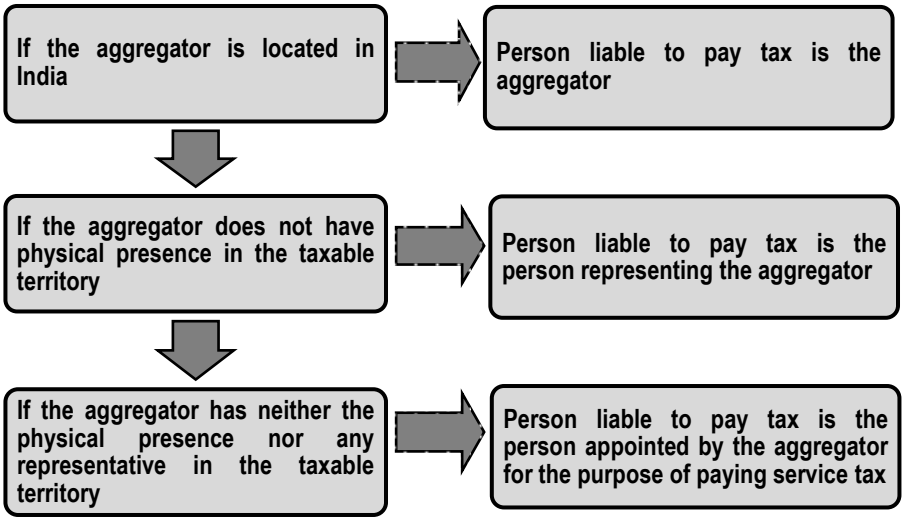
(AA) in relation to service provided or agreed to be provided by a recovery agent to a banking company or a financial institution or a non-banking financial company, the recipient of the service.

(AAA) in relation to service provided or agreed to be provided by a person involving an aggregator in any manner, the aggregator of the service would be the person liable for paying service tax.

In case, the aggregator does not have a physical presence in the taxable territory, any person representing the aggregator for any purpose in the taxable territory will be liable for paying service tax.

However, if the aggregator neither has a physical presence nor does it have a representative for any purpose in the taxable territory, it will have to appoint a person in the taxable territory for the purpose of paying service tax and such person will be the person liable for paying service tax.

The above has been represented in the diagram given on the next page.



(B) in relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—

- any factory registered under or governed by the Factories Act, 1948;
- any society registered under the Societies Registration Act, 1860 or under any other law for the time being in force in any part of India;
- any co-operative society established by or under any law;
- any dealer of excisable goods, who is registered under the Central Excise Act, 1944 or the rules made thereunder;
- any body corporate established, by or under any law; or
- any partnership firm whether registered or not under any law including association of persons;

any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage:

However, when such person is located in a non-taxable territory, the provider of such service shall be liable to pay service tax.

(C) in relation to service provided or agreed to be provided by way of sponsorship to anybody corporate or partnership firm located in the taxable territory, the recipient of such service;

(D) in relation to service provided or agreed to be provided by,-

- an arbitral tribunal, or
- an individual advocate or a firm of advocates by way of legal services,

to any business entity located in the taxable territory, the recipient of such service;

(E) in relation to ***support***[4] services provided or agreed to be provided by Government or local authority except

(i) renting of immovable property, and

(ii) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act,1994

to any business entity located in the taxable territory, the recipient of such service;

(EE) in relation to service provided or agreed to be provided by a director of a company or a body corporate to the said company or the body corporate, the recipient of such service;

(F) in relation to services provided or agreed to be provided by way of :-

(a) renting of a motor vehicle designed to carry passengers, to any person who is not engaged in a similar business; or

(b) supply of manpower for any purpose; or

(c) security services; or

(d) service portion in execution of a works contract

by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as a body corporate, located in the taxable territory, both the service provider and the service recipient to the extent notified under sub-section (2) of section 68 of the Act, for each respectively.

(G) in relation to any taxable service provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory, the recipient of such service.

1. **Partnership firm** includes limited liability partnership [Rule 2(1)(cd)].
2. **Body corporate** has the meaning assigned to it in section 2(7) of the Companies Act, 1956 [Rule 2(1)(bc)].
3. **Goods carriage:** Goods carriage means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods [Rule 2(1)(c1a)].
4. **Insurance agent:** Insurance agent means an insurance agent licensed under Section 42 of the Insurance Act, 1938 who receives agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business including business relating to the continuance, renewal or revival of policies of insurance [Rule 2(1)(cba)].
5. **Legal service:** means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority [Rule 2(1)(cca)].

[4] The word "support" is to be omitted from a date to be notified by the Central Government. However, no such date has been notified as yet.

6. **Supply of manpower:** means supply of manpower, temporarily or otherwise, to another person to work under his superintendence or control [Rule 2(1)(g)].
7. **Security services:** means services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity [Rule 2(1)(fa)]
8. ***Aggregator means a person, who owns and manages a web based software application, and by means of the application and a communication device, enables a potential customer to connect with persons providing service of a particular kind under the brand name or trade name of the aggregator" [Rule 2(1)(aa)]***
9. ***Brand name or trade name means a brand name or a trade name whether registered or not, that is to say, a name or a mark, such as an –***
   - ***invented word or writing,***
   - ***or a symbol,***
   - ***monogram,***
   - ***logo,***
   - ***label,***
   - ***signature,***

   which is used for the purpose of indicating, or so as to indicate a connection, in the course of trade, between a service and some person using the name or mark with or without any indication of the identity of that person" [Rule 2(1)(bca)].

6.4.4. Sub-contractors liable to service tax: A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. A question arises as to whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.

A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor.

The rationale is that the sub contractor's service tax charge can be availed as a credit by the main contractor whose burden of paying the tax would reduce to that extent. This is the essence of value added tax (VAT) of which service tax is part. The fact that the sub contractor in India is generally not literate and may not be able to understand or comply with these requirements is only mitigated upto ₹ 10 lakhs of small service provider exemption.

The advantage of the sub contractor being in the CENVAT chain is that the credit of inputs, capital goods or input services utilized by him for providing the services can be passed onto the main contractor whereby the transaction would become tax efficient.

Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as

input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

6.5 Payment of service tax

6.5.1 Payment both on receipt and accrual basis: As per rule 6(1) of the Service Tax Rules, 1994, service tax is payable on service deemed to be provided as per Point of Taxation Rules, 2011. As per the Point of Taxation Rules, 2011:-

In case the invoice is issued within the prescribed period of 30 days from the date of completion of provision of service, service tax is payable on:-

(i) date of invoice

or

(ii) date of payment

whichever is earlier.

However, in case the invoice is not issued within 30 days of the completion of the provision of the service, service tax is payable on:-

(i) date of completion of service

or

(ii) date of payment

whichever is earlier.

Further, in case of individuals and partnership firms whose aggregate value of taxable services provided from one or more premises is ₹ 50 lakh or less in the previous financial year, service tax on taxable services provided or to be provided by him up to a total of ₹ 50 lakh in the current financial year is payable on receipt basis. Also in case of advance, service tax is payable on receipt basis, i.e. when the consideration for the services are received. Hence, service tax is payable on both cash and accrual basis.

6.5.2 Service tax not payable on free services: Section 67(1)(iii) and Service Tax (Determination of Value) Rules, 2006 make provisions for valuation even when consideration is not ascertainable. However, these provisions apply only when there is consideration. If there is no consideration i.e., in case of free service, section 67 and Service Tax (Determination of Value) Rules, 2006 cannot apply.

Thus, no service tax is payable when value of service is zero as the charging section 66B provides that service tax is chargeable on the value of taxable service. Hence, if the value is zero the tax will also be zero even though the service may be taxable. However, this principle applies only when there is really a 'free service' and not when its cost is recovered through other means.

6.5.3 Service tax liable to be paid even if not collected from the client: Section 68 casts the liability to pay service tax upon the service provider or upon the person liable to pay service tax as per Rule 2(1)(d). This liability is not contingent upon the service provider

realizing or charging the service tax at the prevailing rate. The statutory liability does not get extinguished if the service provider fails to realize or charge the service tax from the service receiver.

However, sometimes it may happen that the assessee is not able to charge service tax because of the nature of service or he fails to recover the service tax from the client/customer as he is not aware that his services are taxable. Hence, in these cases the amount recovered from the client in lieu of having rendered the service will be taken to be inclusive of service tax and accordingly tax payable will be calculated by making back calculations.

For example, if bill amount is ₹ 5,000 and service tax is not shown separately in invoice, then service tax payable shall be computed as follows:

5000/114 x 14 = ₹ 614

It may be noted that service tax payable is not ₹ 700 computed by applying 14% to ₹ 5000. The value of the taxable service in this case is ₹ 4,386.

The example given above can be solved by using the following formulae:

Value of taxable service = [Gross amount charged/(100 + rate of tax)] x 100

Service tax = [Gross amount charged/(100 + rate of tax)] x rate of tax

6.5.4 Service tax payable on advance received: As per general rule 3 of the Point of Taxation Rules, 2011, service tax is payable on any advance by whatever name known, received by the service provider towards the provision of taxable service.

Example: A security agency takes a contract to provide security services to a client for the month of October for a consideration of ₹ 50,000. It receives an advance of ₹ 25,000 from the client in the month of September. In this case, service tax shall be payable by the security agency on the amount of ₹ 25,000 received as an advance even though the service has not been provided at that time.

6.5.5. Advance payment of service tax: The assessee has been provided a facility to make advance payment of service tax on his own and adjust the amount so paid against the service tax which he is liable to pay for the subsequent period. Such facility shall be available when the assessee:

(i) intimates the details of the amount of service tax paid in advance, to the Jurisdictional Superintendent of Central Excise within a period of 15 days from the date of such payment, and

(ii) indicates the details of the advance payment made, and its adjustment, if any in the subsequent return to be filed under section 70 [Sub-rule (1A) of rule 6].

6.5.6. Self adjustment of service tax where services are partly or wholly not rendered: As per rule 6(3), where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract, the assessee may take the credit of such excess service tax paid by him, if the assessee:

(a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or

(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.

6.5.7 Service tax collected from the recipient of service must be paid to the Central Government [Section 73A]: Section 73A covers the amounts collected by any person in the guise of service tax. At times tax payers who are unsure of tax liability collect the service tax, but do not remit the amount so collected. In such a case, they would be charged with both interest and penalty. Therefore, even if one is not sure whether tax is payable or not, the same should be remitted to the revenue authorities. The provisions of section 73A are:

(1) Service tax collected to be deposited with the Central Government: Service tax collected has to be paid to the credit of the Central Government in the following cases—

(a) Person liable to pay service tax has collected service tax in excess of the service tax assessed or determined and paid on any taxable service or

(b) Any person has collected the service tax which is not required to be collected [Sub-section (1) and (2)].

(2) Notice to be served in case the service tax not so deposited with the Central Government: If any person, who is liable to pay any of the abovementioned amounts, does not pay such amount to the credit of the Central Government, a notice shall be served on him by the Central Excise Officer. The notice will require such person to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government [Sub-section (3)].

Such person may make a representation to the Central Excise Officer after receiving the notice. The Central Excise Officer shall consider the said representation and then determine the amount due from such person. Such amount will however, not exceed the amount specified in the notice. Thereupon, such person shall pay the amount so determined [Sub-section (4)].

(3) Adjustment of amount paid to the credit of the Central Government against the service tax payable [Sub-sections (5) & (6)]: Such amounts paid shall be adjusted against the service tax payable by the person on finalization of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).

Surplus amount: Where any surplus amount is left after the adjustment, such amount shall be:-

(i) credited to the Consumer Welfare Fund, or

(ii) refunded to the person who has borne the incidence of such amount (in accordance with the provisions of section 11B of the Central Excise Act, 1944).

Time-limit for filing refund claim: Such person may make an application within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.

6.5.8 Interest on amount collected in excess [Section 73B]

(1) Cases where interest is to be levied: Where an amount has been collected in excess of the tax assessed/determined and paid for any taxable service under this Chapter/rules made thereunder from the recipient of such service.

(2) Who is liable to pay interest and on what amount?: Such person who is liable to pay such amount as determined under sub-section (4) of section 73A above, shall, in addition to the amount, be liable to pay interest.

(3) Rate of interest: The interest could be ranging between 10% to 24% p.a. At present, the rate of interest @ **18% p.a** has been notified vide *Notification No. 15/2011 dated 01.03.2011*.

(4) Period for which interest would be charged: The interest shall be payable from the first day of the month succeeding the month in which the amount ought to have been paid till the date of payment of such amount.

(5) No interest payable subject to certain conditions: No interest shall be payable where the amount becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, subject to fulfillment of the following conditions:

(i) the full amount is paid voluntarily within 45 days from the date of issue of such order, instruction or direction; and

(ii) no right to appeal against such payment at any subsequent stage is reserved.

In other cases, the interest shall be payable on the whole amount, including the amount already paid.

(6) Change in amount of interest: Where the amount determined by the Central Excise Officer under section 73A is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal, or the Court, the interest payable thereon under this section shall be on such reduced or increased amount.

(7) Concession of 3% for specified assesses: In the case of a service provider, whose value of taxable service provided in a financial year does not exceed ₹ 60 lakh during any of the financial years of the notice issued under section 73A(3) or during the preceding financial year, as the case may be, such rate of interest shall be reduced by 3% per annum.

Hence, a concessional rate of interest of 15% per annum is available to the tax payers whose turnover during any of the years covered in the notice issued under section 73A(3) or the preceding financial year is upto ₹ 60 lakh.

6.5.9 Due date for payment of service tax: Provisions of rule 6(1) *inter alia* provides as follows:

(1) Due date for payment of service tax on the service which is deemed to be provided (as per the Point of Taxation Rules, 2011) by an individual or a proprietary firm or a partnership firm:-

S.No.	Particulars	Due date for payment of service tax
1.	If the service tax is paid electronically through internet banking	6th day of the following **quarter**
2.	In any other case	5th day of the following **quarter**
3.	In the case service is deemed to be provided in the quarter ending in March	31st day of March

(2) Due date for payment of service tax on the service which is deemed to be provided (as per the Point of Taxation Rules, 2011) in any other cases (company and HUF):-

S.No.	Particulars	Due date for payment of service tax
1.	If the service tax is paid electronically through internet banking	6th day of the following **month**
2.	In any other case	5th day of the following **month**
3.	In the case service is deemed to be provided in the month of March	31st day of March

(3) Individuals/partnership firms with aggregate value of taxable services of ₹ 50 lakh or less in previous year allowed to pay service tax on receipt basis in current year upto a total of ₹ 50 lakh [Third proviso to sub-rule (1)]

In case of individuals and partnership firms whose aggregate value of taxable services provided from one or more premises is ₹ 50 lakh or less in the previous financial year, the due dates for payment of service tax on taxable services provided or agreed to be provided by him up to a total of ₹ 50 lakh in the current financial year, at the option of service provider, is as follows:-

S.No.	Particulars	Due date for payment of service tax
1.	If the service tax is paid electronically through internet banking	6th day of the following quarter in which the payment is received
2.	In any other case	5th day of the following quarter in which the payment is received
3.	In the case payment is received in the quarter ending in March	31st day of March

Note: Partnership firm includes limited liability partnership [Rule 2(cd)].

6.5.10 Manner of payment

A. Conventional mode of payment: Where the assessee is allowed to pay service tax by GAR-7 challan (i.e., otherwise than by e-payment), following procedure would be followed:

(1) Bank to have EASIEST facility: Duty is payable in authorized bank by way of GAR-7 challan where Bank is having 'EASIEST' facility (Earlier, it was a TR-6 challan).

(2) Single copy challan: GAR-7 challan is a single copy challan with tax payer's counterfoil at the bottom of challan. Both challan and counterfoil are to be filled in by assessee. The challan should be on white paper with black printing.

(3) Challan to be serially numbered: The challans should be serially numbered from 1st April onwards.

(4) Details required in GAR-7 challan: Details to be filled in GAR-7 challan are as follows-

(a) Full name of assessee

(b) Complete Address

(c) Telephone number

(d) PIN code

(e) Assessee's STC Code (15 digit)

(f) Commissionerate name

(g) Commissionerate Code

(h) Division Code

(i) Range Code

(j) Accounting Code of service tax

(k) Amount tendered in ₹ (6 columns)

(l) Total

(m) Total Rupees in words

(n) Cash/Cheque/Draft/Pay order No. and date

(o) Bank on which Cheque/Draft/Pay order No. is drawn.

(5) Relevant details to be repeated on counterfoil: Relevant among these details like assessee code, amount tendered in ₹, accounting code of service tax etc. are repeated in the Tax payer's counter-foil. Details filled in the challan and Taxpayer's counter-foil should be identical.

(6) Receipt of payment: The counterfoil duly receipted by Bank with stamp of Bank will be given by receiving Bank to assessee.

The stamp of receiving bank will contain Challan Identification Number (CIN). This CIN will have to be quoted in the return.

(7) Evidence of payment of service tax: The Taxpayers acknowledgement is the evidence of payment. The Challan Identification Number (CIN) appearing on this acknowledgement will have to be quoted in the return. The banks will be giving the tax payer a computer generated acknowledgement/receipt with the various details including the CIN.

(8) Payment in case of multiple service provider: A multiple service provider (a service provider rendering more than one taxable service) can use single GAR-7 challan for payment of service tax on different services. However, amounts attributable to each such service along with concerned accounting codes should be mentioned clearly in the column provided for this

purpose in the GAR-7 challan. Alternatively, separate GAR-7 challans may be used for payment of service tax for each service provided by the service provider.

B. E-payment of service tax [Sub-rule (2) of rule 6]: Every assessee has to electronically pay the service tax payable by him, through internet banking. However, the jurisdictional Assistant/Deputy Commissioner of Central Excise may for reasons to be recorded in writing, allow the assessee to deposit service tax by any mode other than internet banking.

(1) Procedure for e-payment of service tax: E-payment of service tax facilitates anytime, anywhere payment of the service tax. Moreover, after the payment of service tax online, the receipt of the same is generated instantly. It provides the convenience of making on line payment of Central excise and service tax through bank's Internet banking service. E-payment of the service tax can be made through ACES.

For e-payment, assessees should open a net banking account with one of the authorized banks (currently there are 28 banks). For effecting payment, assessees can access the ACES website and click on the e-payment link that will take them to the EASIEST portal or they can directly visit the EASIEST portal.

Procedure for e-payment of excise duty/service tax can be summarized as follows:-

(i) To pay excise duty and service tax online, the assessee has to enter the 15 digit Assessee Code allotted by the Department under the application ACES. There will be an online check on the validity of the Assessee Code entered.

(ii) If the Assessee code is valid, then corresponding assessee details like name, address, Commissionerate Code etc. as present in the Assessee Code Master will be displayed.

(iii) Based on the Assessee Code, the duty / tax i.e. Central Excise duty or Service Tax to be paid will be automatically selected.

(iv) The assessee is required to select the type of duty / tax to be paid by clicking on Select Accounting Codes for Excise or Select Accounting Codes for Service Tax, depending on the type of duty / tax to be paid.

(v) At a time the assessee can select up to six Accounting Codes.

(vi) The assessee should also select the bank through which payment is to be made.

(vii) On submission of data entered, a confirmation screen will be displayed. If the taxpayer confirms the data entered in the screen, it will be directed to the net-banking site of the bank selected.

(viii) The taxpayer will login to the net-banking site with the user id/ password, provided by the bank for net-banking purpose, and will enter payment details at the bank site.

(ix) On successful payment, a challan counterfoil will be displayed containing CIN, payment details and bank name through which e-payment has been made. This counterfoil is proof of payment made.

Automation of Central Excise and Service Tax (ACES)

(a) What is ACES?

In continuation of its efforts for trade facilitation, CBEC has rolled-out a new centralized, web-based and workflow-based software application called Automation of Central Excise and Service Tax (ACES) in all 104 Commissionerates of Central excise, service tax and large tax payer units (LTUs) as on 23rd December, 2009. ACES is a Mission Mode project (MMP) of the Govt. of India under the national e-governance plan and it aims at improving tax-payer services, transparency, accountability and efficiency in the indirect tax administration in India. This application has replaced the earlier applications of SERMON, SACER, and SAPS used in Central Excise and Service Tax for capturing returns and registration details of the assessees.

(b) Automation of major processes: ACES has automated the major processes of Central excise and service tax-registration, returns, accounting, refunds, dispute resolution, audit, provisional assessment, exports, claims, intimations and permissions.

(c) Benefits to the assessee: The ACES offers following benefits to the assessee:-

1. Reduce physical interface with the Department
2. Save time
3. Reduce paper work
4. Online registration and amendment of registration details
5. Electronic filing of all documents such as applications for registration, returns claims, permissions and intimations; provisional assessment request, export-related documents, refund request
6. System-generated E-Acknowledgement
7. Online tracking of the status of selected documents
8. Online view facility to see selected documents
9. Internal messaging system on business-related matters

(d) Registration with ACES: To transact business on ACES a user has to first register himself/herself with ACES through a process called 'Registration with ACES'. This registration is not a statutory registration as envisaged in Acts/Rules governing Central Excise and Service Tax but helps the application in recognizing the bonafide users.

(e) E-filing of Returns: The assesses can electronically file statutory returns of Central Excise and Service Tax by choosing one of the two facilities being offered by the Department at present:-

(i) they can file it online, or

(ii) download the off-line return utilities which can be filled-in off-line and uploaded to the system through the internet.

(f) Certified Facilitation Centres (CFCs): CBEC has set up ACES Certified Facilitation Centres (CFCs) with the help of professional bodies like Institute of Chartered Accountants of India (ICAI), Institute of Cost and Works Accountants of India (ICWAI) etc.

(i) These CFCs can provide a host of services to the assessees such as digitization of paper documents like returns etc. and uploading the same to ACES.

(ii) Assessees requiring the services of the CFCs may be required to pay service fees to the CFCs.

(iii) CBEC has approved the maximum rates at which CFCs can charge their customers for the services rendered by them.

(iv) For this purpose, assessees are required to write to the Department authorizing one of the CFCs, from the approved list, to work in ACES on their behalf. They have to furnish the name and other details of the CFCs, including the registration number issued by the ICAI/ICWAI etc.

(v) At any given time, one assessee can authorize one CFC, while one CFC can provide services to more than one assessee throughout India.

(vi) In case the assessee wants to withdraw the authorization, it can do so by intimating the Department.

(vii) However, an assessee will be held liable for all actions of omission or commission of the CFC, during the period they are authorized by him/her to work in ACES.

Electronic Accounting System in Excise and Service Tax (EASIEST)

(i) What is EASIEST scheme?

EASIEST has been developed to make payment of tax easy. The facility is available with 28 banks.

(ii) Benefits of EASIEST to the taxpayer

(a) Only one copy of the challan has to be filled instead of earlier four copies.

(b) Facility of online verification of the status of tax payment using CIN.

(iii) Challan Identification Number (CIN): Challan Identification Number (CIN) is a 20 digit unique identifier which will be given on the Taxpayer's computer generated acknowledgement /receipt. This number is a combination of the BSR code of the bank branch (first 7 digits), the date of deposit (next 8 digits) and Challan Serial Number (last 5 digits).

(iv) Service Tax Code Number: Assessee code/registration number/STC code are all one and the same. It is a 15-character identification number allotted by the system to the assessee based on the PAN number or temporary number (if PAN is not submitted) when the registration details are entered in the Central Server. The 15-character assessee code will be available in the registration certificate issued to the assessee by the Assistant Commissioner/Deputy Commissioner of the Division.

The first 10 digits of the STC code are 10 character PAN issued by Income tax authorities. Next two are 'ST'. Last three are numeric codes 001, 002, 003 etc. The concerned person has to apply in a prescribed form to obtain STC.

The main objective of allocating an alphanumerical number by the Government agencies is to identify the assessees/exporters/importers. It is also used to identify in some cases the concerned office where the person would be assessed or registered. Further alphanumeric number helps in processing of the information in relation to the assessee on computers. Quoting of service tax code number on all the related documents has become compulsory from 1.7.2002.

6.5.11 Points to be remembered while paying service tax: The following important points should be kept in mind while paying service tax:

- Service tax is to be paid on the value of taxable services which is charged by an assessee. Any income tax deducted at source is included in the charged amount. Therefore, service tax is to be paid on the amount of income tax deducted at source also.
- Payment should be rounded off in multiple of rupees.
- In case the amount of service tax is paid by cheque, the date of presentation of cheque to the bank designated by Central Board of Excise and Customs shall be considered as the date of payment, subject to realization of cheque.
- Where the amount of service tax is paid in cash, the date of payment is the date on which cash is tendered to the designated bank.

6.5.12 Adjustment of excess amount paid towards service tax liability [Sub-rules (4A) & (4B) of rule 6]: Where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be. However, self-adjustment of excess credit shall be subject to the condition that the excess amount paid is on account of reasons not involving interpretation of law, taxability, valuation or applicability of any exemption notification.

6.5.13 Adjustment of excess amount paid as service tax in case of renting of immovable property service: In case of renting of immovable property service, a deduction of property taxes paid in respect of the immovable property is allowed from the gross amount charged for renting of the said immovable property vide *Notification No.29/2012 ST dated 20.06.2012* (discussed in detail in Chapter 5: Exemptions and Abatements).

However, where any amount in excess of the amount required to be paid towards service tax liability has been paid on account of non-availment of such deduction, such excess amount may be adjusted against the service tax liability within 1 year from the date of payment of such property tax. The details of such adjustment shall be intimated to the Superintendent of Central Excise having jurisdiction over the service provider within a period of 15 days from the date of such adjustment.

6.5.14 Provisional payment of service tax: In case the assessee is unable to correctly estimate, at the time of the deposit, the actual amount of service tax for any month or quarter, he may make a written request to Assistant/Deputy Commissioner of Central Excise for making payment of service tax on provisional basis. The provisions relating to provisional assessment under service tax have been discussed in detail in Chapter 7: Demand, adjudication and offences.

6.5.15 ALTERNATIVE RATES FOR PAYMENT OF SERVICE TAX

A. In case of air travel agent [Sub-rule (7)]

Person liable for paying the service tax in relation to the services provided by an air travel agent, shall have the option to pay following amounts instead of paying service tax at the rate of ***14%***:-

In the case of	Option to pay an amount calculated at the rate of
Domestic bookings of passage for travel by air	***0.7%*** of the basic fare
International bookings of passage for travel by air	***1.4%*** of the basic fare

Points to be noted

1. The option once exercised, shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under any circumstances.

2. For the purposes of this sub-rule, the expression **"basic fare"** means that part of the air fare on which commission is normally paid to the air travel agent by the airline.

B. In case of insurer carrying on life insurance business [Sub-rule (7A)]

An insurer carrying on life insurance business shall have the option to pay tax:

(i) on the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of policy holder, if such amount is intimated to the policy holder at the time of providing of service;

(ii) where amount of the gross premium allocated for investment or savings on behalf of policy holder is not intimated to the policy holder at the time of providing of service:-

First year	at ***3.5%*** of the gross amount of premium charged
Subsequent year	at ***1.75%*** of the gross amount of premium charged

towards the discharge of his service tax liability instead of paying service tax at the rate of ***14%***.

Option not available in certain cases: Such option shall not be available in cases where the entire premium paid by the policy holder is only towards risk cover in life insurance.

Life insurance business: means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, and any contract which is subject to payment of premiums for a term dependent on human life and shall be deemed to include-

(a) the granting of disability and double or triple indemnity accident benefit, if so provided in the contract of insurance,

(b) the granting of annuities upon human life, and

(c) the granting of superannuation allowances and annuity payable out of any fund applicable solely to the relief and maintenance of person engaged in any particular profession, trade or employment or of the dependent of such person [Rule 2(1)(ccb)].

C. In case of sale/purchase of foreign currency including money changing [Sub-rule (7B)]

Person liable to pay service tax in relation to purchase or sale of foreign currency, including money changing, has an option to pay an amount at the following rates instead of paying service tax at the rate of ***14%:-***

S.No.	For an amount	Service tax shall be calculated at the rate of
1.	Upto ₹ 100,000	***0.14%*** of the gross amount of currency exchanged or ***₹ 35*** whichever is higher
2.	Exceeding ₹ 1,00,000 and upto ₹ 10,00,000	***₹ 140 + 0.07%*** of the (gross amount of currency exchanged-₹ 1,00,000)
3.	Exceeding ₹ 10,00,000	***₹ 770 + 0.014%*** of the (gross amount of currency exchanged-₹ 10,00,000) or ***₹ 7,000*** whichever is lower

Option not available in certain cases: However, the person providing the service shall exercise such option for a financial year and such option shall not be withdrawn during the remaining part of that financial year.

D. In case of service of promotion, marketing or organising/assisting in organising lottery [Sub-rule (7C)]

An optional mode of payment of service tax has been provided for the taxable service of promotion, marketing or organising/assisting in organising lottery in the following manner instead of paying service tax at the rate of ***14%:-***

Where the guaranteed lottery prize payout is > 80%	***₹ 8200/-*** on every ₹ 10 Lakh (or part of ₹ 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw.
Where the guaranteed lottery prize payout is < 80%	***₹ 12,800/-*** on every ₹ 10 Lakh (or part of ₹ 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw.

Points to be noted:-

1. In case of online lottery, the aggregate face value of lottery tickets will be the aggregate value of tickets sold.
2. The distributor/selling agent will have to exercise such option within a period of one month of the beginning of each financial year. The new service provider can exercise such option within one month of providing the service.

3. The option once exercised cannot be withdrawn during the remaining part of the financial year.

(a) Draw: means a method by which the prize winning numbers are drawn for each lottery/lottery scheme by operating the draw machine or any other mechanical method based on random technology which is visibly transparent to the viewers [Rule 2(d) of the Lottery (Regulation) Rules, 2010].

(b) Online lottery: means a system created to permit players to purchase lottery tickets generated by the computer or online machine at the lottery terminals where the information about the sale of a ticket and the player's choice of any particular number or combination of numbers is simultaneously registered with the central computer server [Rule 2(e) of the Lottery (Regulation) Rules, 2010].

(c) Organising State: means the State Government which conducts the lottery either in its own territory or sells its tickets in the territory of any other State [Rule 2(f) of the Lottery (Regulation) Rules, 2010].

6.5.16 Interest on delayed payment of service tax [Section 75]: Failure to pay service tax, including a part thereof within the period prescribed, attracts simple interest at a rate not below 10% p.a. but not exceeding 36% p.a. as may be notified by the Central Government. Interest would also apply in case of excess availment and utilization of CENVAT credit.

(1) Rate of interest: *Notification No. 12/2014 ST dated 11.07.2014* prescribes slab rates of interest which vary with the extent of delay. The rates of interest for delayed payment of service tax are as follows:

Extent of delay	Simple interest rate per annum
Up to 6 months	18%
More than 6 months & upto 1 year	18% for first 6 months, and 24% for the period of delay beyond 6 months
More than 1 year	18% for first 6 months, 24% for second 6 months, and 30% for the period of delay beyond 1 year

(2) Period for which interest is payable: Interest is payable for the period by which such crediting of the tax or any part thereof is delayed.

(3) Concession of 3% for specified assesses: In case of a service provider, whose value of taxable service provided in a financial year does not exceed ₹ 60 lakh during any of the financial years covered by the notice or during the preceding financial year, as the case may be, such rate of interest shall be reduced by 3% per annum.

6.6 Returns [Section 70, Rule 7, Rule 7B & Rule 7C of the Service Tax Rules, 1994]

Section 70(1) *inter alia* provides that every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be

prescribed. Rule 7 of the Service Tax Rules, 1994 prescribes the form, manner and frequency of furnishing the return.

Section 70(2) provides that the person or class of persons notified under sub-section (2) of section 69 shall furnish to the Superintendent of the Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.

6.6.1 Manner of filing return

1.	**Form of return**	Return/revised return has to be furnished in **Form ST-3**.
2.	**Periodicity of filing return**	Service tax return has to be filed on a **half-yearly basis**.
3.	**Details to be furnished**	Return must indicate *inter alia*, monthwise: (i) the value of taxable services charged/billed; (ii) the value of taxable service realised; (iii) the amount of service tax payable/paid etc.

6.6.2 Due dates for filing of service tax returns: The service tax return, in Form ST-3 should be filed on half yearly basis by the 25th of the month following the particular half year. The due dates on this basis are tabulated as under:

Half year	Due date
1st April to 30th September	25th October
1st October to 31st March	25th April

6.6.3 Delayed return: A delayed return can also be furnished by paying the prescribed late fee. Section 70(1) inter alia provides for filing of periodical return after the due date with the prescribed late fee of not more than ₹ 20,000.

(1) Late fee for delayed return [Rule 7C]: The prescribed late fee for furnishing a delayed return is given in the following table:

S. No.	Period of delay	Late fee
(a)	15 days from the date prescribed for submission of the return	₹ 500
(b)	Beyond 15 days but not later than 30 days from the date prescribed for submission of the return	₹ 1,000
(c)	Beyond 30 days from the date prescribed for submission of the return	An amount of ₹ 1,000 plus ₹ 100 for every day from the 31st day till the date of furnishing the said return

(2) Maximum late fees: Total late fee for delayed submission of return shall not exceed ₹ 20,000.

Further, where the assessee has paid the prescribed late fee for delayed submission of return, the proceedings, if any, in respect of such delayed submission of return shall be deemed to be concluded.

(3) Late fee may be reduced/waived where service tax payable is nil: Where the gross amount of service tax payable is nil, the Central Excise Officer may, on being satisfied that there is sufficient reason for not filling the return, reduce or waive the penalty (late fee) [Proviso to rule 7C].

Example: BCC Ltd. is engaged in providing taxable services. For the half year ended on 30th September, it filed its return on:-

Case I: 9th November

Case II: 23rd November

Case III: 25th January

Determine the amount of late fee payable by BCC Ltd. in each of the independent cases.

Solution:

Case	Particulars	Penalty as per rule 7C (₹)
I	Return has been filed with a delay of 15 (i.e. 6+9) days from the date prescribed for submission of the return	₹ 500
II	Return has been filed with a delay of 29 (i.e. 6+23) days from the date prescribed for submission of the return	₹ 1,000
III	Return has been filed with a delay of 92 (i.e. 6+30+31+25) days from the date prescribed for submission of the return	Lower of the following two amounts:- (i) ₹1,000+(₹100×62 days) (ii) ₹ 20,000 Late fees leviable is ₹7,200

Note: *In case the gross amount of service tax payable by BCC Ltd. is nil, the Central Excise Officer may, on being satisfied that there is sufficient reason for not filling the return, reduce or waive the penalty (late fee).*

6.6.4 Revised return [Rule 7B]: An assessee can submit a revised return, in **Form ST-3**, in **triplicate**, to correct a mistake or omission, within a period of **90 days** from the date of submission of the original return.

Important: It has been clarified that where an assessee submits a revised return, the **'relevant date'** for the purpose of recovery of service tax, if any, under section 73 of the Act shall be the date of submission of such revised return.

6.6.5 Contents of the return: General details, like financial year, half year period (April-September or October-March), name of the assessee, registration number of the premises for which return is being filed, category of taxable services are required to be furnished. Apart from this, some significant month-wise details also need to be furnished. For instance:

(i) amount received towards taxable service(s) provided and amount received in advance towards taxable service(s) to be provided

(iii) Gross amount billed for exempted services and services exported without payment of tax

(iv) amount billed for services on which tax is to be paid

(v) abatement claimed - value

(vi) notification number of abatement and exemption

(vii) service tax payable

(viii) GAR-7 challan date and number

(ix) credit details for service tax provider/recipient

6.6.6 Return by input service provider: The input service distributor, shall furnish a half yearly return in Form ST-3 giving details of credit received and distributed during the said half year to the jurisdictional Superintendent of Central Excise, not later than the last day of the month following the half year period.

The due dates on this basis are tabulated as under:

Half year	Due date
1st April to 30th September	31th October
1st October to 31st March	30th April

6.6.7 Single return for multiple service providers: For an assesee who provides more than one taxable service, only a single return will be sufficient. However, the details in each of the columns of the Form ST-3 have to be furnished separately for each of the taxable service rendered by him.

6.6.8 Nil return: Even if no service has been provided during a half year and no service tax is payable; the assessee has to file a Nil return within the prescribed time limit.

6.6.9 First return: Every assessee shall furnish to the Superintendent of Central Excise, at the time of filing of return for the first time, a list in duplicate, of-

(i) all the records prepared or maintained by the assessee for accounting of transactions in regard to,-

  (a) providing of any service, whether taxable or exempted;

  (b) receipt or procurement of input services and payment for such input services;

  (c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;

  (d) other activities, such as manufacture and sale of goods, if any.

(ii) all other financial records maintained by him in the normal course of business.

6.6.10 E-filing of returns: E-filing of returns is mandatory for the assessees. Every assessee has to submit half-yearly service tax return electronically, irrespective of the amount of service tax paid by him in the preceding financial year.

It is convenient for the assessee to file the service tax returns from his office, residence or any other place of choice, through the Internet, by using a computer.

Central Excise and Service Tax returns, the DG (Systems) has issued comprehensive instructions outlining the procedure for electronic filing of Central Excise duty and Service Tax returns under ACES. The said instructions outline the steps for preparing and filing of return, procedure for obtaining acknowledgement of e-filed return etc.

Following points merit consideration regarding e-filing:-

(a) In case of e-filing of service tax return, no documents are required to be filed along with the return.

(b) There is no need to file a hard copy of the service tax return after e-filing of such return.

(c) Once return is filed electronically, a unique document reference number is generated which consists of 15 digit registration number of assessee, period for which return filed etc.

6.6.11 Scheme for submission of returns through Service Tax Return Preparers [Section 71]: Section 71 provides for the scheme for submission of returns through Service Tax Returns Preparers. A **Service Tax Return Preparer** shall assist the **person or class of persons** to prepare and furnish the return in such manner as may be specified in the Scheme framed under this section.

This section empowers the Central Board of Excise and Customs (Board) to frame a Scheme for the purposes of enabling any person or class of persons to prepare and furnish a return under section 70 and authorise a Service Tax Return Preparer to act as such under the Scheme.

"Service Tax Return Preparer" means any individual, who has been authorised to act as a Service Tax Return Preparer under the Scheme framed under this section.

"Person or class of persons" means such person, as may be specified in the Scheme, who is required to furnish a return required to be filed under section 70.

Note: CBEC has framed the Service Tax Return Preparer Scheme, 2009 notified through *Notification 7/2009 ST dated 03.02.2009*.

6.7 Large Tax Payer [Rule 10 of Service Tax Rules, 1994]

LTU scheme is the beneficial scheme which would act as the single window facilitation centre for all large entities paying Central Excise Duty/Service Tax/Corporate tax. This was introduced as there was a need to monitor large tax paying entities in revenue interest *[The concept of large tax payer has been discussed in detail in Chapter 5 of Module-1: Central Excise].* Rule 2(1)(cc) of the Service Tax Rules, 1994 defines "large tax payer" to have the meaning assigned to it in the Central Excise Rules, 2002.

Procedures and facilities for large tax payer: Rule 10 of the Service Tax Rules, 1994 lays down the procedure and facilities for the large taxpayer. The provisions of this rule are discussed below:

Notwithstanding anything contained in these rules, the following shall apply to a large taxpayer-

(1) A large taxpayer shall submit the returns, as prescribed under these rules, for each of the registered premises. A large taxpayer who has obtained a centralized registration under rule 4(2) shall submit a consolidated return for all such premises.

(2) A large taxpayer, on demand, may be required to make available the financial, stores and CENVAT credit records in electronic media, such as, compact disc or tape for the purposes of carrying out any scrutiny and verification, as may be necessary.

(3) A large taxpayer may, with intimation of at least 30 days in advance, opt out to be a large taxpayer from the first day of the following financial year.

(4) Any notice issued but not adjudged by any of the Central Excise Officer administering the Act or rules made thereunder immediately before the date of grant of acceptance by the Chief Commissioner of Central Excise, Large Taxpayer Unit, shall be deemed to have been issued by Central Excise Officers of the said unit.

(5) Provisions of these rules, in so far as they are not inconsistent with the provisions of this rule shall mutatis mutandis apply in case of a LTU.

6.8 Records [Rule 5 of Service Tax Rules, 1994]

(1) No prescribed nature and form of records to be maintained: The records (including computerised data) as maintained by an assessee in accordance with various laws in force from time to time shall be acceptable. It implies that the nature of records to be maintained and the form in which the records are to be maintained are left at the judgment of the assessee [Sub-rule (1)].

(2) List of accounts to be furnished to the Superintendent of Central Excise: Every assessee shall furnish to the Superintendent of Central Excise, at the time of filing of return for the first time, a list in duplicate, of-

(i) all the records prepared or maintained by the assessee for accounting of transactions in regard to-

  (a) providing of any service;

  (b) receipt or procurement of input services and payment for such input services;

  (c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;

  (d) other activities, such as manufacture and sale of goods, if any.

(ii) all other financial records maintained by him in normal course of business. [Sub-rule (2)]

(3) Preservation of records: All the records maintained by an assessee in this regard shall be preserved at least for a period of 5 years immediately after the financial year to which such records pertain [Sub-rule (3)].

E-preservation of records: ***Records under rule 5 may be preserved in electronic form and every page of the record so preserved would be authenticated by means of a digital signature [Sub-rule (4)]. The Board may specify the conditions, safeguards and***

procedure to be followed by an assessee preserving digitally signed records [Sub-rule (5)].

(i) The expression "authenticate" shall have the same meaning as assigned in the Information Technology Act, 2000.

(ii) The expression "digital signature" shall have the meaning as defined in the Information Technology Act, 2000 and the expression "digitally signed" shall be construed accordingly."

6.9 Accounting codes for payment of service tax

Earlier, under the positive list approach of taxation of services, Department had issued Accounting codes [eight digit numerical codes] in respect of each taxable service to be used by the assessee while paying service tax through GAR-7 challan. Thus, 119 service specific accounting codes were there.

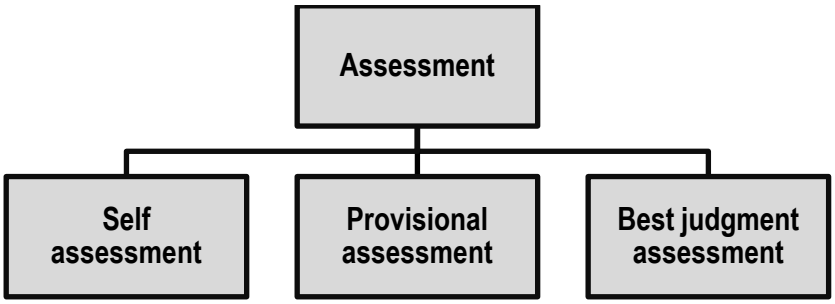
With the introduction of negative list approach of taxation of services, with effect from 01.07.2012, at first service specific old accounting codes were done away with and one Accounting code was prescribed for the purpose of payment of service tax i.e. "All Taxable Services" – 00441089. However, subsequently, for the purpose of statistical analysis, service specific old accounting codes have been again restored along with 120th description as "other taxable services".

Consequently, CBEC has accordingly amended Form ST-1 (Registration Form under Service Tax). The amended form has an annexure containing description of taxable services and accounting codes for payment of service tax. The assessee can choose the description as applicable to him from the annexure.

7

Demand, Adjudication and Offences

7.1 Assessment



(1) **Self assessment:** Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in prescribed manner.

(2) **Provisional assessment [Sub-rule (4), (5) and (6) of rule 6 of the Service Tax Rules, 1994]:** An assessee may make a request for provisional assessment of service tax if he is unable to correctly estimate the actual amounts of service tax payable for any month or quarter. The provisions of the Central Excise Rules, 2002 relating to provisional assessment shall apply except the provisions relating to execution of bond.

Procedure for provisional assessment

(a) **Request for provisional assessment:** The assessee shall make a request in writing to the Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, to make a provisional payment of tax on the basis of the amount deposited.

(b) **Order of provisional assessment of service tax:** The Assistant Commissioner/Deputy Commissioner as the case may be, may, on receipt of such request, order provisional assessment of service tax.

(c) **Memorandum in Form ST-3A to be submitted along with Form ST-3:** In case of an assessee requesting for provisional assessment, he shall submit a memorandum in form ST-3A, giving details of difference between the provisional amount of service tax deposited and the actual amount of service tax payable for each month along with the half-yearly return in form ST-3.

(d) Finalization of provisional assessment: Where the assessee submits a memorandum in Form ST-3A, it shall be lawful of the Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be to complete the assessment, wherever he deems it necessary, after calling such further documents or records as he may consider necessary and proper in the circumstances of the case.

(3) Best judgment assessment [Section 72]: Section 72 empowers the Central Excise Officer to make best judgment assessment.

(A) Cases where Central excise officer is empowered to make best judgment assessment: Central excise officer can make best judgment assessment in the following two cases**:-**

If any person, liable to pay service tax,—

(a) fails to furnish the return under section 70 or

(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder.

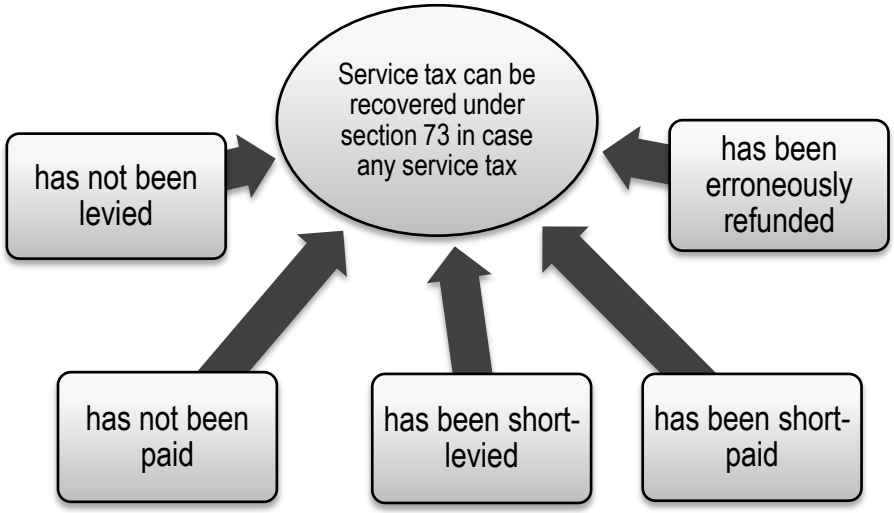
(B) Procedure to be followed:-

1. Central Excise Officer would require the assessee to produce such accounts, documents or other evidence as he may deem necessary.
2. After taking into account all the relevant material which is available or which he has gathered, he shall issue notice to the assessee quantifying the value of taxable service to the best of his judgment, its basis for determination and service tax payable thereon.
3. The assessee shall be given an opportunity of being heard.
4. The Central Excise Officer shall pass an order in writing determining the sum payable/ refundable to the assessee on the basis of such assessment.

7.2 Demand of Service Tax

Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded [Section 73]: Section 73 deals with the value of taxable services escaping assessment. The provisions, as explained below, are similar to the provisions of section 11A of the Central Excise Act.

(1) Cases where service tax can be recovered under section 73: In any of the following cases, the Central Excise Officer may serve notice on the person chargeable with the service tax requiring him to show cause why he should not pay the amount specified in the notice:



(2) Time-limit for issue of show cause notice

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by	**Time limit for issuing show cause notice***
(i) reason of:- (a) fraud; or (b) collusion; or (c) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax	Five years from the relevant date
(ii) any other reason	Eighteen months from the relevant date

***Period of stay to be excluded from the time-limit**

For this purpose, where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

Few relevant judgments

1. Mere inaction or failure to do something does not constitute suppression. There must be something positive to prove suppression *[CCE v. Chemphar Drugs and Liniments 1989 (40) ELT 276 SC]*.

2. Limitation for extended period invokable only if existence of both situations - (1) suppression, fraud, collusion etc. and, (2) intent to evade payment of duty proved *[Tamilnadu Housing Board v. CCE 1994 (74) ELT 9 (SC)]*.
3. Department cannot sleep over the matter for years and accuse the assessee of suppression *[Mutual Industries Ltd v. CCE 2000 (117) ELT 578 (Tri-LB)]*.

(3) No need to re-type the grounds in the follow-up demand notices, if issued on same grounds as notices of earlier periods: Where a follow-up demand is to be given for a period subsequent to the previous notice(s) on same grounds, the Central Excise Officer may not issue a detailed show cause notice and instead serve a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period on the same assessee on whom earlier notice had been served. However, this is possible only when the grounds for subsequent notices are same as the grounds mentioned in the earlier notices. A point to note here is that the time limit of eighteen months for serving the notice for recovery of service tax will, however, apply to such statements.

This provision, therefore, aims to save the botheration of retyping the same charges (and save paper) when a follow-up demand is given for a period subsequent to the previous notice(s) on same grounds [Sub-section (1A)].

(4) Self-assessed service tax that is declared in the return but not paid, can be recovered under section 87 without service of any notice: Notwithstanding anything contained in section 73(1), in a case where the amount of service tax payable has been self-assessed in the return furnished under section 70(1), but not paid either in full or in part, the same will be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under section 73(1).

It may be noted that the sub-section starts with the words 'Notwithstanding anything contained in sub-section (1)' and ends with the words 'without service of notice under sub-section (1)'. Thus, once liability is admitted by the assessee in his returns, no show cause notice is required for recovery and since the provisions of section 73(1) will not apply, the period of limitation will not apply either [Sub-section (1B)].

(5) Determination of service tax payable: The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served, determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined [Sub-section (2)]

(6) SCN issued by invoking extended period of limitation, if not found sustainable, to be deemed to be a SCN issued for a period of eighteen months: In cases where the Department has raised a demand invoking the extended period of limitation (i.e. 5 years), and the appellate authority or Tribunal or Court concludes that extended period cannot be invoked because the charges for fraud, suppression, willful misstatement etc. are not established, the Central Excise Officer can determine the service tax liability for the

normal period of limitation i.e, the last eighteen months and raise the demand accordingly.

It may be noted that in case of non/short levy or non/short payment of service tax in non-fraud cases, penalty under section 78 does not apply. For such cases, penalty under section 76 is invoked. However, interest is payable under section 75 in both the cases for the period of default. [Sub-section (2A)].

(7) Voluntary payment of service tax by the assessee before issuance of the show cause notice: Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice in respect of the amount so paid [Sub-section (3)].

However, Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "eighteen months" shall be counted from the date of receipt of such information of payment.

Interest under section 75 payable on amount so paid : The interest under section 75 shall be payable on the amount paid by the person and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer.

Penalty not to be imposed in case of voluntary payment of service tax and interest before issuance of show cause notice: No penalty under any of the provisions of this Act or the rules made there under shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(8) Voluntary payment of service tax before the issue of show cause notice not allowed in case of fraud, collusion, willful mis-statement etc.: The provisions of payment of service tax before the issue of show cause notice shall not allowed in a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax [Sub-section (4)].

(9) Time limit for completion of adjudication: As per sub-section (4B), Central Excise Officer, where it is possible to do so, should determine the amount of service tax due within the following time limits from the date of notice:

Cases whose limitation is specified as 18 months in sub-section (1) [i.e., cases not involving fraud, collusion, suppression of facts etc.)	6 months
Cases falling under the proviso to sub-section (1) [i.e, cases involving fraud, collusion, suppression of facts etc.] or the proviso to sub-section (4A) [cases where demand has arisen out of audit/investigation etc.)	1 year

(10) Meaning of relevant date [Sub-section (6)]

In a case where		Relevant date
(i) Taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid	(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee	the date on which such return is so filed
	(b) where no periodical return as aforesaid is filed	the last date on which such return is to be filed under the said rules
	(c) in any other case	the date on which the service tax is to be paid under this Chapter or the rules made thereunder
(ii) Service tax is provisionally assessed under this Chapter or the rules made thereunder		the date of adjustment of the service tax after the final assessment thereof
(iii) Any sum, relating to service tax, has erroneously been refunded		the date of such refund

(11) Adjudication under section 73: The monetary limits for adjudication under section 73 are as follows:-

S No.	Central Excise Officer	Amount of Service Tax or CENVAT credit specified in a notice for the purpose of adjudication.
(1)	Superintendent of Central Excise*	Not exceeding ₹ 1 lakh (excluding the cases relating to taxability of services or valuation of services and cases involving extended period of limitation.)
(2)	Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise	Not exceeding ₹ 5 lakh (except cases where Superintendents are empowered to adjudicate.)
(3)	Joint Commissioner of Central Excise	Above ₹ 5 lakh but not exceeding ₹ 50 lakh
(4)	Additional Commissioner of Central Excise	Above ₹ 20 lakh but not exceeding ₹ 50 lakh
(5)	Commissioner of Central Excise	Without limit.

*In respect of the above powers of adjudication conferred on the Superintendents, the following has been clarified:

(i) The Superintendents would be competent to decide cases that involve service tax and / or CENVAT credit upto ₹ 1 lakh in individual show cause notices.

(ii) They would not be competent to decide cases that involve taxability of services, valuation of services, eligibility of exemption and cases involving suppression of facts, fraud, collusion, willful mis-statement etc.

(iii) They would be competent to decide cases involving wrong availment of CENVAT credit upto a monetary limit of ₹ 1 lakh.

7.3 Provisional attachment to protect revenue in certain cases [Section 73C]

(1) Provisional attachment of property to protect revenue: During the pendency of any proceeding under section 73 or section 73A, the Central Excise Officer may provisionally attach any property belonging to the person on whom notice is served under section 73(1) or section 73A(3), as the case may be, in the prescribed manner subject to the following conditions:-

(i) Central Excise officer is of the opinion that the attachment is necessary for the purpose of protecting the interests of revenue, and

(ii) A previous approval of the Principal Commissioner/Commissioner of Central Excise, by order in writing, has been obtained [Sub-section (1)].

(2) Time period of attachment: Such an attachment can be done for a period of 6 months. This period will commence from the date of the order made under sub-section (1) [Sub-section (2)].

Extended period of attachment: This period may be extended by the Principal Chief Commissioner/Chief Commissioner of Central Excise by such further period or periods as he thinks fit. The reasons for such an extension shall be recorded in writing. It is to be noted that the total period of extension in any case shall not exceed 2 years [Proviso to sub-section (2)].

CBEC has issued certain guidelines for provisional attachment of the property under service tax vide Circular No. 103/06/2008 ST dated 01.07.2008. They are similar to the guidelines issued in respect of provisional attachment of property in excise laws [Refer Chapter 8: Demand, Adjudication and Offences of Section A of this Study Material for the said guidelines].

7.4 Rectification of mistake apparent from the records by the Central Excise Officer [Section 74]

(1) Time-limit for rectification of the order: Any mistake apparent from the records may be rectified by the Central Excise Officer, by passing an order in writing, **within two years** from the date on which the order was passed.

(2) Rectification can be either *suo-moto* or on mistake being brought to notice by assessee or Principal Commissioner/Commissioner or Commissioner (Appeals): Subject to the other provisions of this section, the Central Excise Officer concerned -

(a) may make a rectification of mistake apparent from the records of his own motion; or

(b) shall make such amendment (rectification) if any mistake is brought to his notice by the assessee or the Principal Commissioner/Commissioner of Central Excise or the Commissioner of Central Excise (Appeals).

(3) Rectification resulting in increasing liability of assessee/reducing refund: In case the rectification results in increasing the liability of the assessee or reducing a refund, he will have to be given a notice and reasonable opportunity of being heard by the Central Excise Officer. Thereafter, the Central Excise Officer shall make an order specifying the sum payable by the assessee and the provisions of this Chapter shall apply accordingly.

(4) Rectification resulting in decreasing liability of assessee/increasing refund: In case the rectification results in decreasing the liability of the assessee or increasing a refund, the Central Excise Officer shall make any refund which may be due to such assessee.

7.5 Recovery of any amount due to Central Government [Section 87]

Central Excise Officer can recover any amount due under the service tax law by one or more of the modes mentioned below:—

(1) Amount not paid by a person under the service tax law may be set off against any money due to him by the Central Excise/Customs Department [Clause (a)]: Central Excise Officer may deduct or may require any other Central Excise Officer/Customs

officer to deduct the amount so payable from any money owing to such person which may be under the control of the said Central Excise Officer/Customs officer.

(2) Recovery from any person other than from whom money is due if that other person holds money for/on account of the first person - Garnishee Proceedings [Clause (b)]:

(i) Issuance of the notice for recovery to any person other than from whom money is due: The Central Excise Officer may issue a written recovery notice to the following persons:

- any person from whom money is due to such person
- any person from whom money may become due to such person
- any person who holds money for or on account of such person
- any person who may subsequently hold money for or on account of such person.

The noticee would be required to pay to the credit of the Central Government so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount.

The money would be paid either forthwith upon the same becoming due or being held, or at or within the time specified in the notice. However, in no case the money would be required to be paid before it becomes due or is held.

(ii) Noticee bound to comply with the notice: Every person to whom a notice is issued under this clause shall be bound to comply with such notice. In case any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.

(iii) In case of failure to make the payment, the noticee deemed to be the assessee in default: If the person to whom a notice under this section is sent, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be an assessee in default in respect of the amount specified in the notice. Thus, all the consequences prescribed for assessees in default would apply for such other person as well.

(3) Detaining any immovable property belonging to/under the control of such person [Clause (c)]: Central Excise Officer may distrain any movable or immovable property belonging to or under the control of such person and detain the same until the amount payable is paid. However, such distrainment shall be made only with the authorisation of the Principal Commissioner/Commissioner of Central Excise and in accordance with the rules made in this behalf.

The said property may be sold by the Central Excise Officer if any part of the said amount payable or of the cost of the distress or keeping of the property remains unpaid for a period of 30 days after such distress. The Central Excise Officer may satisfy the amount payable and the costs including unpaid cost of sale with the proceeds of such sale. The surplus amount, if any, shall be rendered to such person.

However, where the person (predecessor) from whom recovery is to be made

- transfers/disposes of his business/trade in whole or in part, or
- effects any change in the ownership thereof,

in consequence of which he is succeeded in such business or trade by any other person, then all goods, in the custody or possession of the successor may also be attached and sold for recovering the sums due from such predecessor at the time of such transfer/disposal or change. Such attachment and sale could however be effected only after obtaining written approval of Principal Commissioner/Commissioner of Central Excise.

(4) Collection of amount due as an arrear of land revenue [Clause (d)]: Central Excise Officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business. The said Collector, on receipt of such certificate, shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue.

When more than one remedy are available for recovery of tax, all can be resorted to at the option of authorities recovering the amount, unless the statute in express words lays down that one remedy is to the exclusion of other *[State of Kerala v. CM Francis and Co. (1961) 12 STC 119 (SC)].*

7.5.1 Liability under Act to be first charge [Section 88]: Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of tax, penalty, interest, or any other sum payable by an assessee or any other person under this Chapter, shall, save as otherwise provided in section 529A of the Companies Act, 1956 and the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002, be the first charge on the property of the assessee or the person as the case may be.

7.6 Refunds

In the event the assessee has to claim a refund of service tax, he has to comply with section 11B of the Central Excise Act, 1944 which is made applicable to service tax *vide* section 83 of the Act.

(1) Doctrine of unjust enrichment applicable: In order to claim refund under section 11B of the Central Excise Act, 1944, the assessee has to prove that the incidence of duty has not been passed on to the buyer or to any other person. This restriction is known as **'unjust enrichment'**. In case, this doctrine is attracted, amount will not be refunded to the applicant, but would be credited to the Consumer Welfare Fund. The same principle is applicable to service tax also.

(2) Time-limit for filing the refund claim: Section 11B(1) of the Central Excise Act, 1944 provides that an application for refund of duty should be made to the Assistant/Deputy Commissioner before the expiry of one year from the relevant date.

"Relevant date" is the date of payment of service tax. Thus, the limitation period of one year is to be reckoned from the date of payment of duty/service tax.

Conditions to be fulfilled for filing a refund claim:-

Conditions to be fulfilled for filing a refund claim may be summarized as follows:

(i) It should be in the prescribed form.

(ii) It should be filed before the expiry of the limitation period of one year from the date of payment of tax.

(iii) Proof should be adduced that the incidence of tax has not been passed on to any person i.e. tax has been borne by the applicant.

(3) Interest on delayed refund: The provisions of section 11BB of the Central Excise Act are applicable for the purpose of service tax which *inter alia* provide that in case the refund is not given within 3 months from the date of receipt of refund application, interest is payable on such amount.

(a) Rate of interest: The rate of interest should be, not below 5% and not exceeding 30% per annum as is fixed by the Central Board of Excise and Customs (Board). The existing rate of interest fixed by the Board is 6% per annum.

(b) Period for which interest is payable: The interest on delayed refunds is payable for the period commencing from the date immediately after the expiry of the said 3 months till the date of refund.

7.7 Penal consequences

7.7.1 Penalties: The penalties for various defaults under service tax law can be summarised as under:-

Sl. No.	Section	Nature of Default	Quantum of penalty
1.	76	***Failure to pay service tax***	• ***Maximum 10% of the service tax amount*** • ***Nil, if service tax + interest paid within 30 days of service of show cause notice*** • ***25% of penalty, if service tax, interest and such reduced penalty paid within 30 days of receipt of order***
2.	77	Contravention of any provision/rules for which no penalty is specified elsewhere	See point (2) below

3.	78	***Failure to pay service tax for reasons of fraud etc.***	• ***Maximum 100% of service tax amount*** • ***15% of service tax amount, if service tax + interest + such reduced penalty paid within 30 days of service of show cause notice*** • ***25% of service tax amount, if service tax + interest + such reduced penalty paid within 30 days of receipt of order.***
4.	78A	Personal penalty on director, manager, secretary, or other officer	**Quantum of penalty** Penalty upto ₹ 1 lakh in case of certain specified contraventions committed by the company

Each of the above penalty is now discussed in detail hereunder:

I. <u>Penalty for failure to pay service tax [Section 76]:</u> Prior to 14.05.2015, penalty for failure to pay service tax was ₹ 100 for every day during which such failure continues or at the rate of 1% of such tax per month, whichever is higher, subject to a maximum of 50% of service tax payable. The said penalty was payable from the first day after the due date till the date of actual payment of the outstanding amount of service tax.

The Finance Act, 2015 has substituted section 76. The new provisions of section 76 are explained hereunder:

(i) Where service tax has not been levied/paid, or has been short levied/paid, or erroneously refunded for any reason other than fraud/ collusion/ wilful misstatement/ suppression of facts/ contravention of any of the provisions of service tax law with the intent to evade payment of service tax, the person who has been served notice under section 73(1) will be liable to pay a penalty not exceeding 10% of such service tax. The above penalty is payable in addition to the service tax and interest specified in the notice [Sub-section 1].

(ii) <u>No penalty:</u> However, if service tax and interest is paid within 30 days of the date of service of notice under section 73(1), no penalty will be payable and proceedings in respect of such service tax and interest will be deemed to be concluded [Clause (i) of proviso to sub-section (1)].

(iii) <u>25% penalty:</u> However, if service tax and interest is paid within 30 days of the date of receipt of the order of the Central Excise Officer determining the amount of service tax under section 73(2), the penalty payable will be 25% of the penalty imposed in that order, only if such reduced penalty is also paid within such period [Clause (ii) of proviso to sub-section (1)].

(iv) Where the amount of penalty is increased by the Commissioner (Appeals)/ the Appellate Tribunal/ the court over and above the amount as determined under

section 73(2), the time within which the reduced penalty is payable under clause (ii) of the proviso to section 76(1) in relation to such increased amount of penalty will be counted from the date of the order of the Commissioner (Appeals)/ the Appellate Tribunal/ the court, as the case may be [Sub-section (2)].

II. **Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere [Section 77]:** Provisions of this section provides for a general penalty where any person contravenes any of the provisions set out in the Finance Act, 1994 or rules made hereunder, for which no penalty has been specifically mentioned elsewhere.

S.No.	Nature of offence	Maximum penalty leviable
1.	Failure to take registration in accordance with the provisions of section 69	upto ₹ 10,000.
2.	Failure to:- (a) furnish information called by an officer (b) produce documents called for by a Central Excise Officer (c) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry	₹ 200 for every day during which such failure continues, starting with the first day after the due date, till the date of actual compliance or ₹ 10,000 whichever is higher
3.	Failure to make e-payment of service tax	₹ 10,000
4.	Issue of invoice with incorrect or incomplete details or fails to account for an invoice in his books of account	
5.	Any contravention of any provisions/rules for which no penalty is separately provided in this Chapter	
6.	Failure to keep, maintain or retain books of account and other documents as required as per the provisions	

III. <u>Penalty for failure to pay service tax for reasons of fraud etc. [Section 78]</u>: With effect from 14.05.2015, section 78 has been substituted by a new section. The new penalty provisions under section 78 are explained hereunder:

(i) Where any service tax has been short/non levied or short/non paid or erroneously refunded, by reason of fraud/collusion/wilful mis-statement/ suppression of facts/contravention of any of the provisions of service tax law with intent to evade payment of service tax, the person who has been served

notice under the proviso to section 73(1) [fraud cases invoking extended period of limitation] be liable to pay a penalty which shall be equal to 100% of such service tax. The above penalty is payable in addition to the service tax and interest specified in the notice [Sub-section (1)].

(ii) <u>50% penalty:</u> In respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with 08.04.2011 upto 14.05.2015 (both days inclusive), the penalty will be 50% of the service tax so determined [First proviso to sub-section (1)].

(iii) <u>Specified records:</u> "Specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records [Explanation to sub-section (1)].

(iv) <u>15% penalty:</u> However, if service tax and interest is paid within 30 days of the date of service of notice under the proviso section 73(1), the penalty payable will be 15% of such service tax and proceedings in respect of such service tax, interest and penalty will be deemed to be concluded [Clause (i) of second proviso to sub-section (1)].

(v) <u>25% penalty:</u> However, if service tax and interest is paid within 30 days of the date of receipt of the order of the Central Excise Officer determining the amount of service tax under section 73(2), the penalty payable will be 25% of the service tax so determined [Clause (ii) of second proviso to sub-section (1)].

(vi) The benefit of reduced penalty under clause (i) [15%] or clause (ii) [25%] of second proviso to section 78(1) will be available only if the amount of such reduced penalty is also paid within such period [Third proviso to sub-section (1)].

(vii) Where the Commissioner (Appeals)/ the Appellate Tribunal/ the court modifies the amount of service tax determined under section 73(2), then the amount of penalty payable under section 78(1) and the interest payable thereon under section 75 will stand modified accordingly. The person who is liable to pay such modified amount of service tax, will also be liable to pay the amount of penalty and interest so modified [Sub-section (2)].

(viii) Where the amount of service tax or penalty is increased by the Commissioner (Appeals)/ the Appellate Tribunal/ the court over and above the amount as determined under section 73(2), the time within which the interest and the reduced penalty is payable under clause (ii) of the second proviso to section 78(1) in relation to such increased amount of service tax will be counted from the date of the order of the Commissioner (Appeals)/ the Appellate Tribunal/ the court, as the case may be [Sub-section (3)]

The penalties payable under sections 76 and 78 are illustrated with the help of the following example:

Section 76 - Non-fraud cases					
Service tax short/ non-levied or short/ non paid or erroneously refunded	*Penalty leviable*	*Date of service of show cause notice*	*Date of receipt of the order*	*Date of payment of service tax and interest*	*Penalty payable, if any*
₹ 1,00,000	*Up to ₹ 10,000*	*20.05.2015*	*NA*	*10.06.2015*	*No penalty as service tax and interest is paid within 30 days of 20.05.2015 (date of service of show cause notice)*
₹ 1,00,000	*Up to ₹ 10,000*	*20.05.2015*	*20.08.2015*	*10.09.2015*	*25% of penalty imposed in the order, if such reduced penalty is also paid within 30 days of 20.08.2015 (date of receipt of the order)*
₹ 1,00,000	*Up to ₹ 10,000*	*20.05.2015*	*20.08.2015*	*25.09.2015*	*100% of penalty imposed in the order as service tax and interest is paid after 30 days of 20.08.2015 (date of receipt of the order)*
Section 78 - Fraud cases					
Service tax short/non-levied or short/non paid or erroneously refunded	*Penalty leviable*	*Date of service of show cause notice*	*Date of receipt of order*	*Date of payment of service tax and interest*	*Penalty payable, if any*
₹ 1,00,000	*₹ 1,00,000*	*20.05.2015*	*NA*	*10.06.2015*	*15% of service tax, if*

					such reduced penalty is also paid within 30 days of 20.05.2015 (date of service of show cause notice)
₹ 1,00,000	*₹ 1,00,000*	*20.05.2015*	*20.08.2015*	*10.09.2015*	*25% of service tax determined in the order, if such reduced penalty is also paid within 30 days of 20.08.2015 (date of receipt of the order)*
₹ 1,00,000	*₹ 1,00,000*	*20.05.2015*	*20.08.2015*	*25.09.2015*	*100% of the service tax determined in the order as service tax and interest is paid after 30 days of 20.08.2015 (date of receipt of the order)*

The provisions of sections 76 and 78 are summarized in a comparative diagram in the page after the next page.

IV. ***Transition provisions for applicability of new penalty provisions under sections 76 and 78 [New section 78B]:*** ***New section 78B which is effective from 14.05.2015 prescribes, by way of a transition provision, that-***

(a) ***Amended provisions of sections 76 and 78 will apply to cases where either no notice has been served, or notice has been served under section 73(1) [non-fraud case] or proviso thereto [fraud cases] but no order has been issued under section 73(2), before 14.05.2015.***

(b) ***In cases where show cause notice has been issued under section 73(1) or under the proviso thereto, but no order has been passed under section 73(2) before 14.05.2015, the period of 30 days for the purpose of closure of proceedings on payment of service tax and interest under clause (i) of the proviso to section 76(1) or on the payment of service tax, interest and penalty (15% penalty) under clause (i) of the second proviso to section 78(1), will be counted from 14.05.2015.***

V. **Imposition of personal penalty on director, manager, secretary, or other officer found to be knowingly concerned with specified contraventions [Section 78A]:** Section 78A makes a director, manager, secretary or other officer of the company personally liable to a penalty upto ₹ 1 lakh in case of certain specified contraventions

committed by the company. Such penalty would be leviable if the director, manager, secretary or other officer of the company was in charge of, and was responsible to, the company for the conduct of business of such company at the time of commitment of any of the specified contraventions and was knowingly concerned with such contravention.

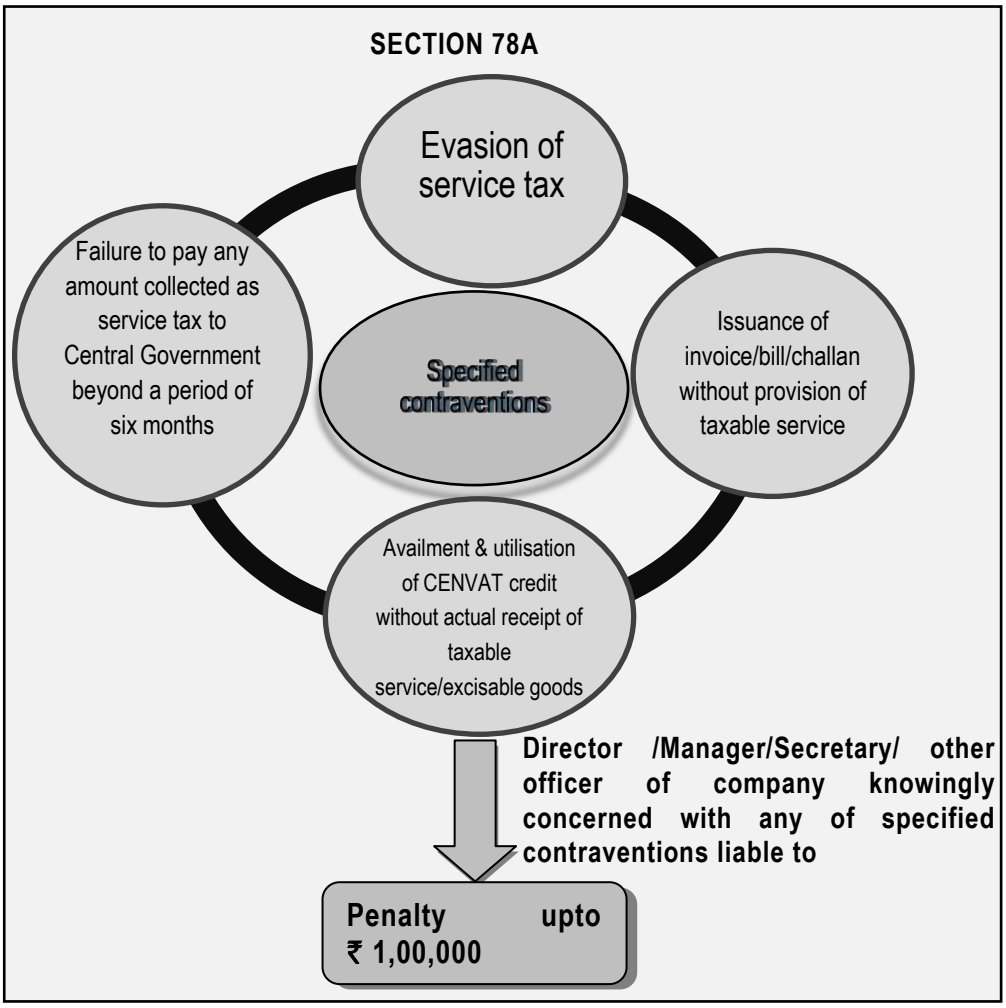
The specified contraventions are:

(a) evasion of service tax; or

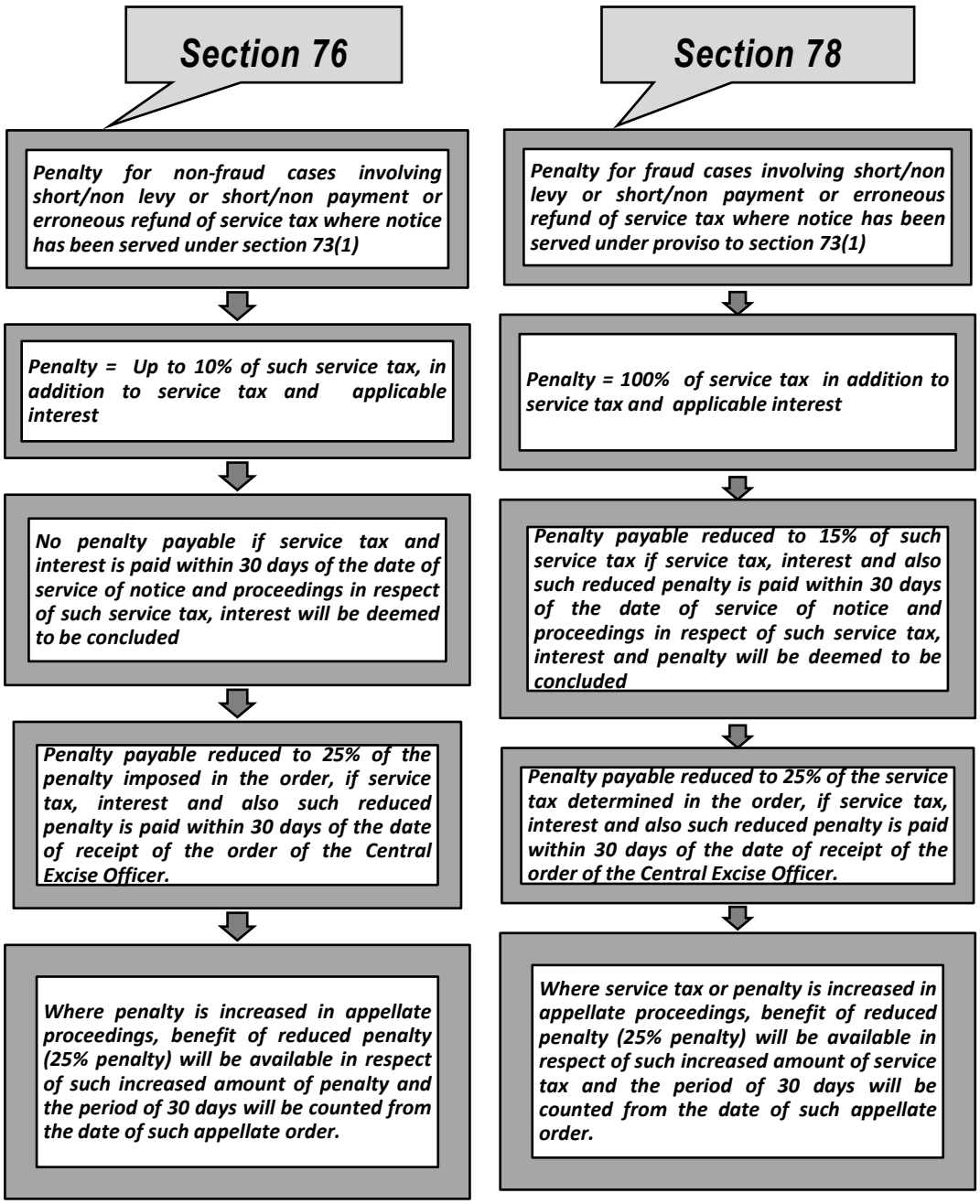
(b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of Chapter V; or

(c) availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of Chapter V; or

(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due.



Comparative Presentation of Provisions of Section 76 and Section 78



7.7.2 Adjudication of penalty [Section 83A]: Where any person is liable to a penalty, such penalty may be adjudged by the Central Excise Officer conferred with such power under a notification issued by Central Board of Excise and Customs.

Sr. No.	Central Excise Officer	Amount of service tax or CENVAT credit specified in a notice for the purpose of adjudication under section 83A
(1)	Superintendent of Central Excise	Up to ₹ 1,00,000 (excluding the cases relating to taxability of services or valuation of services and cases involving extended period of limitation)
(2)	Assistant/Deputy Commissioner of Central Excise	Up to ₹ 5,00,000 (except cases where Superintendents are empowered to adjudicate)
(3)	Joint Commissioner of Central Excise	₹ 5,00,000 to ₹ 50,00,000
(4)	Additional Commissioner of Central Excise	₹ 20,00,000 to ₹ 50,00,000

However, these provisions shall not apply where a decision or order passed under Chapter V of the Finance Act, 1994 or the rules made thereunder has been referred back to any authority which passed such decision or order, with such directions, for a fresh adjudication or decision, as the case may be.

7.8 Prosecution provisions [Section 89 & 90]

I. Offences and prosecution [Section 89]

(1) Categories of offences: The offences described in section 89 can be divided into two categories, namely category 'A' and category 'B'.

Category 'A' offences are:

(a) willful evasion of payment of service tax; or

(b) availment and utilization of credit of service tax / excise duty without actual receipt of taxable service / excisable goods either fully or partially in violation of the rules made under the provisions of Chapter V; or

(c) maintenance of false books of account or failure to supply any information which a person is required to supply or knowingly supplying false information.

Category 'B' offence is collection of any amount as service tax but failure to pay the amount so collected to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due [Sub-section (1)].

(2) Prosecution provisions:

(i) Category 'A' offences

(a) If any person commits any of the category 'A' offences, he shall be punishable with imprisonment for a term which may extend from six months to three years if the amount involved in the offence exceeds ₹ 50 lakh.

(b) In case, the amount involved in respect of the category 'A' offence does not exceed ₹ 50 lakh, the imprisonment shall be for a term which may extend to one year.

(c) Any second or subsequent offence from category 'A' offences (whether the amount involved exceeds ₹ 50 lakh or not) would be punishable with imprisonment for a term which may extend to three years.

(ii) Category 'B' offence

(a) A person who has committed category 'B' offence will be punishable with imprisonment for a term which may extend from six months to seven years if the amount exceeds ₹50 lakh.

(b) In case, the amount involved in respect of the category 'B' offence does not exceed ₹ 50 lakh, the imprisonment shall be for a term which may extend to one year.

(c) A second or subsequent category 'B' offence (where the amount involved does not exceed ₹ 50 lakh) would be punishable with imprisonment for a term which may extend to three years.

(d) A second or subsequent category 'B' offence (where the amount involved exceeds ₹ 50 lakh) would be punishable with imprisonment for a term which may extend to seven years.

(iii) It may be noted that in case where a person has been convicted of an offence of category 'A' and category 'B' offences for the first time, the term of imprisonment cannot be less than six months if the amount involved in the offence exceeds ₹ 50 lakh. However, the punishment can be reduced if there are special and adequate reasons, which would be recorded in the judgment of the Court, for granting lesser punishment.

(3) Cases not to be regarded as special and adequate reasons for awarding lesser imprisonment: Following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than six months, namely:—

(i) the fact that the accused has been convicted for the first time for an offence under this Chapter;

(ii) the fact that in any proceeding under this Act, other than prosecution, the accused has been ordered to pay a penalty or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a secondary party in the commission of offence;

(iv) the age of the accused [Sub-section (3)].

On the above grounds, sanctioning authority cannot refrain from launching prosecution against an offender.

(4) Prior sanction of Principal Chief Commissioner/ Chief Commissioner of Central Excise mandatory: A person shall not be prosecuted for any offence under this section except with the previous sanction of the Principal Chief Commissioner/ Chief Commissioner of Central Excise [Sub-section (4)].

II. Cognizance of offences [Section 90]

Section 90 provides that offence involving collection of any amount as service tax but failure to pay the amount so collected to the credit of the Central Government beyond a period of six months would be a cognizable offence if the amount exceeds ₹50 lakh. Therefore, arrest can be made for such an offence without a warrant.

All the category 'A' offences would be non-cognizable and bailable. Further, non-payment of amount collected as service tax beyond a period of six months, when the amount does not exceed ₹50 lakh, would also be a non-cognizable and bailable offence.

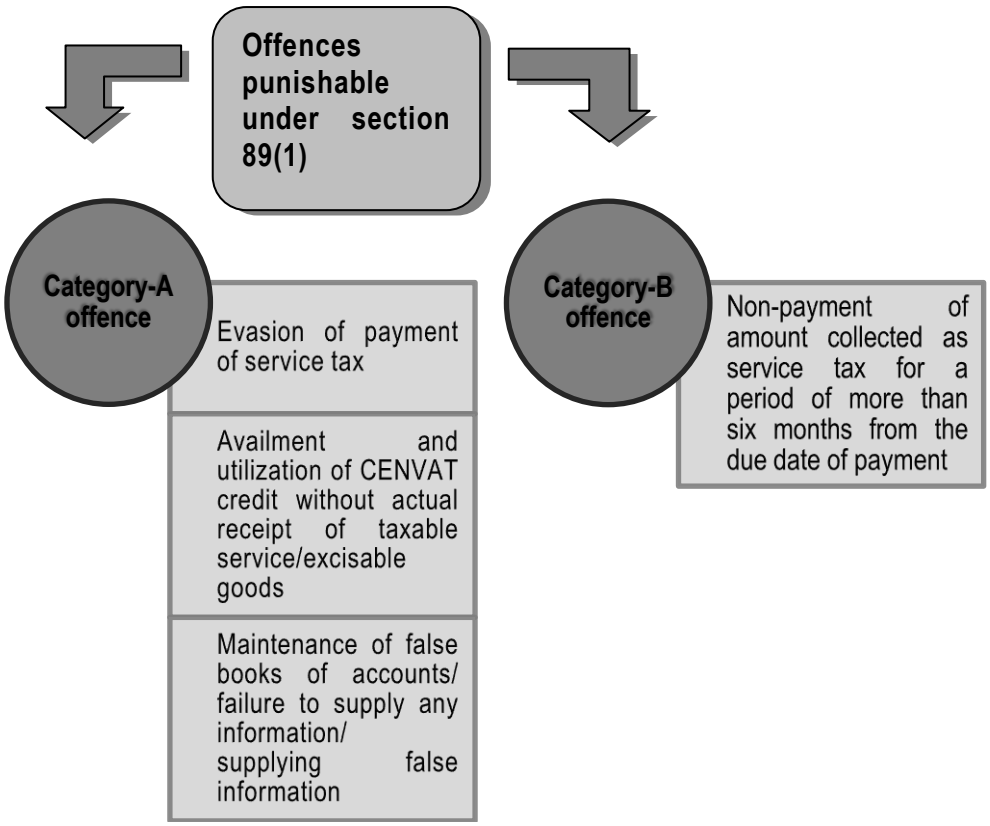
The provisions of section 89 and 90 have been summarized on the next page.

Points which merit consideration:

1. In order to constitute an offence under clause (b) of Category A offences, the taxpayer must both avail as well as utilize the credit without having actually received the goods or the service. The clause is not meant to apply to situations where an invoice has been issued for a service yet to be provided on which due tax has been paid. It is only meant for such invoices that are typically known as "fake" where the tax has not been paid at the so called service provider's end or where the provider stated in the invoice is non-existent. It will also cover situations where the value of the service stated in the invoice and/or tax thereon have been altered with a view to avail CENVAT credit in excess of the amount originally stated. While calculating the monetary limit for the purpose of launching prosecution, the value shall be the amount availed as credit in excess of the amount originally stated in the invoice.
2. Clause (c) of Category A offences, is based on similar provision in the central excise law. It should be noted that the offence in relation to maintenance of false books of accounts or failure to supply the required information or supplying of false information, should be in material particulars have a bearing on the tax liability. Mere expression of opinions shall not be covered by the said clause. Supplying false information, in response to summons, will also be covered under this provision.
3. Category B offence will apply only when the amount has been collected as service tax. It is not meant to apply to mere non-payment of service tax when due. This provision would be attracted when the amount was reflected in the invoices as service tax, service

receiver has already made the payment and the period of six months has elapsed from the date on which the service provider was required to pay the tax to the Central Government. Where the service receiver has made part payment, the service provider will be punishable to the extent he has failed to deposit the tax due to the Government.

4. Section 9C of Central Excise Act, 1944, which is made applicable to Finance Act, 1994, provides that in any prosecution for an offence, existence of culpable mental state shall be presumed by the court. Therefore each offence described in section 89(1) of the Finance Act, 1994, has an inherent *mens rea*. Delinquency by the defaulter of service tax itself establishes his 'guilt'. If the accused claims that he did not have guilty mind, it is for him to prove the same beyond reasonable doubt. Thus "burden of proof regarding non existence of '*mens rea'* is on the accused".



Offence Category	If any person is convicted under section 89 for an offence for		
A	First time	**where the amount is**	**Term of imprisonment**
		(i) upto ₹ 50 lakh	Upto 1 year
		(ii) more than ₹ 50 lakh	6 months* - 3 years

	Second & every subsequent offence		The term of imprisonment may extend to 3 years.
B	First time	**where the amount is**	**Term of imprisonment**
		(i) upto ₹ 50 lakh	Upto 1 year
		(ii) more than ₹ 50 lakh	6 months* - 7 years
	Second & every subsequent time	(i) upto ₹ 50 lakh	Upto 3 years
		(ii) more than ₹ 50 lakh	Upto 7 years

Such imprisonment shall be for a term of less than six months if there are* **special and adequate reasons *to be recorded in the judgment of the Court.*

Non-cognizable and bailable offence [Section 90]

Cognizable offence [Section 90]

7.9 Powers of arrest [Section 91]

(i) Who can arrest? - New section 91 provides that the Principal Commissioner/Commissioner of Central Excise by general or special order authorize any officer of Central Excise, not below the rank of Superintendent of Central Excise to arrest a person.

(ii) Who can be arrested? - A person who has committed any of the offences specified under section 89(1) and the amount involved in the offence exceeds ₹50 lakh.

(iii) When can arrest be ordered? - The Principal Commissioner/Commissioner of Central Excise can order arrest if he has reason to believe that a person has committed the offence mentioned above.

(iv) Manner of arrest - All arrests have to be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 relating to arrests.

(v) Procedure in case of cognizable offence – In case of cognizable offence, every officer authorised to arrest a person has to inform the arrested person of the grounds of arrest and produce him before a magistrate within 24 hours.

(vi) Procedure in case of non-cognizable and bailable offence – The Assistant Commissioner /Deputy Commissioner is empowered to release an arrested person on bail or otherwise. For this purpose, the Assistant Commissioner /Deputy Commissioner will have same powers and be subject to the same provisions as an officer in charge of a police station is under Code of Criminal Procedure, 1973.

8
Other Provisions

In this chapter, miscellaneous provisions of service tax including power to search premises, appeals, power of the Central Government to make rules and to grant exemption and rebate, advance ruling and audit under service tax have been discussed.

8.1 Appeals under service tax

A. Revision application to CCE (Appeals) by Department [Section 84]

(1) PCCE/CCE may direct to make an application for revision to the CCE (Appeals)

- Principal Commissioner of Central Excise/Commissioner of Central Excise (hereinafter referred to as PCCE/CCE) may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision/order under this Chapter for the purpose of satisfying himself as to the legality or propriety of any such decision or order.
- He may, by order, direct such authority/any Central Excise Officer subordinate to him to apply to the Commissioner of Central Excise (Appeals) [hereinafter referred to as CCE (Appeals)] for the determination of such points arising out of the decision or order as may be specified by the PCCE/CCE in his order.

(2) Time-limit for making order: Such order shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(3) Provisions relating to appeal to apply to the application filed to CCE (Appeals) by adjudicating authority/any other authorised officer

- In pursuance of an order of PCCE/CCE [referred to in point (1) above], the adjudicating authority or any other officer authorised in this behalf shall make an application to the CCE (Appeals) within a period of one month from the date of communication of such order to the adjudicating authority.
- Such application shall be heard by the CCE (Appeals), as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Chapter regarding appeals shall apply to such application.

B. Appeals to CCE (Appeals) by assessee [Section 85]

(1) Appealable orders: Any person may appeal to the CCE (Appeals) if he is aggrieved by any decision or order passed by an adjudicating authority subordinate to the PCCE/CCE.

(2) Documents to be enclosed: The appeal in Form ST-4 along with Statement of facts and the Grounds of appeal shall be filed in duplicate and shall be accompanied by a copy of the decision or order appealed against.

(3) Time limit for filing appeal: The appeal has to be filed within 2 months from the date of receipt of the order of such adjudicating authority.

Extension of time-limit allowed: The CCE (Appeals) may allow a further period of 1 month if sufficient cause is adduced for the delay.

(4) Procedure to be followed

1. The procedure laid down in the Central Excise Act, 1944 for hearing appeals and making orders is applicable under service tax also.
2. The CCE (Appeals) is required to hear and determine the appeal and pass the requisite order including an order enhancing the service tax, interest or penalty.
3. However, an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

C. Appeals to the Appellate Tribunal [Section 86]

(1) APPEAL BY THE ASSESSEE

(a) Appealable orders [Sub-section (1)]: Subject to point (b), an assessee aggrieved by any of the following orders may apply to the Appellate Tribunal:-

(i) Order passed by a Principal Commissioner/Commissioner of Central Excise under section 73

(ii) Order passed by a Principal Commissioner/Commissioner under section 83A

(iii) Order passed by CCE (Appeals) under section 85

(b) ***Revision application against the order of Commissioner (Appeals) in matters involving service tax rebate (not an appeal before CESTAT): The remedy against the order passed by Commissioner (Appeals) under section 85 in a matter involving rebate of service tax on input services or rebate of duty paid on inputs, used in providing the service which has been exported, shall lie in terms of section 35EE of the Central Excise Act i.e., a revision application will be filed with the Revisional Authority in such cases and not an appeal with CESTAT.***

(c) Documents to be enclosed: The appeal in Form ST-5 along with a Statement of Facts and Grounds of Appeal shall be filed in quadruplicate and accompanied by equal number of copies of the order appealed against (including one certified copy).

(d) Time-limit for filing appeal: The appeal shall be filed within 3 months from the date on which the order sought to be appealed against is received by the assessee.

(2) APPEAL BY THE DEPARTMENT

(a) Appeal to be filed by PCCE/CCE [Sub-section (2)]

Appealable orders: Committee of Principal Chief Commissioner of Central Excise/Chief Commissioner of Central Excise (hereinafter referred to as PCCCE/CCCE) may direct the PCCE/CCE to appeal to the Appellate Tribunal if it objects to any of the following orders passed by the PCCE/CCE:-

(i) Order passed under section 73.

(ii) Order passed under section 83A.

Difference in opinion of the Committee of PCCCE/CCCE against the order of the PCCE/CCE: Where the Committee of PCCCE/CCCE differs in its opinion against the order of the PCCE/CCE, it shall state the point or points on which it differs and make a reference to the Board.

If the Board, after considering the facts of the order, is of the opinion that the order passed by the PCCE/CCE is not legal or proper, it shall direct the PCCE/CCE to appeal to the Appellate Tribunal against the order.

(b) Appeal to be filed by Central Excise Officer [Sub-section (2A)]

Appealable orders: Committee of PCCE/CCE may direct any Central Excise Officer to appeal to the Appellate Tribunal if it objects to order passed by CCE (Appeals) under section 85.

Difference in opinion of the Committee of PCCE/CCE against the order of the CCE(Appeals): If the Committee of Principal Commissioners/Commissioners differs in its opinion against the order of the CCE(Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner.

The Chief Commissioner shall direct any Central Excise Officer to appeal to the Appellate Tribunal against such order if it is of the opinion that the order passed by the CCE(Appeals) is not legal or proper.

Meaning of jurisdictional Chief Commissioner: "Jurisdictional Chief Commissioner" means the Chief Commissioner having jurisdiction over the concerned adjudicating authority in the matter [Explanation].

(c) Time-limit for filing appeal: The appeal shall be filed within 4 months from the date on which the order sought to be appealed against is received by the Committee of Chief Commissioners or, the Committee of Commissioners, as the case may be.

(d) Documents to be enclosed: The appeal by the Department shall be filed in Form ST-7 including the Statement of facts and Grounds of application, in quadruplicate and an equal number of copies of the decisions or order appealed against.

Constitution of Committee of PCCCE/CCCE or PCCE/CCE: Central Board of Excise and Customs has been empowered to constitute, by order, Committees comprising of two PCCCE/CCCE or two PCCE/CCE, as the case may be [Sub-section (1A)].

(3) MEMORANDUM OF CROSS-OBJECTIONS [Sub-section (4)]

An assessee or the PCCE/CCE or any Central Excise Officer subordinate to him may present a memorandum of cross-objections in Form ST-6, in quadruplicate, to the Appellate Tribunal, within 45 days from the receipt of notice that an appeal against the order of PCCE/CCE or the CCE (Appeals) has been preferred.

(4) CONDONATION OF TIME-LIMIT FOR FILING APPEAL/MEMORANDUM OF CROSS OBJECTIONS [Sub-section (5)]

The Appellate Tribunal can admit an appeal filed by the PCCE/CCE or a Central Excise Officer following the direction of Committee of PCCCE/CCCE or Committee of PCCE/CCE respectively after the expiry of the statutory period (4 months) for filing the same, if it is satisfied that there was sufficient cause for not presenting it within that period. Similarly, the Tribunal can also admit an appeal filed by the assessee after the expiry of the statutory period for filing the same, i.e., 3 months, if it is satisfied that there was sufficient cause for not presenting it within that period.

Further, the Tribunal also has the powers to permit the filing of a memorandum of cross-objections by the PCCE/CCE/ Central Excise Officer/ assessee after the expiry of the statutory period (45 days) for filing the same, if it is satisfied that there was sufficient cause for not presenting it within that period.

(5) FEES FOR FILING THE APPEAL [Sub-section (6)]

Following fees for filing an appeal to the Appellate Tribunal has been prescribed:

Amount of service tax, interest demanded and penalty levied by any Central Excise Officer	Fee for filing an appeal
Less than or equal to ₹ 5,00,000	₹ 1,000
More than ₹ 5,00,000 but not exceeding ₹ 50,00,000	₹ 5,000
More than ₹ 50,00,000	₹ 10,000

No appeal filing fees in the certain cases: No such fee shall be payable in case:-

(i) An appeal is preferred by the Department [by PCCE/CCE/Central Excise Officer].

(ii) A memorandum of cross-objections is filed.

Fees for filing an application for rectification of mistake or restoration of an appeal/application [Sub-section (6A)]

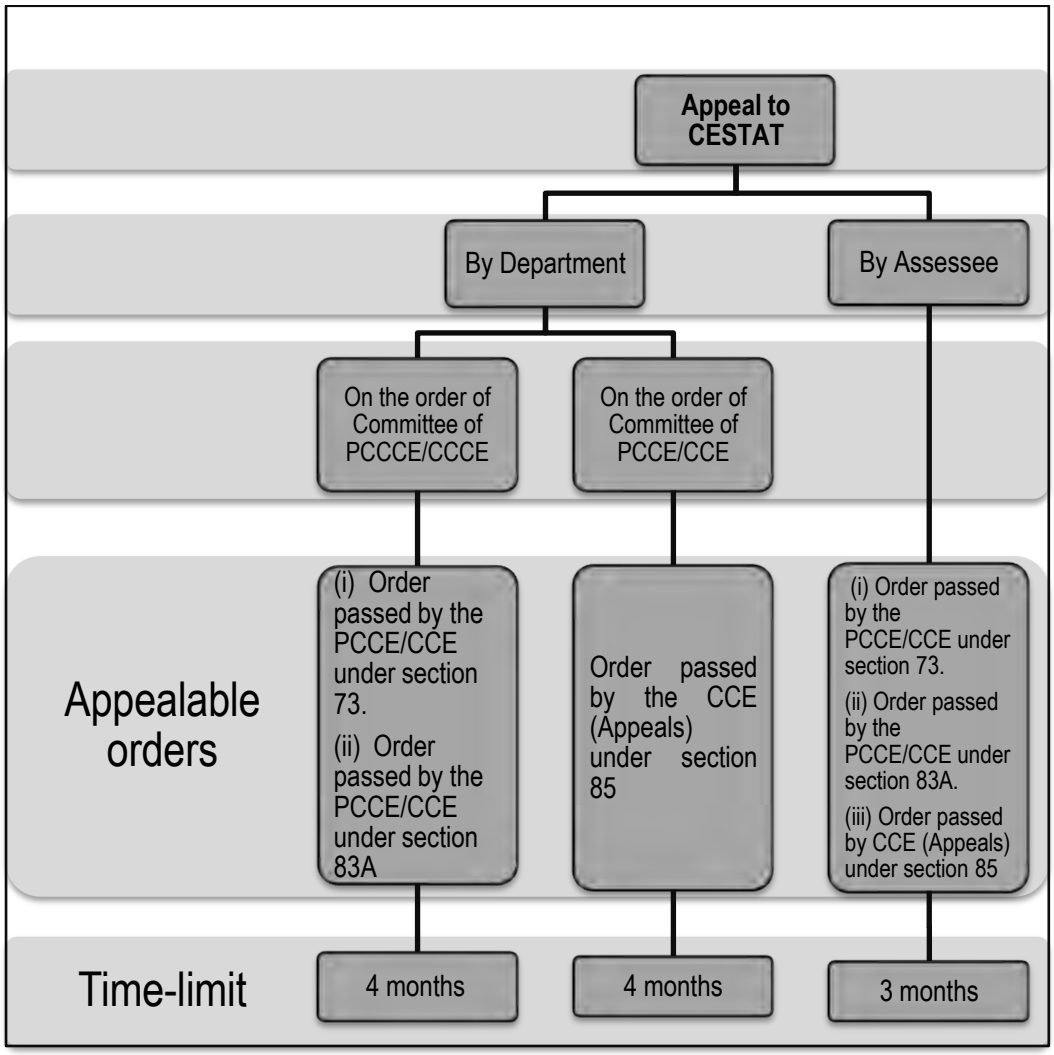
Every application made before the Appellate Tribunal, —

(a) for rectification of mistake in an appeal or for any other purpose; or

(b) for restoration of an appeal or an application,

shall be accompanied by a fee of ₹ 500.

No application filing fees in the certain cases: No such fee shall be payable in the case of an application filed by the PCCE/CCE or Assistant/Deputy Commissioner of Central Excise.



D. Appeal to High Court and Supreme Court

Appeal may be made to the High Court/Supreme Court in accordance with the provisions of the Central Excise Act which are made applicable to service tax.

Students may refer Central Excise portion for further details and analysis of the same.

8.2 Advance Ruling [Sections 96A to 96I]

Chapter VA of the Finance Act, 1994 provides for the advance ruling in respect of a question of law or fact regarding the liability to pay service tax in relation to a service proposed, in the specified manner.

(1) Definitions [Section 96A]: In this chapter unless the context otherwise requires,-

(a) Advance ruling: means the determination, by the Authority of a question of law or fact specified in the application regarding the liability to pay service tax in relation to a service proposed to be provided, by the applicant.

(b) Applicant: means :-

(i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or

(b) a resident setting up a joint venture in India in collaboration with a non-resident; or

(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

who or which, as the case may be, proposes to undertake any business activity in India;

(ii) a joint venture in India; or

(iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf,

and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 96C.

Central Government has specified a public sector company, resident public limited company, resident private limited company and ***resident firm*** for the purpose of clause (iii) above.

1. **Public sector company:** A public sector company shall have the same meaning as is assigned to it in section 2(36A) of the Income Tax Act, 1961.
2. **Public limited company:** A public limited company shall have the same meaning as is assigned to "public company" in section 3(1)(iv) of the Companies Act, 1956[1] and shall include a private company that becomes a public company by virtue of section 43A of the said Companies Act, 1956.
3. **Resident:** A resident shall have the same meaning as is assigned to it in section 2(42) of the Income-tax Act, 1961 in so far as it applies to a company.
4. **Private limited company:** A private limited company shall have the same meaning as is assigned to "private company" in section 2(68) of the Companies Act, 2013.

[1] Section 2(71) of the Companies Act, 2013

5. ***Firm: A firm shall have the meaning assigned to it in section 4 of the Indian Partnership Act, 1932 and includes-***

   (i) the limited liability partnership as defined in section 2(1)(n) of the Limited Liability Partnership Act, 2008; or

   (ii) limited liability partnership which has no company as its partner; or

   (iii) the sole proprietorship; or

   (iv) one Person Company.

   Here

   (a) Sole proprietorship means an individual who engages himself in an activity as defined in section 96A(a) of the Finance Act, 1994.

   (b) One Person Company means as defined in section 2(62) of the Companies Act, 2013.

6. ***Resident: A resident shall have the meaning assigned to it in section 2(42) of the Income-tax Act, 1961 in so far as it applies to a resident firm.***

7. **Joint venture in India:** Joint venture in India means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement.

   Thus, in case of a joint venture an applicant for advance ruling can be made only when one of the partners is non-resident.

(c) Application: means an application made to the Authority under sub-section (1) of section 96C.

(d) Authority: means the Authority for Advance Rulings, constituted under sub-section (1), or authorised by the Central Government under sub-section (2A), of section 28F of the Customs Act, 1962.

(e) Non-resident, Indian company and Foreign company: shall have the meanings respectively assigned to them in clauses (30), (26) and (23A) of section 2 of the Income-tax Act, 1961.

(f) Other words : Words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 or the rules made thereunder shall apply, so far as may be, in relation to service tax as they apply in relation to duty of excise.

(2) Vacancies, etc., not to invalidate proceedings [Section 96B]: No proceeding before, or pronouncement of advance ruling by, the Authority under this Chapter shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Authority.

(3) Application for advance ruling [Section 96C]

(a) Form of application: An applicant desirous of obtaining an advance ruling under

this Chapter may make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought.

(b) **Questions on which advance ruling can be sought:** The question on which the advance ruling is sought shall be in respect of,-

(a) classification of any service as a taxable service under Chapter V;

(b) the valuation of taxable services for charging service tax;

(c) the principles to be adopted for the purposes of determination of value of the taxable services under the provisions of Chapter V;

(d) applicability of notifications issued under Chapter V;

(e) admissibility of credit of duty or tax in terms of the rules made in this regard;

(f) determination of the liability to pay service tax on a taxable service under the provisions of Chapter V.

(c) **Copies and fees of application:** The application shall be made in quadruplicate and be accompanied by a fee of ₹ 2,500.

(d) **Time-limit for withdrawal of application:** An applicant may withdraw an application within 30 days from the date of the application.

(4) Procedure on receipt of application [Section 96D]

(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the PCCE/CCE and, if necessary, call upon him to furnish the relevant records.

(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application.

However, the Authority shall not allow the application where the question raised in the application is-

(a) already pending in the applicant's case before any Central Excise Officer, the Appellate Tribunal or any Court; or

(b) the same as in a matter already decided by the Appellate Tribunal or any Court.

However, no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard. Also, where the application is rejected, reasons for such rejection shall be given in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the PCCE/CCE.

(4) Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

(5) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.

"**Authorised representative**" has the meaning assigned to it in sub-section (2) of section 35Q of the Central Excise Act, 1944.

(6) The Authority shall pronounce its advance ruling in writing within 90 days of the receipt of application.

(7) A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the PCCE/CCE, as soon as may be, after such pronouncement.

(5) Applicability of advance ruling [Section 96E]

(1) The advance ruling pronounced by the Authority under section 96D shall be binding only-

(a) on the applicant who had sought it;

(b) in respect of any matter referred to in sub-section (2) of section 96C;

(c) on the PCCE/CCE, and the Central Excise authorities subordinate to him, in respect of the applicant.

(2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.

(6) Advance ruling to be void in certain circumstances [Section 96F]

(1) Where the Authority finds, on a representation made to it by the PCCE/CCE or otherwise, that an advance ruling pronounced by it under sub-section (4) of section 96D has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be void ab initio and thereupon all the provisions of this Chapter shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

(2) A copy of such order shall be sent to the applicant and the PCCE/CCE.

(7) Powers of Authority [Section 96G]

(1) The Authority shall, for the purpose of exercising its powers regarding discovery and inspection, enforcing the attendance of any person and examining him on oath, issuing commissions and compelling production of books of account and other records, have all the powers of a civil court under the Code of Civil Procedure, 1908.

(2) The Authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973, and every proceeding before the Authority shall be deemed to be a judicial

proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code.

(8) Procedure of Authority [Section 96H]: The Authority shall, subject to the provisions of this Chapter, have power to regulate its own procedure in all matters arising out of the exercise of its powers under this Act.

(9) Power to make rules [Section 96I]

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the form and manner for making application under sub-section (1) of section 96C;

(b) the manner of certifying a copy of advanced ruling pronounced by the Authority under sub-section (7) of section 96D;

(c) any other matter which, by this Chapter, is to be or may be prescribed.

(3) Every rule made under this Chapter shall be laid, as soon as may be, after it is made, before each House of Parliament.

8.3 Powers of the Central Government

8.3.1 Power to grant exemption from service tax [Section 93]

If the Central Government is satisfied that it is in public interest to do so, it may by notification in the Official Gazette exempt generally or subject to certain conditions specified therein, taxable service of any specified description. Such exemption may be total or partial.

The Central Government may also in public interest exempt by special order in each case, any taxable service from the whole or part of service tax leviable thereon, as it thinks fit. Such special order shall be issued only in exceptional circumstances which are to be specified in the order.

8.3.2 Power to grant rebate [Section 93A]

(1) The Central Government may grant rebate of service tax paid on input services used in the manufacturing or processing or removal or export of such goods or for provision of services, which are exported.

(2) This provision enables the Central Government to prescribe schemes of neutralization of service tax paid on input services used in export goods or services.

(3) Such rebate shall be subject to such extent and manner as may be prescribed.

(4) However, where any rebate has been allowed on any goods or services under this section and the sale proceeds in respect of such goods or consideration in respect of such services are not received by or on behalf of the exporter in India within the time allowed by the Reserve Bank of India under section 8 of the Foreign Exchange Management Act, 1999, such rebate shall, except under such circumstances or such conditions as may be prescribed, be deemed never to have been allowed.

(5) Thereupon, the Central Government may recover or adjust the amount of such rebate in such manner as may be prescribed.

8.3.3 Power to make rules [Section 94]

Section 94 gives power to central government to make rules. Accordingly, the Central Government may by way of a notification in the Official Gazette make rules for carrying out the provisions of this Chapter. Rules of the following provision may be made without prejudice to the foregoing powers:

The Central Government has been given the power to make rules which inter alia may provide for all or any of the following matters:

(i) collection and recovery of service tax under section 66 and 68;

(ii) the determination of amount and value of taxable service, ***the manner thereof, and the circumstances and conditions under which an amount shall not be a consideration,*** under section 67;

(iii) the time, manner and form in which the application for registration shall be made under section 69(1) and 69(2);

(iv) the form, manner and frequency of the returns to be furnished under section 70(1) and section 70(2) and the late fee for delayed furnishing of return under section 70(1);

(v) the manner of provisional attachment of property under sub-section (1) of section 73C;

(vi) publication of name of any person and particulars relating to any proceeding under sub-section (1) of section 73D;

(vii) the form in which appeals may be filed under sections 85 and 86(6) and the manner in which they may be verified;

(viii) the manner in which the memorandum of cross objections under section 86(4) may be verified;

(ix) the credit of service tax paid on the services consumed or duties paid or deemed to have been paid on goods used for providing a taxable service

(x) the manner of recovery of any amount due to the Central Government under section 87;

(xi) provisions for determining export of taxable services;

(xii) grant of exemption to, or rebate of service tax paid on, taxable services which are exported out of India;

(xiii) rebate of service tax paid or payable on the taxable services used for providing taxable services which are exported out of India;

(xiv) rebate of service tax paid or payable on the taxable services used as input services in the manufacturing or processing of goods exported out of India under section 93A;

(xv) the date for determination of rate of service tax and the place of provision of taxable service under section 66C;

(xvi) provide for the amount to be paid for compounding and the manner of compounding of offences;

(xvii) provide for the settlement of cases, in accordance with sections 31, 32 and 32A to 32P (both inclusive), in Chapter V of the Central Excise Act, 1944 as made applicable to service tax vide section 83;

(xviii) imposition, on persons liable to pay service tax, for the proper levy and collection of the tax, of duty of furnishing information, keeping records and the manner in which such records shall be verified;

(xix) make provisions for withdrawal of facilities or imposition of restrictions (including restrictions on utilisation of CENVAT credit) on provider of taxable service or exporter, for dealing with evasion of tax or misuse of CENVAT credit;

(xx) authorisation of the Central Board of Excise and Customs or PCCCE/CCCE to issue instructions, for any incidental or supplemental matters for the implementation of the provisions of this Act;

(xxi) any other matter which by this Chapter is to be or may be prescribed.

Every rule, scheme framed under section 71 and every notification issued under section 93 shall be laid before each House of Parliament as soon as possible. It shall be laid for a total period 30 days.

Rules made under section 94 to be applicable to services other than taxable services [Section 93B]: All rules made under section 94 and applicable to the taxable services shall also be applicable to any other service in so far as they are relevant to the determination of any tax liability, refund, credit of service tax or duties paid on inputs and input services or for carrying out the provisions of Chapter V of the Finance Act, 1994.

8.3.4 Power to remove difficulties [Section 95]

Section 95 empowers Central Government to issue orders for removing difficulties, which may arise in respect of implementing or assessing the value of any taxable service incorporated by any of the Finance Acts.

The order so made has to be laid, as soon as may be after it is made, before each House of the Parliament.

8.3.5 Power to publish information in respect of defaulters [Section 73D]

The Central Government may cause to be published the name of any person and any other particulars relating to any proceedings under this Chapter in respect of such person in such manner as may be prescribed subject to the following conditions:-

(i) Central Government is of the opinion that it is necessary/expedient in the public interest to publish such names and particulars, and

(ii) Publication under this section shall be made in relation to any penalty imposed under this Chapter only after the time for presenting an appeal to the Commissioner (Appeals) under section 85 or the Appellate Tribunal under section 86, as the case may be, has expired without an appeal having been presented or the appeal, if presented, has been disposed of.

Explanation: In the case of a firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, shall also be published if, in the opinion of the Central Government, circumstances of the case justify it.

Service Tax (Publication of Names) Rules, 2008 have been notified *vide Notification No. 15/2008-S.T. dated 01.03.2008*.

8.4 Powers of Central Excise Officers

8.4.1 Access to registered premises [Rule 5A(1)]: An officer authorised by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue [Sub-rule (1)].

8.4.2 Power to search premises [Section 82]

Where the Joint Commissioner/Additional Commissioner of Central Excise/such other Central Excise officer as may be notified by the Board has reasons to believe that any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Chapter, are secreted in any place, he may authorise in writing any Central Excise officer to search for and seize or may himself search and seize such documents or books or things. The search shall be subject to the Code of Criminal Procedure, 1973.

8.5 Audit under service tax

Service tax audit is a verification of financial accounts and other records particularly records relating to provision of service by the assessees to ascertain that service tax has been correctly paid. The statutory provisions relevant for service tax audit are rule 5A(2) of the Service Tax Rules, 1994 and section 72A of the Finance Act, 1994.

8.5.1 Audit by Department [Rule 5A(2)]: Since the returns filed with the Department are based on self assessment, the correctness of the payment and application of statute are verified during the periodical audits conducted by the Department. The Department conducts audit under the authority of rule 5(A)(2) of the Service Tax Rules, 1994.

Rule 5A(2) is within the scope of rule making powers under section 94(2)(k) [explained in point (xviii) under Heading 8.3.3.]. The expression "verified" used in section 94(2)(k) is of wide import and would include within its scope, audit by the departmental officers, as the procedure prescribed for audit is essentially a procedure for verification mandated in the statute [Circular No. 181/7/2014 ST dated 10.12.2014].

(1) ***Furnishing of records on demand [Rule 5A(2): Every assessee, shall, on demand make available to the officer so empowered or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, or a Cost***

Accountant or Chartered Accountant nominated under section 72A of the Finance Act, 1994,-

(i) the records maintained or prepared by him in terms of rule 5(2);

(ii) the cost audit reports, if any, under section 148 of the Companies Act, 2013; and

(iii) the income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961,

for the scrutiny of the officer or the audit party, or the Cost Accountant or Chartered Accountant, within the time limit specified by the said officer or the audit party or the Cost Accountant or Chartered Accountant, as the case may be.

Since there are no prescribed service tax records, records maintained by the assessees are requested for scrutiny. These may include financial statements, invoices, ledgers, bank statements, CENVAT credit documents, accounting policies etc., apart from statutory returns.

(2) **Selection criteria of the assessees for the audit:** ***Circular No. 995/2/2015 CX dated 27.02.2015, which has come into effect from 1st July, 2015 has specified new norms to be followed by Audit Commissionerates. The new norms do not prescribe any frequency for conducting audits. The new norms have introduced risk based selection of assessees for audit based on identified/quantified risk parameters and also introduced jurisdictional specific criteria (as opposed to uniform norm across the country) for segmenting the taxpayer into large, medium & small categories.***

The criteria for categorizing an assessee as large, medium or small would be value of services rendered and services received (which are dutiable on reverse charge basis) and total service tax paid. The threshold limits of value of services for categorizing the units into large, medium and small would be dependent upon (i) the available manpower in the Audit Commissionerate and (ii) the assessee base, turnover and service tax paid by each assessee in the jurisdiction of the Audit Commissionerate. It may be noted that threshold limits may vary from one Audit Commissionerate to another Audit Commissionerate in view of varying number of assessees and quantum of value of services and service tax paid in case of each assessee.

The selection of assessees would be done based on the risk evaluation method prescribed by the Directorate General of Audit. The risk evaluation method would be separately communicated to the Audit Comissionerates during the month of March / April every year. The risk assessment function will be jointly handled by National Risk Managers (NRM) situated in the Directorate General of Audit and Local Risk Managers (LRM) heading the Risk Management section of Audit Commissionerates. The Audit Commissionerates could also select few units at random or based on risk perception in each category of large, medium and small tax payers.

(3) Objections raised during audit: The auditors discuss each and every objection they are going to raise and issue a spot memo. If the assessee voluntarily rectifies the error and corrects the same by payment of service tax, interest and penalty etc., the para would be settled. If the Department does not agree with the assesse's reply, a show cause notice is issued by the Audit Commissionerate answerable to respective competent authority in executive Commissionerate. The assessee's written reply and submissions made in personal hearing will be considered and the case will be adjudicated.

8.5.2 Special audit by Chartered Accountant/Cost Accountant: Section 72A provides for the special audit by a practicing Chartered Accountant/Cost Accountant.

(1) Circumstances under which PCCE/CCE may order Special audit: If the PCCE/CCE, has reasons to believe that any person liable to pay service tax (herein referred to as "such person"),—

(i) has failed to declare or determine the value of a taxable service correctly; or

(ii) has availed and utilised credit of duty or tax paid—

(a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or

(b) by means of fraud, collusion, or any wilful misstatement or suppression of facts; or

(iii) has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises failing under the jurisdiction of the said Commissioner,

he may direct such person to get his accounts audited by a Chartered Accountant or Cost Accountant nominated by him, to the extent and for the period as may be specified by the Commissioner.

(2) Submission of duly signed and certified report to the PCCE/CCE within the specified period: The said Chartered Accountant or Cost Accountant shall, within the period specified by the said PCCE/CCE, submit a report duly signed and certified by him to the said PCCE/CCE mentioning therein such other particulars as may be specified by him.

(3) Opportunity of being heard: The person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the special audit and proposed to be utilised in any proceeding under the provisions of this Chapter or rules made thereunder.

(4) In case accounts are already audited under any other law: The provisions of sub-section (1) shall apply even if the accounts of such person have been audited under any other law for the time being in force.

(i) **Chartered Accountant** means a person who is a member of the Institute of Chartered Accountants of India.

(ii) **Cost Accountant** a person who is a member of the Institute of Cost and Works Accountants of India.

8.6 Miscellaneous

8.6.1 Power to appoint officers [Rule 3]: Rule 3 of the Service Tax Rules, 1994, empowers Central Board of Excise and Customs to appoint Central Excise Officers as it thinks fit for exercising the powers under Chapter V of the Act within such local limits as it may also assign to them as also specify the taxable service in relation to which any such Central Excise Officer shall exercise his powers.

8.6.2 **Power to issue instructions for supplemental matters [Rule 12]:** ***Rule 12 of the Service Tax Rules, 1994 provides that the Board or the Chief Commissioners of Central Excise may issue instructions for any incidental or supplemental matters for the implementation of the provisions of the Finance Act, 1994.***

8.6.3 Manner of determination of commencement and termination of time: Section 9 of the General Clauses Act, 1897 lays down the provision relating to commencement and termination of time. It stipulates that in any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from, and, for the purpose of including the last in a series of days or any other period of time, to use the word to.

In simple words, while computing time, the rule is to exclude the first day and to include the last day. Courts have held that the word "from" is akin to "after" and that the word "from" if used for the purpose of and in reference to the computation of time, as for example, from a stated date, that stated date is *prima facie* excluded from computation. Although on some occasions, Courts have a taken a view that the question as to whether the stated date should or should not be so excluded, should be decided according to the context in which the word "from" occurs.

It is worthwhile to mention here that the Supreme Court, in case of *M/s. Econ Antri Ltd v. M/s. Rom Industries Ltd. & Anr,* had also taken a similar view on this point and decided that while computing the period of limitation, the day on which the offence is committed/ date of cause of action has to be excluded.

Another point which needs a mention here is that section 3(35) of the General Clauses Act, 1897 defines the expression "month" to mean a month reckoned according to the British calendar. Further, Allahabad High Court in case of *CCus & CEx. v. Ashok Kumar Tiwari 2015 (37) STR 727 (All.)* has held that where the legislature has stipulated the period of limitation in terms of months, such a stipulation can only mean a calendar month and not 30 days.

8.7 Applicability of provisions of the Central Excise Act, 1944 to service tax [Section 83]

The following provisions of the Central Excise Act, 1944 are made applicable to service tax *vide* section 83.

Section No.	Title
Sub-section (2A) of section 5A	An explanation inserted in a notification/order within one year of the date of issue of such notification/order for clarifying the scope or applicability thereof shall apply retrospectively from the date of issue of the original notification/order.
Sub-section (1) of section 9A	Certain offences to be non-cognizable
Section 9AA	Offences by companies
Section 9B	Power of Court to publish name, place of business, etc., of persons convicted under the Act
Section 9C	Presumption of culpable mental state
Section 9D	Relevancy of statements under certain circumstances
Section 9E	Application of section 562 of the Code of Criminal Procedure, 1898, and of the Probation of Offenders Act, 1958
Section 11B	Claim for refund of duty.
Section 11BB	Interest on delayed refunds.
Section 11C	Power of Central Government not to recover duty of excise not levied or short levied as a result of general practice
Section 12	Application of provisions of Act No. 52 of 1962 to Central Excise Duties.
Section 12A	Invoice to indicate the amount of duty paid thereon.
Section 12B	Presumption that the incidence of duty has been passed on to the buyer.
Section 12C	Consumer Welfare Fund.
Section 12D	Utilization of the Consumer Welfare Fund.
Section 12E	Powers of Central Excise Officers.
Section 14	Power to summon persons to give evidence and produce documents in inquiries under this Act.
Section 15	Officers required to assist Central Excise Officers
Section 15A	Obligation to furnish information return
Section 15B	Penalty for failure to furnish information return

Section 31	Settlement Commission
Section 32	
Section 32A to 32P	
Section 33A	Adjudication Procedure
Section 34A	Confiscation/penalties not to interfere with other punishments
Section 35EE	Revision by the Central Government
Section 35F	Deposit of certain percentage of duty demanded or penalty imposed before filing appeal
Section 35FF	Interest on delayed refund of amount deposited under section 35F (pre-deposit)
Section 35G	Appeal to High Court
Section 35H	Application to High Court
Section 35I	Power of High Court or Supreme Court to require statement to be amended
Section 35J	Case before High Court to be heard by not less than two judges
Section 35K	Decision of High Court or Supreme Court on the case stated
Section 35L	Appeal to the Supreme Court
Section 35M	Hearing before Supreme Court
Section 35N	Sums due to be paid notwithstanding reference, etc.
Section 35O	Exclusion of time taken for copy
Section 35Q	Appearance by authorised representative
Section 35R	CBEC empowered to issue instructions regarding non-filing of appeal in certain cases
Section 36	Definitions
Section 36A	Presumptions as to documents in certain cases
Section 36B	Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence.
Section 37A	Delegation of powers
Section 37B	Instructions to Central Excise Officers
Section 37C	Service of decisions, orders, summons, etc.
Section 37D	Rounding off of duty, etc.
Section 38A	Effect of amendments, etc., of rules, notifications or orders
Section 40	Protection of action taken under the Act.

FINAL COURSE STUDY MATERIAL

PAPER 8

INDIRECT TAX LAWS

MODULE – 3: CUSTOMS & FOREIGN TRADE POLICY

BOARD OF STUDIES
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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As amended by the Finance Act, 2015

Edition	:	November, 2015
Reprint Edition	:	November, 2016
Website	:	www.icai.org
Department/ Committee	:	Board of Studies
E-mail	:	bosnoida@icai.in
ISBN No.	:	
Price	:	
Published by	:	The Publication Department on behalf of The Institute of Chartered Accountants of India, ICAI Bhawan, Post Box No. 7100, Indraprastha Marg, New Delhi-110 002, India. Typeset and designed at Board of Studies.
Printed by	:	

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1

Basic Concepts

1.1 Introduction

Meaning of word "customs"

Customs is a form of indirect tax. Standard English dictionary defines the term **'customs'** as duties imposed on imported or less commonly exported goods. This term is usually applied to those taxes which are payable upon goods or merchandise imported or exported.

Historical Background

The term **'customs'** derives its colour and essence from the term 'custom', which means a habitual practice or course of action that characteristically is repeated in like circumstances. Duties on import and export of goods have been levied from time immemorial by all the countries. In the times, when the predominant system of governance was monarchy, it was customary for a trader bringing the goods to a particular kingdom to offer certain offerings as gifts to the King for allowing him to sell his goods in that kingdom. Over a period of time, the system of governance took a paradigm shift from monarchy in favour of democracy.

Kautiliya's Arthashastra also refers to shulka (Customs Duty) consisting of import duty and export duty to be collected at the city gates on both goods coming in and going out. Subsequently, the levy of tax on goods imported into the country was organised through legislation during the British period.

The Customs Act was passed and promulgated in India by the Parliament in the year 1962 which replaced the erstwhile Sea Customs Act, 1878. Further, the Customs Tariff Act was passed in the year 1975 to replace the Indian Tariff Act, 1934. The Customs Tariff Act was amended in the year 1985 to move in times with and to deal with the complexities resulting from the rapid development in science and technology and consequent industrial development and expansion of manufacturing and trading activities. The Customs Act, as it stands now, consolidates the entire law on the subject of import and export duties, which were earlier contained in various enactments like the Sea Customs Act, 1878, In-land Bounded Warehousing Act, 1896 and the Land Customs Act, 1924. Thus, now the Act stands as a complete code in itself as to the levy and collection of duties on import and export of goods.

1.2 Constitutional provisions

All the enactments enacted by the Parliament should have its source in the Constitution of India. The power for enacting the laws is conferred on the Parliament and on the legislature of a State by Article 245 of the Constitution. The said Article states:

Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the state. No law made by the Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246 governs the subject matter of the laws made by the Parliament and by the legislature of states. The matters are listed in the seventh schedule to the Constitution.

The seventh schedule is classified into three lists as follows:

List I [referred as Union List]

This list enumerates the matters in respect of which the Parliament has an exclusive right to make laws.

List II [referred as State List]

This list enumerates the matters in respect of which the legislature of any state has an exclusive right to make laws.

List III [referred as the concurrent list

This list enumerates the matters in respect of which both the Parliament and, subject to List I, legislature of any state, have powers to make laws.

Parliament has a further power to make any law for any part of India not comprised in a state, notwithstanding that such matter is included in the state list.

Some of the relevant entries in the lists referred to above are:-

- **Union List**

Entry No.	Subject matter
82	Taxes on income other than agricultural income
83	Duties of Customs including Export duties
84	Duties of excise on tobacco and other goods manufactured or produced in India

except:

(a) alcoholic liquors for human consumption

(b) opium, Indian hemp and other narcotic drugs and narcotics; but

including

medicinal and toilet preparations containing alcohol, or any substance stated before.

92A Taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter State Trade or Commerce.

- **Concurrent List**

Entry No.	Subject matter
35	Mechanically propelled vehicles including the principles on which taxes on

such vehicles are to be levied.

44 Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

The Parliament is authorised by virtue of Article 271 to increase any of the taxes or duties by imposing a surcharge and the amount collected as such shall form part of the Consolidated Fund of India.

1.3 An overview of the Customs Act, 1962

The entire gamut of the Act is grouped into seventeen chapters.

The following table presents an overview of the said chapters and aims at securing the reader's understanding of the provisions of the Act in a proper perspective.

Ch. No.	Chapter Heading	Sections	Content
I	Preliminary	1 & 2	Short title and definitions
II	Officers of Customs	3 to 6	Classes, appointment and powers of the customs officers.
III	Appointment of Customs ports, airports, warehousing stations etc.	7 to 10	Appointment of ports, Airports, landing stations and customs area
IV	Prohibition on importation and exportation of goods	11	Power to prohibit the import or export of goods..
IVA	Detection of illegally imported goods and prevention of the disposal thereof	11A to 11G	Notified goods, control over storage, sale, accounting, transportation etc.
IVB	Detection and prevention of illegal export of goods	11H to 11M	Notified goods, storage, transportation etc.
IVC	Exemption from Ch. IVA and Ch. IVB	11N	Central Government's power to grant exemption.
V	Levy and exemption of Customs duty	12 to 28BA	Dutiable goods, valuation, rate of duty, assessment, remission, exemption, interest on delayed payments.
VA	Indicating amount of duty in the price of goods	28C & 28D	Price of goods and passing of incidence of duty
VB	Advance rulings	28E to 28M	Authority, application, procedure, applicability and powers.
VI	Control over conveyances carrying imported or	29 to 43	Arrival/departure reports, Import/Export general manifest,

	export goods		entry inwards, place time and restrictions on loading/unloading, water borne goods etc.
VII	Clearance of goods	44 to 51	Bill of entry, shipping bill, clearance for home consumption/warehousing and exportation, storage of goods,
VIII	Goods in transit	52 to 56	Transit and transhipment procedures
IX	Warehousing	57 to 73	Appointment & licensing of warehouse, bonding of goods, period of warehousing, payment of rent and charges, clearance of warehoused goods, allowance for volatile goods
X	Drawback	74 to 76	Drawback allowable, Interest allowable, prohibition and regulation
XA	Special Provisions relating to Special Economic Zone	76A to 76N	Omitted in view of the introduction of a separate Act namely, Special Economic Zones Act, 2005
XI	Special provisions relating to baggage, goods imported or exported by posts and stores	77 to 90	Declaration, rate of duty and valuation, exemption and procedures
XII	Coastal goods and vessels carrying coastal goods	91 to 99	Entry, restrictions, clearance, loading and unloading and application.
XIII	Searches, Seizure and Arrest	100 to 110A	Powers and procedures of search, seizure and arrest.
XIV	Confiscation and penalties	111 to 127	Powers and procedures for confiscation and for levy and collection of penalties.
XIVA	Settlement of cases	127A to 127N	Application for settlement, procedure, powers of settlement commission, inspection etc.
XV	Appeals and revision	128 to 131C	Procedure and time limits for appeals and revisions
XVI	Offences and prosecutions	132 to 140A	Cognizable offences and procedures for prosecution.

XVII	Miscellaneous	141 to 161	Recovery of sums due, power to take samples, licensing of custom house agents, liability of principal and agent, delegation of powers, general power to make rules etc.

1.4 Some important definitions

1.4.1 Assessment [Section 2(2)]: "Assessment" includes provisional assessment, self-assessment, reassessment and any assessment in which the duty assessed is nil.

1.4.2 Coastal goods [Section 2(7)]: "Coastal goods" means goods, other than imported goods, transported in a vessel from one port in India to another.

1.4.3 Conveyance [Section 2(9)] "Conveyance" includes:-

(a) a vessel

(b) an aircraft and

(c) a vehicle.

As the Customs Act seeks to consolidate the laws relating to levy of duties on import and export of goods, it is necessary to cover all the modes of transport. Therefore, the Act uses the term conveyance with an inclusive definition covering all the 3 modes of transport i.e., water, air and land.

The specific terms are:

(a) vessel (by sea)

(b) aircraft (by air) and

(c) vehicle (by land).

1.4.4 Dutiable goods: [Section 2(14)]

"Dutiable goods" mean any goods:-

(a) which are chargeable to duty and

(b) on which duty has not been paid.

In order to be dutiable, any article must first satisfy both the following conditions:-

(a) The article should fall within the ambit of the word goods [defined under sec 2(22)].

(b) The article should find a mention in the Customs Tariff.

1.4.5 Export: [Section 2(18)]

The term **"export",** with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

1.4.6 Export goods: [Section 2(19)]

"Export goods" means any goods, which are to be taken out of India to a place outside India.

1.4.7 Exporter: [Section 2(20)]

"Exporter", in relation to any goods at any time between their entry for export and the time when they are exported, **includes** any owner or any person holding himself out to be the exporter.

1.4.8 Foreign going vessel or aircraft: [Section 2(21)]

"Foreign going vessel or aircraft"

means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not

includes-

- any naval vessel of any foreign Government taking part in any naval exercise;
- any vessel engaged in fishing or any other operations outside the territorial waters of India;
- any vessel or aircraft proceeding to a place outside India for any purpose whatsoever.

Hence, the definition consists of two limbs:-

(a) The first limb applies to the vessel/aircraft for the time being engaged in the carriage of passengers/goods between any port/airport in India and any port/airport outside India.

(b) The second limb includes the vessels which are undertaking activities entirely unconnected with the carriage of passengers/goods between India and a foreign country.

1.4.9 Goods: [Section 2(22)]

"Goods' includes-

(a) vessels, aircrafts and vehicles;

(b) stores;

(c) baggage;

(d) currency and negotiable instruments;

(e) any other kind of movable property;

Fundamental aspects of goods

There are two fundamental aspects for any thing to be called as goods and they are moveability and marketability.

(a) Concept of moveable

The first aspect of goods is that they should be movable. The Supreme Court has enunciated this principle in the case of *UOI v. Delhi Cloth Mills (1977) ELT J – 199* and in

South Bihar Sugar Mills v. UOI (1978) ELTJ 336 by holding that to be called goods, the articles are such as are capable of being bought and sold in the market. Though these judgments are rendered in the context of excise duty, the subject matter being pari materia, they can also be applied in the context of customs duty.

(b) Concept of marketable

The second fundamental aspect of goods is that they should be capable of being marketed. Marketability is the capability of an article to be put into market for sale. Whether a particular article is marketable or not is decided on the circumstances of each case.

Detailed discussions on these subjects are in Chapter 1 of the Excise module.

1.4.10 Import: [Section 2(23)]

The term **"import"** with its grammatical variations and cognate expressions means bringing into India from a place outside India.

For a detailed discussion refer to the Chapter-7 on Importation, Exportation and Transportation of Goods.

1.4.11 Imported goods: [Section 2(25)]

"Imported goods"

means any goods brought into India from a place outside India but

does not include goods which have been cleared for home consumption.

For a detailed discussion refer to the Chapter on Importation, Exportation and Transportation of Goods.

1.4.12 Importer: [Section 2(26)]

"Importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, **includes** any owner or any person holding himself out to be the importer.

For a detailed discussion refer to the Chapter on Importation, Exportation and Transportation of Goods.

1.4.13 India: [Section 2(27)]

"India" includes the territorial waters of India.

Meaning and significance of territorial waters of India

Territorial waters of India extend to 12 nautical miles into sea from the appropriate base line.

Goods are deemed to have been imported if the vessel enters the imaginary line on the sea at the 12th nautical mile i.e. if the vessel enters the territorial waters of India. Therefore, a vessel not bound to India should not enter these waters.

India includes not only the surface of sea in the territorial waters, but also the air space above and the ground at the bottom of the sea.

1.4.14 Indian customs waters: [Section 2(28)]

"Indian customs waters"

means the waters extending into the sea up to the limit of contiguous zone of India (under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976) and **includes** any bay, gulf, harbour, creek or tidal river.

Analysis

Indian customs waters cover both the Indian territorial waters and contiguous zone as well. Indian territorial waters extend up to 12 nautical miles (nm) from the base line whereas contiguous zone extend to a further 12 nm from the outer limit of territorial waters. Therefore, Indian customs waters extend to a total of 24 nm from base line.

Significance of Indian customs waters

(i) If an officer of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132/133/ 135/135A/136, he may arrest such person informing him of the grounds for such arrest [Section 104 of the Customs Act, 1962].

(ii) Where the proper officer has reason to believe that any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any smuggled goods, he may stop any such vehicle, animal or vessel or, in case of an aircraft, compel it to land [Section 106 of the Customs Act, 1962].

(iii) Any vessel which is or has been within the Indian customs waters is constructed, adapted, altered or fitted in any manner for the purpose of concealing goods shall be liable to confiscation [Section 115(1)(a) of the Customs Act, 1962].

(iv) Customs officer has the power to search any person who has landed from/about to board/is on board any vessel within Indian customs waters and who has secreted about his person, any goods liable to confiscation or any documents relating thereto [Section 100 of the Customs Act, 1962].

(v) Any goods which are brought within the Indian customs waters for the purpose of being imported from a place outside India, contrary to any prohibition imposed by or under this Act or any other law for the time being in force, shall be liable to confiscation [Section 111(d) of the Customs Act, 1962].

1.4.15 Person-in-charge: [Section 2(31)]

S.No.	In relation to	Person-in-charge means
1.	vessel	the master of the vessel
2.	aircraft	the commander or the pilot-in-charge of the aircraft

3.	railway train	the conductor, guard or other person having the chief direction of the train
4.	any other conveyance	the driver or other person-in-charge of the conveyance

1.4.16 Prohibited Goods: [Section 2(33)]

"Prohibited goods"

means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but

does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

1.4.17 Stores: [Section 2(38)]

"Stores" means goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting.

Stores are also goods but are covered by special provisions in sections 85 to 90. The definition **does not cover goods for use in a vehicle**.

For a detailed discussion refer to the Chapter on Importation, Exportation and Transportation of Goods.

1.4.18 Tariff value: [Section 2(40)]

"Tariff value", in relation to any goods, means the tariff value fixed in respect thereof under sub-section (2) of section 14.

1.4.19 Value: [Section 2(41)]

"Value", in relation to any goods, means the value thereof determined in accordance with the provisions of sub-section (1) or sub-section (2) of section 14.

1.4.20 Vehicle:[Section 2(42)]

"Vehicle" means conveyance of any kind used on land and includes a railway vehicle.

1.4.21 Warehouse:[Section 2(43)]

"Warehouse" means a public warehouse appointed under section 57 or a private warehouse licensed under section 58.

1.4.22 Warehoused Goods:[Section 2(44)

"Warehoused goods" means goods deposited in a warehouse.

Few other important terms

1. Baseline

It is the lower water mark along the coast.

2. Indian territorial waters

Indian territorial waters extend up to 12 nautical miles (22 km) from the baseline of India.

3. Contiguous zone of India

It is an area 12 nautical miles beyond the Indian territorial waters. Therefore, it is at a distance of twenty-four nautical miles from the nearest point of the baseline.

4. Exclusive economic zone of India

It is an area beyond the Indian territorial waters. The limit of exclusive economic zone is 200 nautical miles from the nearest point of the baseline.

5. Continental Shelf of India

Continental shelf is the part of the sea floor adjoining a land mass where the depth gradually increases before it plunges into the ocean deeps. The maximum depth of sea water in the continental shelf is 200 meters. Continental shelf of India extends beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline.

2

Levy of and Exemptions from Customs Duty

Three stages of imposition of taxes and duties

All taxes and duties are imposed in three stages, which are levy, assessment and collection:-

(a) **Levy** is the stage where the declaration of liability is made and the persons or the properties in respect of which the tax or duty is to be levied is identified and charged.

(b) **Assessment** is the procedure of quantifying the amount of liability. The liability to tax or duty does not depend upon assessment.

(c) The final stage is where the tax or duty is actually collected. The **collection of tax or duty** may for administrative or other reasons be postponed to a later time as done in the case of excise duty, wherein the liability towards duty arises upon manufacture of excisable goods, the duty is collected only upon removal of goods from the factory.

2.1 Determining Factors

The liability towards customs duty is broadly based upon the following 3 factors:

1. the goods, the point and the circumstances under which the customs duty becomes leviable;
2. the procedure, the mechanism and the organization for determining the amount of customs duty and collection thereof;
3. the exemption to the levy either on grounds of morality or equity or as a result of the discretionary powers vested in the Government as a tool for planning tax structure and control of economic growth of the country.

The customs duty is considered to be levied on the goods and not on the person importing the goods or paying the duty. Equitability requires charging of duty at the same level if the circumstances of importation are similar. This has given rise to a deemed provision under section 12 of the Customs Act.

2.2 Point and circumstances of levy

2.2.1 Charging section [Section 12]

1. This section is the charging section of the Act. Except as provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being

in force, on goods imported into and exported from India [Sub-section (1)].

2. The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

Hence, there is no general exemption to goods imported by Government. But imports by Indian Navy, specific equipment required by police, Ministry of Defence, Costal Guard etc. are fully exempt from customs duty by virtue of specific notifications subject to fulfillment of conditions and/or procedure set out in the notification.

The following propositions arise from the above provisions:-

1. Duties of customs shall be levied on goods. However, it may be noted that this levy is subject to other sections in the Act. For instance:

   Section 13 – no duty on pilfered goods

   Section 22 – reduced duty on damaged goods

   Section 23 – remission of duty on destroyed goods.

2. The goods shall be such as are imported or exported to or from India;

3. The duty shall be charged at such rates as may be specified under the Customs Tariff Act, 1975.

4. Government goods shall be treated at par with non-Governmental goods for the purposes of levy of customs duty.

Analysis of section 12

(a) Charge on goods

The charge of customs duty is considered to be on the goods and not on the person importing them or paying the duty. Being such, it is expected to be passed on to the buyer.

(b) Taxable event-Import of goods into India/export of goods from India

Section 12 makes it abundantly clear that importation or exportation of goods into or out of India is the taxable event for payment of the duty of customs.

Earlier, a lot of problems were faced in determining the point at which the importation or exportation takes place. The root cause of the problem was the definition of "India" given by section 2(27). Under the said section, India includes territorial waters of India. Consequently, even an innocent entry of a vessel into the territorial waters of India would result in import of goods. Further, it was almost impossible to determine when exactly the vessel crossed the territorial waters limit. But this matter is no longer *res integra.*

Relevant judgments regarding the determination of taxable event

The main test for determining the taxable event is the happening of the event on which the charge is affixed.

I. Imports

(a) In case of goods cleared for home consumption

The Supreme Court observed that import of goods will commence when they cross the territorial waters, but continues and is completed when they become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and bill of entry for home consumption is filed.

[Garden Silk Mills v. UOI 1999 (113) E.L.T. 358 (S.C.)]

(b) In case of goods cleared for warehousing

In case of warehoused goods, the custom barriers would be crossed when they are sought to be taken out of customs and brought to the mass of goods in the country.

[Kiran Spinning Mills v. Collector of Customs 1999 (113) E.L.T. 753 (S.C.)]

II. Exports

Export of goods is complete when the goods cross the territorial waters of India.

2.2.2 Distinction between clearance for home consumption and clearance for warehousing

Clearance for home consumption implies that, the customs duty on import of the goods has been discharged and the goods are therefore cleared for utilization or consumption. The goods may instead of being cleared for home consumption be deposited in warehouse and cleared at a later time. When the goods are deposited in the warehouse the collection of customs duty will be deferred till such goods are cleared for home consumption. The revenue for the Government is safeguarded by the importer executing a bond binding himself in a sum equal to twice the amount of duty assessed on the goods at the time of import. The importer is also liable to pay interest, rent and charges for storage of goods in warehouse.

2.2.3 Duty liability in certain special circumstances

A. Re-importation of goods produced/manufactured in India [Section 20]

If goods are imported into India after exportation therefrom, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof.

It implies that goods manufactured or produced in India, which are exported and thereafter re-imported are treated on par with other goods, which are otherwise imported.

CONCESSIONS IN THIS REGARD

However, the following notifications have provided certain concessions in this regard:

(i) Concessional duty payable in case of re-importation of goods exported for repairs or exported under duty drawback, rebate etc.

S.No.	Description of goods exported	Amount of import duty payable if re-imported
1.	Goods exported under claim for duty drawback, rebate of excise duty, bond without payment of duty, etc.	Amount of incentive availed of at the time of export

2*.	Goods exported for repairs abroad	Duty payable on fair cost of repairs carried out including cost of materials used in repairs (whether such costs are actually incurred or not), insurance and freight charges, both ways.

Conditions to be satisfied for claiming the above two concession/exemptions:-

(a) Time-limit for re-importation

The time limit for re-importation is 3 years. This is extendable to 5 years.

(b) Same goods

The exported goods and the re-imported goods must be the same.

(c) No change in ownership

In case of point (2*.), the ownership of the goods should also not have changed.

[Notification no. 94/96 Cus. dated 16.12.1996]

(ii) Exemption to re-import of goods and parts thereof for repairs, reconditioning, reprocessing, remaking or similar other process

S.No.	Goods manufactured in India and re-imported for	Time-limit for re-importation from the date of exportation	Other conditions to be satisfied
1.	Repairs or for reconditioning	3 years In case of export to Nepal, such time-limit is 10 years.	(a) Goods must be re-exported within six months (extendable till one year) of the date of re-importation. (b) The Assistant Commissioner/Deputy Commissioner of Customs is satisfied as regards identity of the goods. (c) The importer at the time of importation executes a bond.
2*.	(a) Reprocessing (b) Refining (c) Re-making (d) Subject to any process similar to the processes referred to in clauses (a) to (c) above.	1 year	

[Notification no.158/95 Cus. dated 14.11.1995]

Note: In 2* above, if any loss of imported goods is noticed during such operation, such loss shall be exempted from whole of the custom duties subject to the satisfaction of Assistant/ Deputy Commissioner of Customs.

The exemption is available even if quantity re-imported is short or low in quantity as long as nature and variety of goods is same *[Saurabhmani Gems v. CC 2005 (188) E.L.T. 82 (Tri. - Del.)].*

B. Goods derelict, wreck etc [Section 21]

All goods, derelict, jetsam, flotsam and wreck brought or coming into India, shall be dealt with as if they were imported into India, unless it be shown to the satisfaction of the proper officer that they are entitled to be admitted duty-free under this Act.

Analysis of section 21

The concept of 'goods brought into India' is not confined to goods, which are intentionally brought into India, but also extends to derelict, jetsam, flotsam and wreck brought or coming into India. This implies that apart from goods which are normally imported in the course of international trade, flotsam, and jetsam, which are washed ashore and derelict and wreck brought into India out of compulsion are also treated on par with trade goods.

Meaning of the various terms

Derelict – This refers to any cargo, vessel, etc. abandoned in the sea with no hope of recovery.

Jetsam – This refers to goods jettisoned from the vessel to save her from sinking.

Flotsam – Jettisoned goods which continue floating in the sea are called flotsam.

Wreck – This refers to cargo or vessel or any property which are cast ashore by tides after ship wreck.

2.3 Procedure, mechanism and organisation for assessment of duty

2.3.1 Meaning of assessment

In the context of the customs duty, the term assessment means quantification of the amount of duty payable. The process of assessment involves the following stages.

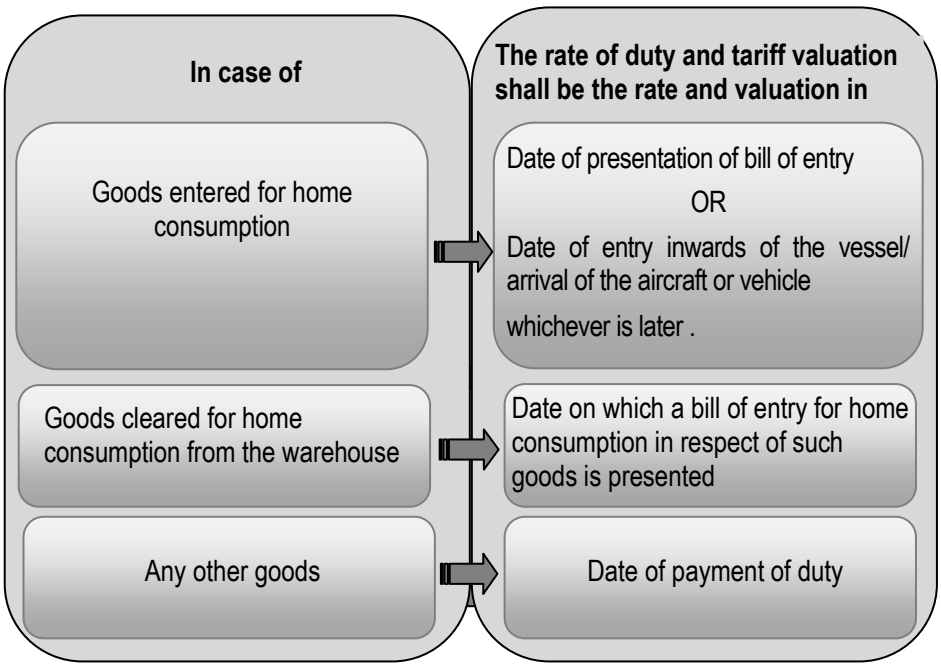
a. Determination of the quantity and total value of the consignment.
b. Determination of the proper tariff classification of the goods.
c. Determination of the appropriate rate of duty after considering the various exemptions, abatements, remissions.
d. Determining whether the goods are to be cleared for home consumption or to be deposited in the warehouse.

2.3.2 Valuation of goods [Section 14]

The method of valuation has been explained in detail in chapter 5.

2.3.3 Date for determining the rate of duty and tariff valuation of imported goods [Section 15]

Section 15 prescribes the relevant date for determining the rate of duty and tariff valuation, if any, applicable to any imported goods in the following manner:



Example: Bill of entry is presented on 01.01.20XX, the vessel arrives on 03.01.20XX. In this situation, relevant date for determination of the rate of import duty is 03.01.20XX because though for procedural purposes, the Bill of Entry was filed on 01.01.20XX, for the purpose of determining the rate of duty and tariff valuation of such goods, Bill of Entry will be deemed to have been filed on 03.01.20XX.

In respect of baggage and goods imported by post, the provisions of section 15 will not be applicable as they are independently covered by other sections.

Relevant case laws

Section 15 has generated a lot of interest in terms of case law development. In *Bharat Surfacants Pvt. Ltd. v. UOI 1989 (43) ELT 189,* the Supreme Court held that the rate of duty and tariff valuation would be done on the date of final entry of the ship. In this case, a ship entered Bombay and made prior entry on 4.7.81 at which time the duty was 12.5%. Since there was no space, the ship proceeded to Karachi and after that came back to Bombay on 23.7.81 and was granted final entry on 4.8.81 when the duty rate had been revised to 15.0%. The Supreme Court held that the rate applicable would be 15.0% only since the formality of entry inward could be done only on 4.8.81.

It would also be important to note that date of contract is not relevant and only the date of importation is relevant as per the decision of the Supreme Court in *Rajkumar Knitting Mills P.Ltd vs CC 1998 (98) ELT 292.*

It is also relevant to note that Section 15 deals with only the rate of duty and tariff valuation and not the valuation under section 14.

2.3.4 Flow of assessment and clearance procedure:

a. The master of the vessel carrying the goods calls on the port, files the arrival report and the import general manifest [IGM] with customs authorities. Import manifest in respect of vessel or aircraft is required to be filed prior to the arrival of a vessel or aircraft. Import report for vehicle is required to be submitted within 12 hours of arrival at the Customs Station.

b. Customs authorities check the documents, grant entry inwards to the vessel, assign an IGM number to the manifest and permit the master of the vessel to land and unload the cargo.

c. The vessel discharges the cargo into the custody of the port trust authorities.

d. The importer of the goods delivers the negotiable bill of lading received from the supplier of the goods to the master of the vessel and obtains the delivery order.

e. It is the right and responsibility of the importer to file an application for clearance of goods and this application is called the bill of entry.

f. The customs authorities check the bill of entry with the IGM and note the bill of entry in the IGM.

g. The bill of entry is then processed by the appraising Department to decide upon the tariff classification and valuation.

h. The customs authorities may physically examine the goods for the above purpose of classification and valuation.

i. If the bill of entry for home consumption is presented, then the customs duty is collected and "pass out of customs charge" is issued.

j. If the bill of entry for warehousing is presented, then the importer executes a warehousing bond equal to twice the amount of duty assessed and then the goods are deposited into the warehouse.

k. The importer on showing the "pass out of customs charge" to the port trust authorities takes delivery of the goods.

l. In case the goods are warehoused, the importer files a bill of entry for ex-bond clearance for home consumption at the time of clearance of goods from such warehouse.

m. The customs duty is then collected and the goods are allowed to be taken from the port.

2.4 Remission, abatement and exemptions

The Customs Act provides for remission, abatement and exemptions from customs duty in certain circumstances. These provisions are discussed in the subsequent paragraphs.

2.4.1 No duty on pilfered goods [Section 13]

If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer

shall not be liable to pay the duty leviable on such goods. However, where such goods are restored to the importer after pilferage, the importer becomes liable to duty.

Analysis of section 13

The logic behind this section is that when the goods are not under the control of the importer, he should not be required to pay duty on such goods.

(a) Conditions to be satisfied for exemption from duty

a. The imported goods should have been pilfered.

b. The pilferage should have occurred after the goods are unloaded, but before the proper officer makes the order of clearance for home consumption or for deposit into warehouse.

c. The pilfered goods should not have been restored back to the importer.

The term **'pilfer'** means "to steal, especially in small quantities; petty theft". Therefore, the term does not include loss of total package.

(b) Circumstances in which pilferage can be claimed

In order to claim pilferage the following circumstances should exist:

a. there should be evidence of tampering with the packages;

b. there should be blank space for the missing articles in the package; and

c. the missing articles should be unit articles [and not part articles]

(c) Pilferage noticed at the time of removal of goods by the importer

The pilferage of goods would normally be noticed at the time of physical verification of goods by the customs authorities. However, in some circumstances, it may so happen that the pilferage may be observed only at the time of removal of goods by the importer. In such case, the order for clearance, or as the case may be, for bonding would already have been passed. Therefore, the importer has to ask for survey either by the steamer agents or by the insurance surveyors and the report issued by them would form the basis for claiming remission. As in such the circumstances, the duty would already have been paid, the remission is allowed in the form of a refund.

(d) Following points merit consideration

1. If goods are pilfered after the order of clearance is made but before the goods are actually cleared, duty is leviable.

2. Section 13 deals with only pilferage. It does not deal with loss/destruction of goods.

3. Provisions of section 13 would not apply if it can be shown that pilferage took place prior to the unloading of goods.

4. In case of pilferage, only section 13 applies and claim of refund under section 23(1) is not permissible *[Bharat Earth Movers Ltd. v. CC 2001 (129) E.L.T. 580 (Mad.)].*

5. Section 13 applies to the goods which are under the custody of the custodian under section 45. The goods, even though held by the custodian appointed by the Collector,

are held by him for the purposes of customs formalities. Any pilferage noticed during the period is on the account of the Customs formalities. Section 13 and section 45 are independent provisions. In other words, whether duty is paid/ payable by the custodian or not, remission cannot be denied to the importer by the Department.

2.4.2 Remission of duty on goods lost, destroyed or abandoned [Section 23]

(a) Remission of duty

Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods. [Sub-section (1)].

Analysis

1. An analysis of section 23 shows that it comes into play after the duty has been paid and even after an order for home consumption has been passed, but before the goods are actually cleared, and then it is found that they have been lost/destroyed. In that case the provision is not that goods will not be liable to duty, but duty paid on such goods shall be remitted by the Assistant/Deputy Commissioner of Customs.

2. In respect of the goods which have been pilfered after they have been unloaded but before the goods are cleared for home consumption or deposit in a warehouse, section 13 would apply and the importer would not be liable to pay the duty. In cases where section 23 is attracted, the importer is entitled to remission of duty.

3. The remission of duty is permissible only in the case of total loss of goods. This implies that the loss is forever and beyond recovery. The loss referred to in this section is generally due to natural causes like fire, flood, etc.

4. The loss referred to in sub-section (1) may be at the warehouse also.

5. In the above situation, the loss/ destruction have to be proved to the satisfaction of the Assistant Commissioner or Deputy Commissioner. Thereupon, he may pass remission orders canceling the payment of duty. In case duty has already been paid, refund can be obtained after getting the remission orders.

(b) Right to relinquish the title to the goods-abandonment of goods

The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon.

However, the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Analysis

1. Meaning of relinquish

"Relinquish" means to give over the possession or control of, to leave off.

2. The aforementioned right can be exercised at any time before the passing of the order for clearance for home consumption. Before that date, it is open to the importer to relinquish the title to the goods.

3. Goods abandoned by importers

Some times, it may so happen that the importer is unwilling or unable to take delivery of the imported goods. Some of the likely causes may be:

(i) the goods may not be according to the specifications;

(ii) the goods may have been damaged or deteriorated during voyage and as such may not be useful to the importer;

(iii) there might have been breach of contract and, therefore, the importer may be unwilling to take delivery of the goods.

In all the above cases, the goods having been imported, the liability to customs duty is imposed and, therefore, the importer has to relinquish his title to the goods unconditionally and abandon them. Relinquishment is done by endorsing the document of title, viz. Bill of Lading, Airway Bill, etc. in favour of the Principal Commissioner/Commissioner of Customs along with the invoice. If the importer does so, he will not be required to pay the duty amount.

However, the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

(c) Distinction between section 13 and section 23

The provisions of section 13 and section 23 can be better appreciated after going through the following points of distinction:-

Basis	Pilferage of goods under section 13	Loss or destruction of goods under section 23
Meaning	The word 'pilfer' means to steal, especially in small quantities; petty theft.	The word 'lost' or 'destroyed' refers to total loss of goods i.e. loss is forever and beyond recovery. Abandonment of goods is possible where the importer is unwilling/unable to take the delivery of the imported goods.
Duty on goods	The importer shall not be liable to pay the duty leviable on such goods.	The duty paid on such goods shall be remitted to the importer.

Subsequent restoration of goods	Where the pilfered goods are restored to the importer after pilferage, the importer become liable to duty.	In case of destruction of goods, the restoration is not possible.
Warehoused goods	Provisions of section 13 are not applicable to warehoused goods.	Provisions of section 23 apply to warehoused goods also.
Onus to prove the pilferage/destruction or loss of goods	The onus to prove the pilferage does not lie on the importer as it is obvious at the time of examination by the proper officer.	The importer has to prove the loss/destruction to the satisfaction of the Assistant/Deputy Commissioner of Customs.
Time of occurrence of pilferage or loss/destruction	The imported goods must have been pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse.	The imported goods must have been lost/destroyed at any time before clearance for home consumption under section 47.

2.4.3 Abatement of duty on damaged or deteriorated goods [Section 22]

Where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs -

(a) that any imported goods had been damaged or had deteriorated at any time before or during the unloading of the goods in India; or

(b) that any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under section 17, on account of any accident not due to any wilful act, negligence or default of the importer, his employee or agent; or

(c) that any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due to any wilful act, negligence or default of the owner, his employee or agent,

such goods shall be chargeable to duty in accordance with the provisions of sub-section (2) [Sub-section (1)].

The duty to be charged on the goods referred to in sub-section (1) shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated goods bears to the value of the goods before the damage or deterioration [Sub-section (2)].

For the purposes of this section, the value of damaged or deteriorated goods may be ascertained by either of the following methods at the option of the owner:-

(a) the value of such goods may be ascertained by the proper officer, or

(b) such goods may be sold by the proper officer by public auction or by tender, or with the consent of the owner in any other manner, and the gross sale proceeds shall be deemed to be the value of such goods [Sub-section (3)].

Analysis

(a) Cases where the abatement is available

Abatement is available if the goods are damaged/deteriorated under any of the following circumstances:

S.No.	Goods damaged/deteriorated	
1.	before or during unloading	
2.	by accident after unloading but before examination for assessment by the customs authorities	Provided such accident is not due to any wilful act, negligence or default of the importer, his employee or agent
3.	by accident in warehouse before their actual clearance from such warehouse	

Meaning of damage

The term **'damage'** denotes physical damage to the goods. This implies that the goods are not fit to be used for the purpose for which they are meant.

Meaning of deterioration

Deterioration is reduction in quality of goods due to natural causes.

(b) Amount of duty chargeable after abatement

$$= \text{Duty on goods before damage/deterioration} \times \frac{\text{Value of damaged/deteriorated goods}^{*}}{\text{Value of goods before damage/deterioration}}$$

Illustration: If the value of goods is ₹ 10,000 and after damage the value is ₹ 2,000 then duty payable on ₹ 10,000/- should be appropriately reduced to 20% (proportion of 2000 to 10000).

(c) *Valuation of the damaged or deteriorated goods

The value shall be:-

(a) Value ascertained by the proper officer

or

(b) The proper officer may sell such goods by public auction/tender or if the importer agrees, in any other manner and the gross sale proceeds shall be deemed to be the value of such goods.

2.4.4 Denaturing or mutilation of goods [Section 24]

Section 24 of the Customs Act, 1962 provides that an importer can request Central Government to make rules for permitting to denature/mutilate the imported goods, which are

ordinarily used for more than one purpose, so as to render them unfit for one or more of such purpose.

If any imported goods can be used for more than one purpose and duty is leviable on the basis of its purpose of utilisation, than denaturing or mutilation of such goods is useful. By denaturing, goods are made unfit for other purposes. After denaturing process, goods can be used only for one purpose and accordingly duty can be levied.

Denaturing of Spirit Rules, 1972 specify procedure for denaturing spirit.

Example

Ethyl Alcohol which is not denatured attracts a higher rate of customs duty whereas denatured ethyl alcohol attracts lower rate of duty. Assuming undenatured ethyl alcohol is imported, certain very bitter chemicals can be added to denature the spirits as per Rules and once they are denatured, they attract the lower rate of duty.

2.4.5 Exemption from customs duty [Section 25]

Central Government's power to grant exemption

Article 265 of the Constitution provides that "No tax shall be levied or collected except by authority of law". The power of the Central Government to alter the duty rate structure is known as delegated legislation and this power is always subject to superintendence and check by Parliament.

a. General exemption: If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, goods of any specified description from the whole or any part of duty of customs leviable thereon.

b. Special exemption: If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty, any goods on which duty is leviable only under circumstances of an exceptional nature to be stated in such order. Further, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.

Both the above mentioned exemptions may be granted by providing for the levy of duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable. Further, the duty leviable under such altered form or method shall in no case exceed the statutory duty leviable under the normal form or method.

2.4.6 Rationale for grant of exemption

The power for grant of exemption vests with the Central Government subject to the overall control of the Parliament. The Government on a rational basis may discretely use this power and the exemptions may be based on any of the following bases:

a. Moral grounds, where the duty should not be levied at all. Some of the instances, which may be given, are;

(i) Where the goods do not reach the Indian soil at all.
(ii) Where the goods have reached the Indian soil but are not available for consumption.
(iii) Where the goods get damaged or deteriorated in transit.

b. Discretionary provision, where the exemption is used for controlling the economy and industrial growth of the country.

♦ **Interpretation of Exemption Notifications**

In *Kasinka Trading v. U.O.I. 1994 (74) E.L.T. 782,* the Supreme Court held that the power to exempt includes the power to modify or withdraw in terms of Section 21 of the General Clauses Act, 1897. It was held that even a time bound exemption notification issued under section 5A of the Central Excise Act, 1944, or section 25 of the Customs Act, 1962 can be modified and revoked if it is in public interest and the doctrine of Promissory Estoppel cannot be invoked since a notification cannot be said to be making a representation or a promise to a party getting benefit thereof.

The Supreme Court has held in *Pankaj Jain Agencies v. U.O.I. 1994 (72) E.L.T. 805* that a Notification is to take effect from the date of the publication in the Official Gazette. In *ITC Ltd. v. CCE 1996 (86) E.L.T. 477* the Supreme Court reiterated this view and said that non-availability of the Gazette on the date of issue of the notification will not affect the operativeness and enforceability of the notification particularly when there are radio announcements and press releases explaining the changes on the very day

An exemption notification cannot be withdrawn and duty cannot be demanded with retrospective effect *[Honest Corporation v. State of Tamil Nadu 1999 STC 113 (HC)].*

Effective date: Section 25 of the Act provides that the date of effect of the notification will be the date of its issue. It also provides for statutory obligation on the part of the Department to publish and sell the notifications to the public through Directorate of Publicity and Public Relations on or before the date on which the notification will be effective.

The following issues need to be kept in mind in case of general exemption.

(i) Where the exemption notification does not mention the date of its effect, the notification comes into effect from the date of its issue by the Central Government for publication in the Official Gazette. It shall be published and also offered for sale on the date of its issue.

(ii) At times, the exemption notification may also come into force from a date later than the date of issue. In such a case the notification shall be published and offered for sale on or before the date from which it comes into force.

(iii) Where the exemption is through a special order, the above rules do not apply. Special orders are issued separately for each case and communicated to the beneficiary directly by the Government. The beneficiary can claim refund for the period reckoned from the date of its issue.

Sub-section 2A empowers the Government to issue clarifications to the notifications within one year from the issue of the notification and such clarifications will have retrospective effect.

2.4.7 List of Important Judicial Decisions on Scope of Exemption Notifications

A. General Principles

Particulars	Citation
1. Exemption notifications represent the policy of the Government evolved to sub-serve public interest and public revenue. It is a part and parcel of the enactment subject to it not being against Article 14 of Constitution.	*U.O.I.* v. *Paliwal Electricals P. Ltd* 1996 (83) E.L.T. 241 (S.C.)
2. Supervening public equity overrides principle of promissory estoppel. Time bound notification can be withdrawn.	*Shrijee Sales Corporation* v. *U.O.I.* 1997 (89) E.L.T. 452 (S.C.)
3. Exemption notification is a class of delegated or conditional legislation. Power can be used not only for raising revenue but also to regulate the economy and for serving social objectives.	*U.O.I.* v. *Jalyan Udyog* 1993 (68) E.L.T. 9 (S.C.)
4. Classification between small and big manufacturers not discriminatory.	*Murthy Match Works* v. *AC* 1978 (2) E.L.T. J429 (S.C.)
5. Choice of date in exemption notifications cannot be questioned being a question of policy.	*ITC Bhadrachalam Paper Boards Ltd.* v. *CCE* 1994 (71) E.L.T. 334 (S.C.)
6. Exemption notification not valid if it does not recite public interest.	*Ramdhan Pandey* v. *State of UP* 1993 (66) E.L.T. 547 (S.C.)
7. Public interest means an act beneficial to general public.	*MJ Exports* v. *CCE* 1992 (59) E.L.T. 112 (T) [approved by SC]
8.In case of omission to claim exemption does not result in denial of benefit.	*Hero Cycles Ltd. v Union of India 2009 (240) E.L.T. 490 (Bom.)* [maintained by SC]
9. For purpose of claiming exemption from payment of tax applicable to a commodity, assessee must bring on record sufficient materials to show that it comes within the purview of notification.	*Boc India Ltd. v State Of Jharkhand 2009 (237) E.L.T. 7 (S.C.)*

B. How to Interpret?

Particulars	Citation
1. Notification to be treated as a part of the enactment itself.	*CCE* v. *Parle Exports P. Ltd*. 1998 (38) ELT 741 (SC)
2. Interpretation given at the time of enactment or issue to be given weight.	

3.(a) Exemption notification should be construed strictly and reasonably having regard to the language employed.	*HMM Ltd.* v. *CCE* 1996 (87) E.L.T. 593 (SC)
(b) Strictness of construction does not mean that circuitous process should be followed. Strictness should also result in giving full effect.	*Swadeshi Polytex Ltd.* v. *CCE* 1989 (44) E.L.T. 794 (SC)
(c) Express language to be given effect. Supposed intention to be gathered from language used.	*GSFC Ltd.* v. *CCE* 1997 (91) E.L.T. 3 (SC)
(d) Exemption notification not to be rendered nugatory or purposeless. The word singular includes plural.	*CC* v. *United Electrical Industries Ltd*. 1999 (108) E.L.T. 609 (SC).
4.(a) Exemption notification construable strictly.	*Novopan India Ltd.* v. *CCE* 1994 (73) E.L.T. 769 (SC)
(b) Exemption notification need not be construed strictly when there is no doubt or ambiguity in it.	*SG Glass Works P. Ltd.* v. *CCE* 1994 (74) E.L.T. 775 (S.C.)
5. Liberal construction which enlarges the term and scope of notification not permissible.	*Rajasthan Spg. & Wvg. Mills Ltd.* v. *CCE* 1995 (77) E.L.T. 474 (S.C.)
6. Exemption notification to be read as an ordinary man would read it. The word "and" to be read conjunctively as any one would do so.	*CCE* v. *Shibani Engi- neering Systems* 1996 (86) E.L.T. 453 (S.C.)
7. Expressions used in the Act should be understood in the same sense if used in Rules and notifications.	*Prestige Engg. India Ltd.* v. *CCE* 1994 (73) E.L.T. 497 (S.C.)
8.(a) Exemption cannot be claimed on the strength of Finance Ministers Budget speech.	*BK Industries* v. *U.O.I.* 1993 (65) E.L.T. 465 (S.C.)
(b) Notings on Government files cannot be used as an aid in construction.	*Doypack Systems P. Ltd.* v. *U.O.I.* 1988 (36) E.L.T. 201 (S.C.)
9. Exemption notification to be interpreted differently from statute. Strict interpretation applicable to find out whether a subject falls under the exemption. Once this is solved, liberal interpretation to be given by reading the notification as a whole.	*Bombay Chemicals P. Ltd.* v. *CCE* 1995 (77) E.L.T. 3 (SC), *Novapan India Ltd.* v. *CCE* 1994 (73) E.L.T. 769 (S.C.)
10.(a) Substantive conditions in notification to be satisfied mandatorily since it may facilitate fraud or introduce administrative	*MCF Ltd* v. *Dy. Commissioner* 1991 (55) E.L.T. 437 (S.C.); *Thermax P. Ltd.* v. *CCE* 1992 (61) E.L.T. 352

inconveniences. Non- observance of procedural conditions condonable. (b) If non-observance of procedural condition may facilitate fraud or administrative convenience, exemption can be denied.	(SC); *Formica India Division* v. *CCE* 1995 (77) E.L.T. 511 (SC) *Indian Aluminium com-pany Ltd.* v. *Thane Municipal Corporation* 1991 (55) E.L.T. 454 (S.C.).
11. Burden to prove eligibility to exemption notification on the claimant.	*Mysore Metal Industries* v. *CCE* 1988 (36) E.L.T. 369 (S.C.); *Motiram tolaram* v. *U.O.I.* 1999 (112) E.L.T. 749 (SC)
12. Exemption cannot be denied on a ground not originally contended.	*Prince Khadi Woollen Handloom Prod. Coop. Indl. Society* v. *CCE* 1996 (88) E.L.T. 637 (SC)
13. Assessee can opt for that notification which is more beneficial.	*CCE* v. *Indian Petro Chemicals* 1997 (92) E.L.T. 13 (SC); *Abrol Watches Pvt. Ltd* v. *CC* 1997 (92) E.L.T. 311 (S.C.)
14. A particular item not expressly excluded does not mean that it is included.	*CC* v. *Perfect Machine Tools Co. P. Ltd* 1997 (96) E.L.T. 214 (S.C.)
15. Benefit not to be extended on the ground that such benefit is wrongly extended to others.	*Faridabad CT Scan Centre* v. *DG Health Services* 1997 (95) E.L.T. 161 (S.C.)
16. In interpreting an earlier notification, narrow or broader view to be taken can be decided based on subsequent notification.	*Johnson & Johnson Ltd.* v. *CCE* 1997 (92) E.L.T. 23 (S.C.)
17. Assessee cannot suffer on account of illegal act of Department. Exemption notification applicable.	*Kuil Fireworks Industries* v. *CCE* 1997 (95) E.L.T. 3 (S.C.)
18. Words in Tariff Schedule to be interpreted keeping in mind the rapid march of technology as industry is not static.	*CC* v. *Lekhraj Jessumal & Sons* 1996 (82) E.L.T. 162 (S.C.)

3
Types of Duty

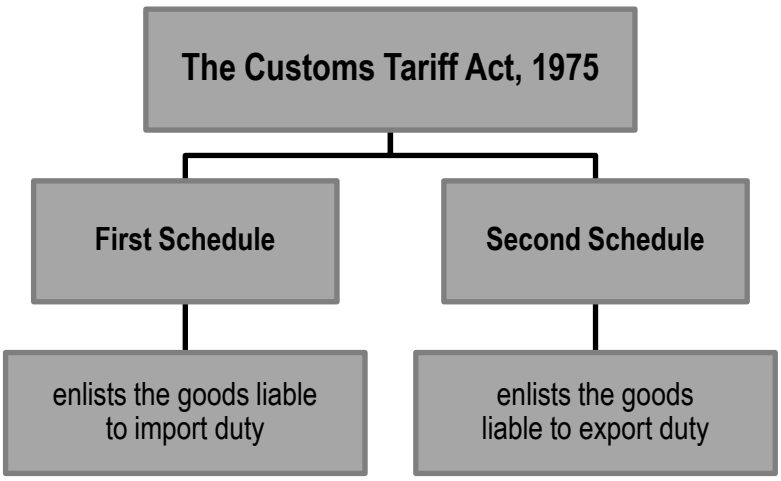
3.1 Basic customs duty [Section 12 of the Customs Act & Section 2 of the Customs Tariff Act]

Basic Customs Duty is levied under the provisions of section 12 of the Customs Act and section 2 of the Customs Tariff Act.

3.1.1 Charging section: The duties of customs shall be levied

- at such rates* as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force
- on goods imported into or exported from India [Section 12 of the Customs Act, 1962]

3.1.2 Rates of basic custom duty: *The rates at which duties of customs shall be levied under the Customs Act 1962 are specified in the First and Second Schedules [Section 2 of the Customs Tariff Act, 1975]



3.1.3 Standard rate of duty: Generally, the rate of duty specified in column (4) is applicable.

3.1.4 Preferential rate of duty: If the goods are imported from the areas notified by the Central Government to be preferential areas, then the rate of duty under column (5) will be applicable.

The Government may by notification under section 25 of the Customs Act prescribe preferential rate of duty in respect of imports from certain preferential areas.

Conditions to be fulfilled for preferential rate of duty: The importer will have to fulfill the following conditions to make the imported goods eligible for preferential rate of duty:-

(a) At the time of importation, he should make a specific claim for the preferential rate.

(b) He should also claim that the goods are produced or manufactured in such preferential area.

(c) The area should be notified under section 4(3) of the Customs Tariff Act to be a preferential area.

(d) The origin of the goods shall be determined in accordance with the rules made under section 4(2) of the Customs Tariff Act.

If the importer fails to discharge the above duties, the goods shall be liable to standard rate of duty.

3.2 Additional duty of customs [Section 3(1) and 3(3) of the Customs Tariff Act]

This duty is popularly referred to as **countervailing duty (CVD**).

1. CVD under section 3(1)		
It is the duty equal to	• Duty of excise for the time being in force leviable on a like article produced or manufactured in India. • If a like article is not so produced or manufactured, duty which would be leviable on the class/description of articles to which the imported article belongs. • Where such duty is leviable at different rates, the highest duty.	
Leviable on	Any imported goods	
Rate of duty	**In case the imported goods are**	**Rate of CVD**
	(i) Alcoholic liquor for human consumption	Rate of CVD will be determined by the Central Government by issuing a notification, having regard to the excise duty leviable on like alcoholic liquor in different States.
	2. Any other goods	Rate of excise duty
2. CVD under section 3(3)		
It is the duty equal to	Duty of excise leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of any article imported into India.	
Leviable on	Any imported article	
Rate of duty	Such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.	

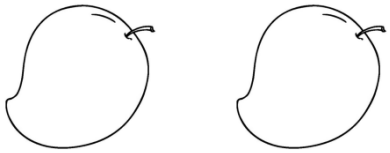
3. Assessable value for computing CVD under section 3(1) and 3(3)		
In case the duty is charged on the like article produced/ manufactured in India	**Assessable value**	
(i) On ad-valorem basis	Value under section 14(1) /tariff value determined section 14(2).	xxx
	Add: Basic custom duty	xxx
	Assessable value	xxx
(ii) On the basis of the tariff value fixed under 3(2) of the Central Excise Act, 1944	Such tariff value	
(iii) On the basis of MRP under section 4A [including goods notified under section 3 read with clause (1) of Explanation III of the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955]	Retail sale price on the imported article	xxx
	Less: Abatement notified by Government for like article	xxx
	Assessable value of the imported article	xxx
4. The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.		

Statutory Provisions: Provisions of sub-section (1) to (4) and sub-section (7) and (8) of section 3 of the Customs Tariff Act relating to CVD are enumerated as follows:-

Additional duty equivalent to excise duty leviable on like article manufactured in India: Any article which is imported into India is also liable to a duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. This duty is called as additional duty. If the excise duty is leviable at a percentage of the value of the goods, the additional duty will also be calculated at that percentage of the value of the imported article.

Rate of additional duty in case of alcoholic liquor: In case of any alcoholic liquor for human consumption imported into India, the Central Government may notify the rate of additional duty having regard to the excise duty for the time being leviable on like alcoholic liquor produced or manufactured in different States. In case if the like alcoholic liquor is not produced or manufactured in any State, then, the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs would be the applicable rate [Sub-section (1)].

Like article



- Identical - alike in all respects
- If not alike in all respects, having closely resembling characteristics

Meaning of "excise duty for the time being leviable on a like article if produced or manufactured in India"

"Excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty [Explanation to sub-section (1)].

Valuation for additional duty: Sub-section (2) of section 3 prescribes the manner for computing the value of imported articles for the purpose of levying additional duty in different circumstances. If the additional duty leviable under sub-sections (1) and (3) is chargeable as a percentage of the value of the imported article, the value of the imported article will be the aggregate of—

(i) the value of the imported article determined under section 14(1) of the Customs Act, 1962 or the tariff value of such article fixed under 14(2) and

(ii) any customs duty chargeable under section 12 of the Customs Act, 1962 plus any other sum chargeable on that article under any law for the time being in force as an addition to, but does not include—

  (a) the additional duty leviable under sub-sections (1), (3) and (5);

  (b) the safeguard duty referred to in sections 8B and 8C;

  (c) the countervailing duty referred to in section 9; and

  (d) the anti-dumping duty referred to in section 9A

Valuation for articles covered under retail sale price (RSP) provisions: In case of an article imported into India,—

(a) in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 to declare on the package thereof the retail sale price (RSP) and

(b) where the like article manufactured in India, or in case where such like article is not so manufactured, then, the class or description of articles to which the imported article belongs, is—

the goods notified under section 4A(1) of the Central Excise Act, 1944, the value of the imported article will be deemed to be the RSP declared on the imported article less the abatement as notified by the Central Government.

Valuation for articles covered under Medicinal and Toilet Preparations (Excise Duties) Act, 1955: In case of an article imported into India,—

(a) in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 to declare on the package thereof the retail sale price (RSP) and

(b) where the like article manufactured in India, or in case where such like article is not so manufactured, then, the class or description of articles to which the imported article belongs, is—

the goods notified under section 3 read with clause (1) of Explanation III of the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the value of the imported article will be deemed to be the RSP declared on the imported article less the abatement as notified by the Central Government.

Imported article having more than one RSP: Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price will be deemed to be the retail sale price for the purposes of this section.

Valuation for articles covered under tariff value provisions: In case of an article imported into India, where the Central Government has fixed a tariff value for the like article produced or manufactured in India under section 3(2) of the Central Excise Act, 1944, the value of the imported article will be deemed to be such tariff value.

Countervailing duty under section 3(3): Special additional duty under sub-section (3) is levied to counter balance the excise duty leviable on raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of the imported article. The Central Government can levy such duty if it is satisfied that it is necessary in the public interest to do so even if such article is liable to additional duty leviable under sub-section (1). The quantum of additional duty will be determined as per the rules made in this behalf [Sub-section (3)].

The Central Government, while making such rules will have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article (4).

Provisions of Customs Act apply to additional duty: The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act [Sub-section (8)].

The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force [Sub-section (7)].

Propositions drawn from some relevant judgments:-

1. *Hyderabad Industries Ltd. v. UOI 1999 (108) ELT 321 (SC)*

The Supreme Court held that section 3 of the Customs Tariff Act is an independent charging section.

The Supreme Court also held that additional duty could be levied only if the article is such that could be manufactured or produced in India. If the article cannot be subjected to excise levy because it is not produced or manufactured, then on the import of like articles, additional duty cannot be levied.

2. *Shroff & Co. v. Municipal Corporation of Greater Bombay 1988 (38) E.L.T. 243 (S.C.)*

The countervailing duty is imposed so as to place the home producer on an equal footing with the importer of foreign goods.

3. *CCus. v. Malwa Industries Ltd (2009) 235 ELT 214 (SC)*

The object of levy of CVD is that importer should not be placed at some more advantageous position vis-a-vis purchasers/manufacturers of similar goods in India.

4. Motiram Tolaram v. UOI 1999 (112) E.L.T. 749 (S.C.)

If an excise exemption notification has been issued reducing the effective rate of excise duty, the rate of CVD would be such reduced rate only.

5. Goodyear India Ltd. v. CCus. 1997 (90) ELT 7 (SC)

Explanation to section 3(1) clarifies that where excise duty is leviable at different rates, the highest duty would be considered for calculation of CVD. It was held that this explanation is applicable only where goods of exactly same description attract different rate of duty.

Point to be noted

Following duties would not be included while computing the assessable value for computation of CVD:-

(a) CVD [Sections 3(1) and (3)]

(b) Special CVD [Section 3(5)]

(c) Safeguard duty [Sections 8B and 8C]

(d) Countervailing duty [Section 9]

(e) Anti-dumping duty [Section 9A]

3.3 Special additional duty of customs [Section 3(5) of the Customs Tariff Act, 1975]

This duty is known as **Special CVD.** This duty is in addition to basic customs duty and CVD leviable under section 3(1) and 3(3) of the Customs Tariff Act, 1975.

1. Special CVD under section 3(5)		
It is the duty equal to	• Sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India. • If a like article is not so sold, purchased or transported, taxes which would be leviable on the class/description of articles to which the imported article belongs. • Where such taxes/charges are leviable at different rates, the highest such tax/charges.	
Leviable on	Any imported article	
Rate of duty	Rate notified by the Central Government. Rate must not exceed 4%.	
Assessable value for computing special CVD under section 3(5)	Value under section 14(1) /tariff value determined section 14(2)	xxx
	Add: Basic custom duty	xxx
	Total	xxx
	Add: CVD under section 3(1) and 3(3)	xxx
	Total	xxx
	Add: Education cess [customs]	xxx
	Add: Secondary and higher education cess [customs]	xxx
	Assessable value	xxx
The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.		

Point which merit consideration:-

Following duties would not be included while computing the assessable value for computation of CVD:-

(a) Special CVD [Section 3(5)]

(b) Safeguard duty [Sections 8B and 8C]

(c) Countervailing duty [Section 9]

(d) Anti-dumping duty [Section 9A]

Statutory provisions: Provisions of section 3(5) to 3(8) of the Customs Tariff Act relating to Special CVD are enumerated as follows:-

Levy of special additional duty: If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as

would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding **4%** of the value of the imported article as specified in that notification [Sub-section (5)].

Meaning of sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India

The expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge.

Valuation for additional duty leviable under section 3(5): Sub-section (6) of section 3 provides that the value of the imported article for the purpose of levying additional duty under sub-section (5) shall notwithstanding anything contained in sub-section (2), or section 14 of the Customs Act, 1962, be the aggregate of—

(i) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include—

  (a) the duty referred to in sub-section (5);

  (b) the safeguard duty referred to in sections 8B and 8C;

  (c) the countervailing duty referred to in section 9; and

  (d) the anti-dumping duty referred to in section 9A.

Provisions of Customs Act apply to additional duty: The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act [Sub-section (8)].

The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force [Sub-section (7)].

Goods cleared from SEZ / FTWZ into DTA exempt from Special CVD

All goods produced or manufactured in a Special Economic Zone (SEZ) and brought to Domestic Tariff Area (DTA), are exempt from the special CVD.

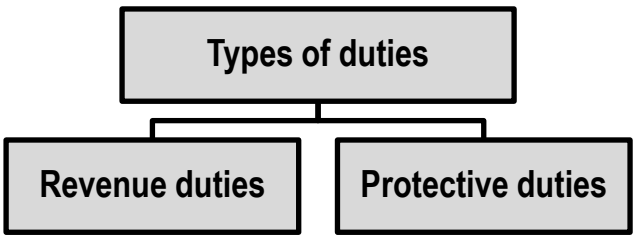
In this regard, it has been clarified that the benefit of exemption from special CVD under aforersaid notification would NOT be available when goods cleared from the SEZ / FTWZ into the DTA on stock transfer basis. The reason for the same is that when a DTA unit imports goods and routes it through SEZ/FTWZ for self-consumption i.e. in the nature of stock transfer from SEZ/FTWZ, no sales tax/VAT is leviable on such transaction, and hence, special CVD is payable *[Circular No. 44/2013 Cus dated 30.12.2013].*

3.3.1 Computation of CVD leviable under section 3(1) & (3) and Special CVD under section 3(5)]: If the additional duty is leviable as a percentage of the value of goods, then the following paragraph illustrates the method of computing the additional duty of customs.

	₹
Assessable value under section 14	1,000.00
Rate of basic customs duty	10%
Rate of additional custom duty under section 3(1)	12.5%
Assessable value for computing basic customs duty	1,000.00
Basic custom duty @ 10% of ₹ 1,000.00	100.00
Total value for computing additional customs duty u/s 3(1)	1,100.00
Additional custom duty u/s 3(1) [12.5% on ₹1100]	137.50
Total [100+137.50]	237.50
Education cess @ 2%	4.75
Secondary and higher education cess @ 1%	2.38
Total duty payable before additional customs duty u/s 3(5)	244.63
Total Value for computing additional customs duty u/s 3(5) [₹1,000+244.63]	1,244.63
Additional customs duty u/s 3(5) [₹1,244.63 × 4%]	49.79
Total duty payable	294.41

3.4 Protective duties [Section 6 & 7 of the Customs Tariff Act]

3.4.1 Types of duties



The two types of custom duties are revenue duties and protective duties:-

(a) Revenue duties: are those which are levied for the purpose of raising customs revenue.

(b) Protective duties: are intended to give protection to indigenous industries. If resort to protective duties is not made there could be a glut of cheap imported articles in the market making the indigenous goods unattractive.

3.4.2 Factors to be considered while giving protection through protective duties: The protection through protective duties is given considering the following factors.

(a) The protective duties should not be very stiff so as to discourage imports.
(b) It should be sufficiently attractive to encourage imports to bridge the gap between demand and supply of those articles in the market.

3.4.3 Levied by Central Government: The protective duties are levied by the Central Government upon the recommendation made to it by the Tariff Commission and upon it being satisfied that circumstances exist which render it necessary to take immediate action to provide protection to any industry established in India [Section 6].

3.4.4 Duration of protective duties: The protective duty shall be effective only upto and inclusive of the date if any, specified in the First Schedule [Section 7(1)].

3.4.5 Power of Central Government to alter such duties: The Central Government may reduce or increase the duty by notification in the Official Gazette.

However, such duty shall be altered only if it is satisfied, after such inquiry as it thinks necessary, that such duty has become ineffective or excessive for the purpose of securing the protection intended to be afforded by it to a similar article manufactured in India [Section 7(2)].

3.4.6 In case of increase in duty, approval of Parliament required: If there is any increase in the duty as specified above, then the Central Government is required to place such notification in the Parliament for its approval.

Every notification insofar as it relates to increase of such duty, shall be laid before each House of Parliament if it is sitting as soon as may be after the issue of the notification, and if it is not sitting within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People. If the Parliament recommends any change in the notification, then the notification shall have effect subject to such changes. However, any thing done pursuant to the notification before the recommendation by the Parliament shall be valid [Section 7(3)].

3.5 Emergency power to impose or enhance export duties [Section 8 of Customs Tariff Act]

3.5.1 Central Government empowered to impose/enhance the export duties: The Central Government may impose or enhance export duties by making amendment to the Second Schedule by issue of a notification in the Official Gazette.

3.5.2 Conditions to be satisfied

a. The goods may or may not be specified in the Second Schedule.

b. The Central Government is satisfied that circumstances exist, which render it necessary for the imposition or enhancement of export duties.

If the above conditions are satisfied, the Central Government may impose or enhance export duties.

Example: Generally in summer season, the production of milk becomes low as compared with other seasons. If the available milk is not able to meet the requirements of the people, the Government may impose or enhance the duty on exports of milk powder or stop the exports of milk powder.

3.6 Emergency power to impose or enhance import duties [Section 8A of Customs Tariff Act]

3.6.1 Central Government empowered to impose/enhance the import duties: The Central Government may impose or enhance import duties by making amendment to the First Schedule by issue of a notification in the Official Gazette.

3.6.2 Conditions to be satisfied: If the following conditions are satisfied, the Central Government may provide for the enhancement of the import duty.

a. The goods should be specified in the First Schedule.

b. The Central Government is satisfied that circumstances exist, which render it necessary for the enhancement of import duties.

Proviso to sub-section (1) provides that the Central Government shall not issue any notification under this section unless the earlier notification amending the rate of duty has been placed before the Parliament and the same has been passed with or without modifications.

3.7 Safeguard duty [Section 8B of the Customs Tariff Act]

3.7.1 Circumstances in which safeguard duty can be imposed: Central Government can impose the safeguard duty if it is satisfied that,

(a) Any article is imported into India in increased quantities;

(b) Such increased importation is causing or threatening to cause serious injury to domestic industry.

The duty is imposed by issuing a notification in the Official Gazette.

3.7.2 Objective of safeguard duty: The safeguard duty is imposed for the purpose of protecting the interests of any domestic industry in India aiming to make it more competitive.

3.7.3 Points which merit consideration

1. Safeguard duty is product specific i.e. the safeguard duty is applicable only for certain articles in respect of which it is imposed.

2. This duty is in addition to any other duty in respect of such goods levied under this Act or any other law for the time being in force.
3. Education cess and secondary and higher education cess is not payable on safeguard duty.

3.7.4 Duration of safeguard duty: The duty imposed under this section shall be in force for a period of 4 years from the date of its imposition.

Extension of period: The Central Government may extend the period of such imposition from the date of first imposition provided it is of the opinion that:-

(a) Domestic industry has taken measures to adjust to such injury or as the case may be to such threat and

(b) It is necessary that the safeguard duty should continue to be imposed.

However, the total period of levy of safeguard duty is restricted to 10 years.

3.7.5 Applicability of all machinery provisions of the Customs Act, 1962: The provisions of the Customs Act, 1962 and the rules and regulations made there under, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

3.7.6 Exemptions from safeguard duty

(a) Articles from developing country: Articles originating from developing country, so long as the share of imports of that article from that country does not exceed 3% of the total imports of that article into India.

(b) Articles originating from more than one developing country: Articles originating from more than one developing country, so long as the aggregate of imports from developing countries each with less than 3% import share taken together does not exceed 9% of the total imports of that article into India.

(c) Imports by 100% EOU or units in a Special Economic Zone: Safeguard duty shall not apply to articles imported by a 100% EOU/unit in a SEZ unless -

(i) specifically made applicable; or

(ii) the article imported is either cleared as such into DTA or used in the manufacture of any goods that are cleared into DTA and in such cases safeguard duty shall be levied on that portion of the article so cleared or so used as was leviable when it was imported into India.

3.7.7 Provisional Assessment

(a) The Central Government is also empowered to impose provisional safeguard duty pending determination of the final duty.

(b) This provisional duty may be imposed on the basis of preliminary determination that

increased imports have caused or threatened to cause serious injury to a domestic industry.

(c) The provisional duty shall be in force for a maximum period of 200 days from the date of its imposition.

(d) If upon final determination, the Central Government is of the opinion that the increased imports have not caused or threatened to cause serious injury to a domestic industry, the duty collected shall be refunded.

3.8 Power of Central Government to impose transitional product specific safeguard duty on imports from China [Section 8C of the Customs Tariff Act]

3.8.1 Circumstances in which transitional product safeguard duty can be imposed: Central Government can impose the transitional product safeguard duty if it is satisfied that,

a. Any article is imported into India in increased quantities from the People's Republic of China;

b. Such increased importation is causing or threatening to cause market disruption to domestic industry.

The duty is imposed by issuing a notification in the Official Gazette.

'Market disruption' shall be caused whenever imports of a like article or a directly competitive article produced by the domestic industry, increase rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.

3.8.2 Points which merit consideration

(a) It is product specific i.e. the safeguard duty is applicable only for certain articles in respect of which it is imposed.

(b) This duty is in addition to any other duty in respect of such goods levied under this Act or any other law for the time being in force.

(c) Education cess and secondary and higher education cess is not payable on transitional product safeguard duty.

3.8.3 Duration of safeguard duty: The duty imposed under this section shall be in force for a period of 4 years from the date of its imposition.

Extension of period: The period of imposition of this duty can be extended by the Central Government if the article on which the duty has been imposed continues to be imported into India from China so as to cause or threatening to cause market disruption to domestic industry. However, the total period of levy of the duty will be restricted to 10 years. The total imposition period cannot be extended beyond ten years from the date on which the safeguard duty was first imposed.

The Central Government can extend the imposition period the domestic notwithstanding the

measures taken by industry to adjust to such market disruption or any threat arising thereof.

3.8.4 Applicability of all machinery provisions of Customs Act, 1962: The provisions of the Customs Act, 1962 and the rules and regulations made there under, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

3.8.5 Provisional Assessment under section 8C

(a) Similar to Section 8B, the Central Government is also empowered to impose provisional transitional product specific safeguard duty pending determination of the final duty under sub-section (1).

(b) This provisional duty may be imposed on the basis of preliminary determination that increased imports have caused or threatened to cause market disruption to a domestic industry.

(c) The provisional duty shall be in force for a maximum period of 200 days from the date of its imposition.

(d) If upon final determination, the Central Government is of the opinion that the increased imports have not caused or threatened to cause serious injury to a domestic industry, the duty collected shall be refunded.

3.8.6 Customs Tariff (Transitional Product specific Safeguard Duty) Rules, 2002: The Central Government has issued Customs Tariff (Transitional Product specific Safeguard Duty) Rules, 2002 vide *Notification No.34/2002-cus (N.T) dated 11.6.20002* under Section 8C of the Act for the purpose of regulation of the product specific safeguard duty.

3.9 Countervailing duty on subsidized articles [Section 9 of the Customs Tariff Act]

3.9.1 Conditions to be satisfied: The countervailing duty on subsidized articles is imposed if the following conditions are satisfied.

(a) Any country or territory, directly or indirectly, pays or bestows subsidy upon the manufacture or production or exportation of any article. Such subsidy includes subsidy on transportation of such article.

(b) Such articles are imported into India.

(c) The importation may/may not directly be from the country of manufacture/production.

(d) The article, may be in the same condition as when exported from the country of manufacture or production or may be changed in condition by manufacture, production or otherwise.

Subsidy shall be deemed to exist if-

(a) There is financial contribution by the Government or any public body in the exporting or producing country or territory. Such contribution may include direct transfer of funds like grants, loans etc., waiver of revenue due to the Government etc.

(b) There is any form of income or price support granted or maintained by the Government, which results in increased export of such article or reduced import of any article into that country.

(c) A Government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions specified above which would normally be vested in the Government and the practice in, no real sense, differs from practices normally followed by Governments.

3.9.2 Amount of countervailing duty on subsidized articles: The amount of countervailing duty shall not exceed the amount of subsidy paid or bestowed as aforesaid.

3.9.3 Points which merit consideration

(a) This duty is in addition to any other duty chargeable under this Act or any other law for the time being in force.

(b) Countervailing duty shall not be levied unless it is determined that -

(i) The subsidy relates to export performance;

(ii) The subsidy relates to the use of domestic goods over imported goods in the export article; or

(iii) The subsidy has been conferred on a limited number of persons engaged in manufacturing producing or exporting the article unless such a subsidy is for-

- Research activities conducted by or on behalf of such persons engaging in manufacture, production, export;
- Assistance to disadvantaged regions within the territory of the exporting country; or
- Assistance to promote adaptation of existing facilities to new environmental requirements.

3.9.4 Duration of countervailing duty on subsidized articles: Unless revoked earlier, the duty imposed under this section shall be in force for a period of 5 years from the date of its imposition.

Extension of period: Central Government may extend the period of such imposition from the date of such extension provided it, in a review, is of the opinion that such cessation is likely to lead to continuation or recurrence of such subsidization and injury.

However, the extension can be for a maximum period of 5 years.

If the review is not completed before the expiry of the period of imposition (5 years) then the duty may continue to remain in force pending the outcome of such review for a further period not exceeding 1 year.

3.9.5 Provisional countervailing duty on subsidized articles

(a) When the determination of the amount of subsidy is pending, the Central Government may impose a provisional countervailing duty not exceeding the amount of such subsidy as provisionally estimated by it.

(b) If the final subsidy determined is less than the subsidy provisionally determined, then the Central Government shall reduce such duty and also refund the excess duty collected.

3.9.6 Retrospective imposition of countervailing duty

Conditions to be satisfied: The following conditions should be satisfied for imposition of countervailing duty with retrospective effect.

(a) The injury to domestic industry, which is difficult to repair, is caused by massive imports in a relatively short period, of the articles benefiting from subsidies.

(b) In order to preclude recurrence of such injury, it is necessary to levy countervailing duty retrospectively.

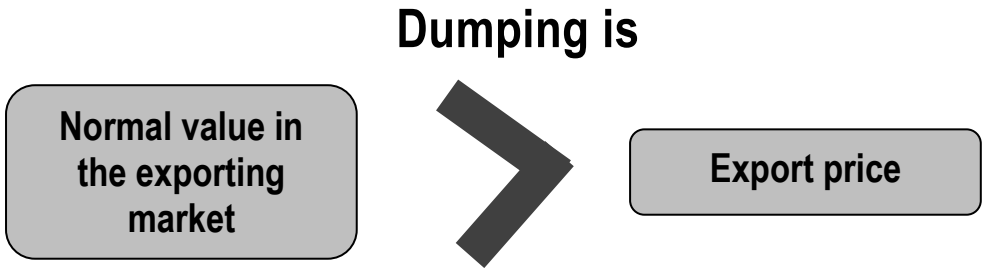
Note: The retrospective date from which the duty is payable shall not be beyond 90 days from the date of notification.

3.9.7 Applicability of all machinery provisions of Customs Act, 1962: The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

3.10 Anti-dumping duty [Section 9A of the Customs Tariff Act]

When the export price of a product imported into India is less than the Normal Value of 'like articles' sold in the domestic market of the exporter, it is known as dumping. Although there is nothing inherently illegal or immoral in exporter charging a price less than the price prevailing in its domestic market, Designated Authority can initiate necessary action for investigations and subsequent imposition of anti-dumping duties, if such dumping causes or threatens to cause material injury to the domestic industry of India.

Anti-dumping action can be taken only when there is an Indian industry which produces "like articles" when compared to the allegedly dumped imported goods. Further, this duty is country specific i.e. it is imposed on imports from a particular country.



Under the General Agreement on Tariffs and Trade (GATT) provisions, anti-dumping duties higher than the margin of dumping cannot be imposed. However, a lesser duty which is adequate to remove the injury to the domestic industry, is permissible. In India, the Government is obliged to restrict the anti-dumping duty to the lower of the two i.e., dumping

margin and the injury margin.

Section 9A(1) of the Customs Tariff Act, 1975 provides that where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

Every notification issued under this section shall as soon as may be after it is issued, be laid before each House of Parliament [Sub-section (7)]. Further, the provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act [Sub-section (8)].

3.10.1 Computation of anti-dumping duty: Anti-dumping duty is:

(i) Margin of dumping

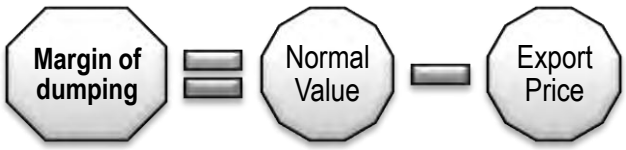
or

(ii) Injury margin

whichever is lower.

The anti-dumping duty chargeable under this section is in addition to any other duty imposed under this Act or any other law for the time being in force.

(a) Margin of dumping: In relation to an article, it means the difference between its export price and normal value. It is generally expressed as a percentage of the export price.



(b) Export price: in relation to an article, means of goods imported into India is the price of an article exported from the exporting country or territory.

Constructed export price: In cases where there is no export price or the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed at the price at which the imported articles are first resold to an independent buyer.

In case where the article is not resold to an independent buyer or not resold in the condition as imported, the export price shall be constructed on such reasonable basis as may be determined in accordance with the rules made.

(c) Normal value: in relation to an article, means comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or

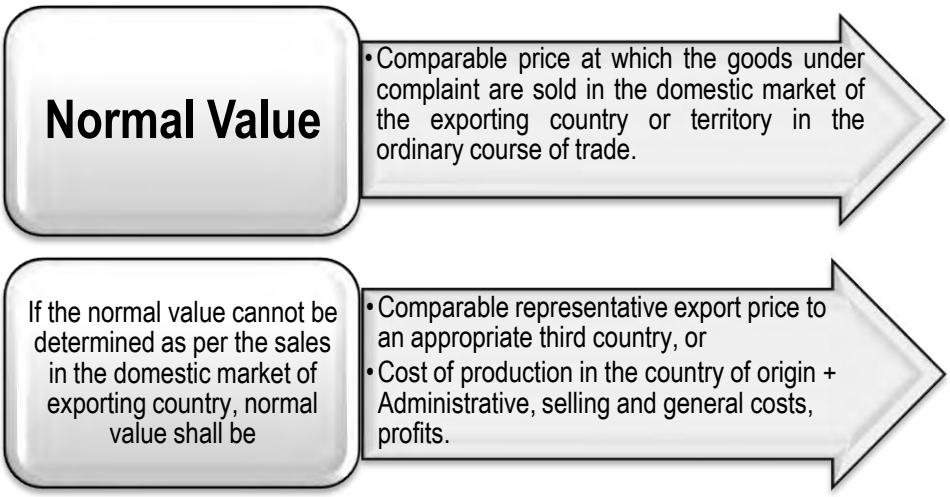
territory as determined in accordance with the rules.

When there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-

(i) Comparable representative price of the like article when exported from the exporting country or territory or an appropriate third country as determined in accordance with the rules made; or

(ii) The cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made:

However, in case the article is imported from a country other than the country of origin or where the article has merely been transshipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.



(d) Injury margin: Injury margin is the margin adequate to remove the injury to the domestic industry. It is the difference between the Fair Selling Price [Non-Injurious Price (NIP)] due to the Domestic Industry and the Landed Value of the dumped imports.

(e) Fair Selling Price (FSP) [Non-Injurious Price]: is that level of price, which the industry is, expected to have charged under normal circumstances in the Indian market during the period defined. This price would have enabled reasonable recovery of cost of production and profit after nullifying adverse impact of those factors of production which could have adversely effected the company and for which dumped imports can't be held responsible. In other words, it is the fair selling price of a product for the domestic industry.

There would be a single Non-Injurious Price for a product and not several Non-Injurious Price for the same product *[Reliance Industries ltd. v. Designated Authority 2006 (202) E.L.T. 23 (S.C.)]*.

(f) Landed Value: is taken as the assessable value under the Customs Act and the applicable basic customs duties except CVD, SAD and special duties.

3.10.2 In case of circumvention of anti-dumping duty imposed on an article, Central Government may extend the anti-dumping duty to such article or an article originating in/exported from such country: Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty has taken place, by either of the following ways:-

(i) by altering the description or name or composition of the article subject to such anti-dumping duty

(ii) by import of such article in an unassembled or disassembled form

(iii) by changing the country of its origin or export or

(iv) in any other manner, whereby the anti-dumping duty so imposed is rendered ineffective

it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case may be [Sub-section (1A)].

3.10.3 Provisional anti-dumping duty: When determination of the normal value and margin of dumping in relation to any article in accordance with this section and rules made there under is pending, the Central Government may impose anti-dumping duty on the basis of provisional estimate of such value and margin. If the provisional duty is higher than the margin finally determined, then the Central Government shall reduce the anti-dumping duty and shall also refund the excess duty collected [Sub-section (2)].

3.10.4 No anti-dumping duty to articles imported by a 100% EOU: Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), shall not apply to articles imported by a hundred per cent, export-oriented undertaking unless, —

(i) specifically made applicable in such notifications or such impositions, as the case may be; or

(ii) the article imported is either cleared as such into the DTA or used in the manufacture of any goods that are cleared into the DTA, and in such cases anti-dumping duty shall be levied on that portion of the article so cleared or so used as was leviable when it was imported into India.

For the purposes of this sub-section, the expression "100% EOU" shall have the meaning assigned to it in *Explanation* 2 to sub-section (1) of section 3 of the Central Excise Act, 1944.

3.10.5 Imposition of duty with retrospective effect: If the following conditions are satisfied, then the Central Government may by notification in the Official Gazette levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti dumping duty. Notwithstanding anything contained in any law for the time being in force, such duty shall be

payable at such rate and from such date as may be specified in the notification. The retrospective date from which the duty is payable shall not be beyond 90 days from the date of such notification.

(a) There is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury; and

(b) The injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of the imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied.

3.10.6 Duty ceases to have effect on expiry of 5 years: The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition

However, if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of 5 years and such further period shall commence from the date of order of such extension.

Further, where a review initiated before the expiry of the aforesaid period of 5 years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding 1 year.

3.10.7 Rules relating to anti dumping duty: The Central Government will determine and ascertain the margin of dumping as referred to in sub-section (1) or sub-section (2) from time to time after carrying out necessary inquiry. Central Government, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner:

(i) in which articles liable for anti-dumping duty may be identified,

(ii) in which the export price, the normal value, the margin of dumping in relation to such articles may be determined and

(iii) for the assessment and collection of such anti-dumping duty [sub-section (6)].

3.10.8 Records to be furnished for determination of margin of dumping: The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer.

However, where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.

3.10.9 Refund of anti-dumping duty: Section 9AA provides that where upon determination by an officer authorised in this behalf by the Central Government under clause (ii) of sub-section (2), an importer proves to the satisfaction of the Central Government that he has paid

anti-dumping duty imposed under sub-section (1) of section 9A on any article, in excess of the actual margin of dumping in relation to such article, the Central Government shall, as soon as may be, reduce such anti-dumping duty as is in excess of actual margin of dumping so determined, in relation to such article or such importer, and such importer shall be entitled to refund of such excess duty.

In *Designated Authority vs Haldor Topsoe 2000 (120) ELT 11,* the Supreme Court held that anti-dumping duty could be fixed with reference to prices in a territory and that European Union could also be a territory.

3.11 No levy under section 9 or section 9A in certain cases [Section 9B of the Customs Tariff Act]

This section provides that, notwithstanding anything contained in section 9 or section 9A,-

(a) No article shall be subjected to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidization.

(b) Countervailing and anti-dumping duties shall not be levied just because such articles are exempt from duties or taxes borne by like articles when meant for consumption in the country of origin or exportation or by reasons of refund of such duties or taxes.

(c) These duties shall not be levied on imports from member country of WTO or from a country with whom the GOI has a most favoured nation agreement unless a determination has been made that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(d) The provisional countervailing and anti-dumping duties shall not be levied on any article imported from specified countries unless preliminary findings have been made of subsidy or dumping and consequent injury to domestic industry and a further determination has also been made that a duty is necessary to prevent injury being caused during the investigation

The points (b), (c) and (d) mentioned above shall not be applicable in a case where countervailing or anti-dumping duty has been imposed on any article to prevent injury or threat of an injury to the domestic industry of a third country exporting the like articles to India.

The provisions of section 9C of the Customs Tariff Act enumerate the orders against which an appeal can be preferred to CESTAT. The procedure, time limit and other related matters of filing an appeal are addressed to in this section. An appeal filed under this section shall be accompanied by a fee of fifteen thousand rupees. Every application made before the Appellate Tribunal,—

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application,

shall be accompanied by a fee of five hundred rupees.

3.12 Education cess and secondary and higher education cess

With effect from 10.07.2004, an education cess has been levied on items imported into India. It is leviable @ 2% on the aggregate of duties of customs leviable on such goods. However, following duties shall be excluded for computing this cess:

(a) Additional duty leviable under section 3(5) of the Customs Tariff Act, 1975;

(b) Safeguard duty under section 8B and 8C of the Customs Tariff Act, 1975

(c) Countervailing duty under section 9 of the Customs Tariff Act, 1975

(d) Anti dumping duty under section 9A of the Customs Tariff Act, 1975

(e) Secondary and higher education cess

(f) Education cess itself on imported goods

Items attracting customs duty at bound rates under International Commitments are exempt from this cess. The education cess so collected is utilized for providing and financing universalised quality basic education.

Further, a secondary and higher education cess @ 1% has also been imposed on imported goods with effect from 01.03.2007. The proceeds from this cess will be utilized to finance secondary and higher education. It shall be chargeable on the aggregate duties of customs.

However, following duties shall be excluded for computing this cess:–

(a) Additional duty leviable under section 3(5) of the Customs Tariff Act, 1975;

(b) Safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act, 1975;

(c) Countervailing duty leviable under section 9 of the Customs Tariff Act, 1975;

(d) Anti-dumping duty leviable under section 9A of the Customs Tariff Act, 1975; and

(e) Education cess and

(f) Secondary and higher education cess itself on imported goods.

The education cess and secondary and higher education cess on imported goods are in addition to any other duties of customs chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force.

The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall apply in relation to the levy and collection of education cess and secondary and higher education cess on imported goods as they apply in relation to the levy and collection of the duties of customs on such goods.

4

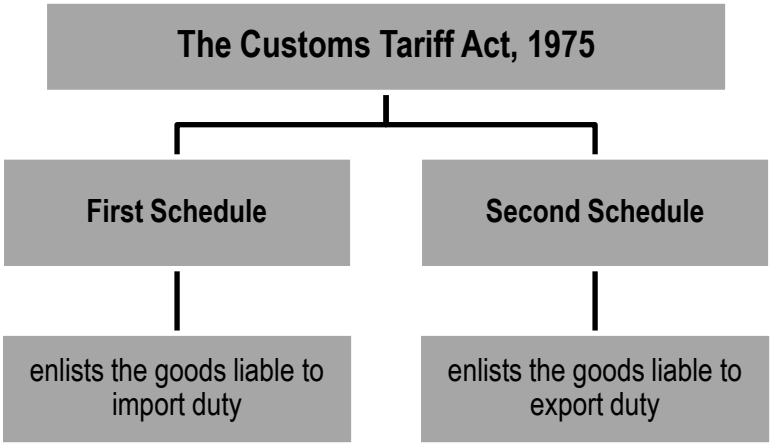
Classification of Goods

4.1 Customs Tariff

4.1.1 Need for classification of goods: One of the important steps in assessing the amount of duty payable is classification of the goods within the ambit of the Schedule to the Customs Tariff Act. The correct classification of goods is necessary to ascertain the rate of custom duty which goods are subject to.

4.1.2 The Customs Tariff Act, 1975

(a) Schedules to tariff



(b) Rules of interpretation and explanatory notes

The Indian Customs Tariff is based upon the Harmonized System of Nomenclature.

The **Harmonized Commodity Description and Coding System** (HS) of tariff nomenclature generally referred to as "Harmonized System of Nomenclature" is an internationally standardized system of names and numbers for classifying traded products developed and maintained by the World Customs Organization (WCO) (formerly the Customs Co-operation Council), an independent intergovernmental organization.

Along the lines of HSN, the customs tariff has a set of Rules of Interpretation of the First Schedule i.e. Import tariff schedule and General Explanatory notes.

(i) Rules of interpretation:- Six

(ii) General explanatory notes: Three

These rules of interpretation and general explanatory notes are an integral part of the Schedule. The purpose of inclusion of the rules of interpretation and the general explanatory notes as an integral part of the first schedule is to give clear direction as to how the nomenclature in the schedule is to be interpreted and to give statutory force to the interpretative rules and the general explanatory notes.

(c) First Schedule of the Customs Tariff

The First Schedule comprises of 98 chapters grouped under 21 sections.

(i) Sections: A group of Chapters representing a particular class of goods.

(ii) Chapters: Each section is divided into various chapters and sub-chapters. Each chapter contains goods of one class.

(iii) Chapter notes: They are mentioned at the beginning of each chapter. These notes are part of the statute and hence have the legal authority in determining the classification of goods.

(iv) Heading: Each chapter and sub-chapter is further divided into various headings.

(v) Sub-heading: Each heading is further divided into various sub-headings.

4.2 General Explanatory Notes

There are **three general explanatory notes** included in the First Schedule. They are-

(a) Relevance of one dash ["-"] and two dash ["--"]

- **"-"** denotes that the said article or group of articles shall be taken to be sub-classification of the article or group of article covered by the said heading.
- **"--"** denotes that that the said article or group of articles shall be taken to be sub-classification of the immediately preceding article/group of articles which has "-".

(b) Meaning of abbreviation "%" in relation to the rate of duty

The abbreviation "%" in any column of the Schedule in relation to the rate of duty means that the duty shall be computed at the percentage specified on the value of the goods as defined in section 14 of the Customs Act.

(c) Standard rate of duty applicable if no preferential rate specified

In any entry, if no preferential rate of duty has been notified, the standard rate of duty shall be applicable.

Example

The above general explanatory notes can be understood with the following example:-

Tariff Item	Description of goods	Units	Rate of duty®	
			Standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)
0801	**Coconuts, brazil nuts and cashew nuts, fresh or dried, whether or not shelled or peeled**			
	- *Coconuts:*			
0801 11 00	-- Desiccated	Kg.	70%	60%
0801 19	-- *Other*			
0801 19 10	--- Fresh	Kg.	70%	60%
0801 19 20	--- Dried	Kg.	70%	60%
0801 19 90	--- Other	Kg.	70%	60%
	- *Brazil nuts*			
0801 21 00	-- In shell	Kg.	30%	20%
0801 22 00	-- Shelled	Kg.	30%	20%
	- *Cashew nuts*			
0801 31 00	-- In shell	Kg.	30%	Free
0801 32	- *Shelled:*			
0801 32 10	-- Cashew kemel, broken	Kg.	30%	20%
0801 32 20	-- Cashew kenel, whole	Kg.	30%	20%
0801 32 90	-- Other	Kg.	30%	20%

In the above entry, following columns are there:-

Column (1): Tariff Item

Column (2): Description of goods

Column (3): Units

Column (4): Standard rate of duty

Column (5): Preferential rate of duty

(a) In the above entry, Coconuts, which is preceded by **"-"** is classification of the heading Coconuts, Brazil nuts and Cashew nuts, fresh or dried, whether or not Shelled or peeled and Desiccated.

"—" is sub-classification of coconut which is preceded by "-".

(b) The second explanatory note states that the abbreviation **"%"** stands for specifying that the rate of duty is *ad valorem.* It means the duty shall be computed at the rates specified in

the First Schedule on the value of the goods determined in accordance with section 14 of the Customs Act. In the above entry, the standard rates are 30% or as the case may be, 70%.

4.3 Rules of interpretation of the First Schedule to the Customs Tariff Act

4.3.1 Rule 1 – General Rule of Classification: The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and provided such headings or notes do not otherwise require, according to the subsequent rules [i.e. rule 2 to 6].

Analysis

The above rule lays down the following propositions:-

(a) The titles of sections, chapters and sub-chapters do not have any legal force.

(b) Terms of headings read with relative section and chapter notes are legally relevant for the purpose of classification.

(c) The rules of interpretation need not be resorted to when classification is possible on the basis of description in heading, sub-heading, chapter notes and section notes.

(d) Notes of one chapter or section cannot be applied for interpreting entries in other chapters or sections.

Example

Product: Letter closing and sealing machine

Sub-heading 8422 30 00: Machinery for filling, closing, sealing or labeling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; machinery for aerating beverages.

Sub-heading 8472 30 00 *inter alia* covers machines for closing or sealing opening, closing or sealing mails.

Both the headings appear to be relevant for the product in question. However, chapter note 2 to chapter 84 inter alia provides that Heading No. 8422 does not cover office machinery of Heading No. 8472. Therefore, the product in question will be classified under 8472 30 00.

4.3.2 Rule 2(a) Classification of Incomplete/Unfinished Articles

(i) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented; the incomplete or unfinished article has the essential character of the complete or finished article.

(ii) It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or dis-assembled.

Analysis

(i) If any particular heading refers to a finished/complete article, the incomplete/unfinished

form of that article shall also be classified under the same heading provided the incomplete/unfinished goods have the essential characteristics of the finished goods.

(ii) If any particular heading refers to a finished/complete article, the unassembled/dis-assembled form of that article shall also be classified under the same heading provided the unassembled/dis-assembled goods have the essential characteristics of the finished goods.

Examples:-

(a) Railway coaches removed without seats would still be railway coaches.

(b) A car without seats would still be classified as car.

Only goods requiring minor adjustments can be construed as having the essential character

It was held that only goods requiring minor adjustments would be construed as having the essential character. Those requiring major processes like turning, grinding, broaching, groove cutting, heat treatment, surface treatment etc., cannot be construed as having the essential character of complete and finished articles and cannot fall within the scope of rule 2(a) of the General Interpretative Rules.

[Motor Industries Company Ltd. v. Assistant Collector of Customs 1992 (62) E.L.T. 13 (Mad.)]

Rule 2(b) – Classification of Mixtures/Combinations of a Material/Substance with Other Materials/Substances

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

(ii) Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance.

(iii) The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

Analysis

The following propositions are laid out by the above rule.

(a) Any reference to a material or substance would refer to mixture or combination of that material or substance.

(b) Any reference to goods containing a particular material or substance would include a reference to goods consisting wholly or partly of such specified material or substance.

Examples

(a) The term coffee will include coffee mixed with chicory.

(b) Natural rubber will cover a mixture of natural and synthetic rubber.

4.3.3 Rule 3 – Classification In Case Goods are Classifiable Under two or More Headings: The application of this rule arises when the goods consists of more than one material or substance.

When by application of rule 2(b) or for any other reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:

Rule 3(a) – Specific over general

(i) The heading which provides the most specific description shall be preferred to headings providing a more general description.

(ii) However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Analysis: The heading that provides a more specific description should be preferred over the heading that provides a general description.

Relevant case law: Electric shaving machine was classifiable under following two headings:-

Heading No. 85.10: Shavers and hair clippers with self contained electric motors

Heading No. 85.09: Electro-mechanical domestic appliances with self-contained electric motor

It was held that the said product was classifiable under heading No. 85.10 as heading No. 85.10 is more specific as compared to heading No. 85.09 *[A. Nagaraju Bros v. State of Andhra Pradesh 1994 (72) E.L.T. 801(S.C.)]*.

Rule 3(b) – Essential character principle: Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified with reference to (a), shall be classified as if they consisted of material which gives them their essential character, in so far as this criterion is applicable.

Analysis: Sub-rule (b) would apply only if the goods cannot be classified under sub-rule (a). This sub-rule provides that composite goods should be classified on the basis of that material or substance that gives it its essential character.

Relevant case law: It was held that in order to find out whether the incomplete article as imported has the essential character of the completed article, the tests to be applied would be whether the imported article has attained the approximate shape or outline of the finished article or part and whether it can only be used for completion into the particular finished article *[BHEL v. CCus 1987 (28) E.L.T. 545 (Tribunal)].*

Example

Product: Lead pencil with an eraser at the back.

Classification: Though the above product is composite goods, the essential character is that it is a pencil and the attachment of eraser at the stub is only for the purpose of adding convenience to the user. Therefore, it shall be classified as a pencil and not as an eraser.

Rule 3(c) – Latter the better: When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Analysis: If both sub-rules (a) and (b) fails to classify the goods in question, then resort may be had to sub-rule (c), which provides that composite goods shall be classified on the basis of the heading that occurs last in numerical order.

Relevant case laws:-

1. ***Mahindra and Mahindra v. CCE 1999 (109) E.L.T. 739 (Tribunal)*** **[maintained by SC]**

   When the goods cleared by assessee were equally classifiable under the following two headings:-

   Heading No. 87.03:-Motor cars and other vehicles principally designed for the transport of persons.

   Heading No. 87.04: Motor vehicles meant for transport of goods.

   It was held that heading 87.04 occurs last and as both the headings equally merit classification, goods shall be classified under 87.04 applying the interpretative Rule 3(c).

2. ***Artherton Engg. Pvt. Ltd. v. CC 2001 (129) E.L.T. 502 (T)*** **[maintained by SC]**

   Rule 3(c) of the Rules of Interpretation comes into operation only if goods cannot be classified by following Rule 3(a) & 3(b).

4.3.4 Rule 4 – Akin Rule : Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Analysis: This rule is popularly referred to as **Akin rule**. This rule specifies that if the goods cannot be classified in accordance with the earlier rules, they shall be classified under the heading in which the most akin goods are classified.

Example

Product: Plastic films used to filter or remove the glare of the sun light, pasted on car glass windows, window panes etc.

Classification: These goods do not find a specific entry in the tariff schedule. However, heading 3925 30 00 covers Builder's wares of plastic not elsewhere specified – shutters, blinds (including Venetian blinds). Even though the product in question is not a builders ware, they are most akin to plastic blinds and hence it can be classified under 3925 30 00 heading.

4.3.5 Rule 5: In addition to the foregoing provisions, the following rules shall apply in respect of goods referred to therein:

(a) Classification of cases/containers used for packaging of goods: Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers shall be classified with a specific article or a set of articles when of a kind normally sold therewith.

Conditions to be fulfilled:-

(i) These cases/containers are specially shaped or fitted to contain a specific article or a set of articles.

(ii) These cases/containers are suitable for long term use and presented with the articles for which they are intended.

This rule does not, however, apply to containers which give the whole its essential character.

(b) Classification of packing materials and packing containers: Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods, if they are of a kind normally used for packing such goods.

However **this provision does not apply** when such packing material or packing containers are clearly suitable of repetitive use.

Analysis: This rule lays down that:-

(i) Cases which are specially designed or fitted to contain a specific article and given with the articles for which they are intended shall follow the classification of the items which are packed.

(ii) The packing materials and containers cleared along with the goods are classifiable with the goods.

Example: Leather cases, which are normally supplied along with the goods, however costly they may be, need not be treated separately for the purpose of classification.

Exceptions to rule 5

(a) Durable containers capable of repetitive use should be classified separately.

Example: Gas cylinders are meant for repetitive use and therefore cannot be classifiable along with gas.

(b) When packing material itself gives the essential character as a whole.

4.3.6 Rule 6: Only Sub-Headings at the Same Level are Comparable

(i) For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading notes and, *mutatis mutandis*, to the above rules, on the understanding that only sub-headings at the same level are comparable.

(ii) For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires.

The main proposition laid down by this rule is that sub-heading at the same level are comparable. This implies that a sub-heading can be compared only with another sub-heading within the same heading.

4.4 Project imports

Project Imports are the imports of machinery, instruments, and apparatus etc., falling under different classifications, required for initial set up of a unit or for substantial expansion of an existing unit. In a project several different items are required, each of which is importable at different rates of customs duties. Hence, it becomes very complicated to make assessment for such project imports. Therefore, one consolidated rate of customs duty has been made applicable for all items imported under a project irrespective of the nature of the goods and their customs classification.

The items eligible for project import are specified in Heading 9801 of the Customs Tariff Act, 1975. These include all items of machinery, instruments, apparatus and appliances, components or raw materials etc. for initial setting up of a unit or for substantial expansion of the same. The spare parts, raw material and consumables stores upto 10% of the value of goods can be imported.

This scheme has been made applicable to Industrial Plants, Irrigation Projects, Power Projects, Mining Projects, Projects for Oil or Mineral Exploration and other projects as may be notified by the Central Government.

4.5 Some judgments on classification

1. ***Saurashtra Chemicals v. CC 1986 (23) ELT 283 (Tri-LB)*** **[approved by SC]**

   This case brings out the importance of section notes and chapter notes in the classification of goods. The Tribunal observed that Section Notes and Chapter Notes in the Customs Tariff are a part of the statute and thus are relevant in the matter of classification of goods. These notes sometimes restrict and some times expand the scope of headings. The scheme of the Customs Tariff is to determine the coverage of headings in the light of section notes and chapter notes. These notes, in this sense have an overriding effect on the headings.

2. ***Maestro Motors Ltd. v. CC 2004 (174) E.L.T 289 (S.C.)***

   In this case, the Court observed that if a tariff heading is specially mentioned in exemption notification, the general interpretative rules would be applicable to such exemption notification. But, if an item is specifically mentioned without any tariff heading, then exemption would be available even though for the purpose of classification, it may be else.

3. ***Hewlett Packard India Sales (p) Ltd. v. CC 2007 (215) E.L.T. 484 (S.C.)***

   In this case the assessee was engaged in the manufacture of, and trading in, computers including Laptops (otherwise called 'Notebooks') falling under Heading 84.71 of the CTA Schedule. They imported Notebooks (Laptops) with Hard Disc Drivers (Hard Discs, for short) preloaded with Operating Software like Windows XP, XP Home etc. These computers were also accompanied by separate Compact Discs (CDs) containing the same software, which were intended to be used in the event of Hard Disc failure.

   The assessee classified the software separately and claimed exemption. The court held that without operating system like windows, the laptop cannot work. Therefore, the laptop along with software has to be classified as laptop and valuation to be made as one unit.

5

Valuation under the Customs Act, 1962

5.1 Introduction

The manner in which duties of customs are charged on goods imported into India (import duty) or goods exported from India (export duty) is basically either by way of –

(a) A specific duty based on the quantity of the goods like ₹ 1000 per metric tone of steel or

(b) Ad valorem, namely expressed as percentage of the value of the goods i.e 40% ad valorem. etc.

The disadvantage with a specific rated levy is that the revenue to the Government remains fixed, unless there is variation in the quantum of total imports and exports. The continuous upward trend in the price of goods has suggested that the Government is losing increase in its revenue by not following ad valorem basis of duties.

5.2 Concept of value

Section 2(41) of the Customs Act, 1962, defines value in relation to any goods as the value thereof determined in accordance with the provisions of sub-section (1) or sub-section (2) of section 14.

Some of the values commonly known to the public are:

(i) Cost price to the manufacturer: It is the total cost incurred by the manufacturer of an article or product in producing or manufacturing the product.

(ii) Sale price of the manufacture: It is the price at which the manufacturer is selling the goods to the buyer.

(iii) There are two sale prices namely

  (a) a domestic sale price

  (b) an export price in the course of international trade.

(iv) In the course of sale, there are two situations namely, wholesale transactions and retail trade. Thus we have (a) Whole sale price and (b) retail price

(v) The sale may be on down right cash basis, or payment on delivery of the goods or the title documents or deferred payment say either on installments or after 30 or 90 days.

  These situations give rise to (a) cash price; (b) payment by sight draft; (60 or 90 days draft).

(vi) There are situations where the manufacturer himself may not be exporting the goods in the course of international trade. This gives rise to the concept of suppliers. As a result we have supplier's price.

(vii) In the course of international trade, where the buyer is in another country, the seller has often to resort to price list or catalogues. This is in turn gives rise to list price.

(viii) There is always a negotiation between the buyer and the seller. The contracted price is arrived at by giving discounts to the list price. Such discounts are given for various considerations. We have therefore terms like

(i) Trade discount

(ii) Quantity discount

(iii) Prompt payment cash discount

(iv) L/C discount

(v) Special discount

(ix) There are situations where the goods are defective, sub – standard or there is a glut of stock and the goods have to be sold at the best price available. This yields disposal price.

(x) The price may vary from consignment from consignment even though there may not be any underhand dealing in the transaction. Such a price is called transaction value.

(xi) There may be a clear understanding between the overseas seller and the Indian buyer of the goods. They may have a special relationship, such as, the Indian buyer may be the sole selling agent for the goods of the overseas seller. He may be the sole distributor. He may even be a branch or subsidiary of the seller and the sale may be a stock transfer. In such a situation, the price is known as dealer's price.

(xii) Lastly, if we have no information of any of the matters relating to the transaction and we have only the commercial invoice used in the transaction, the price is invoice price.

5.3 Terms used in commercial parlance

It would be useful to know and understand the terms and contents of documents used in the International Trade transactions.

(1) Invoice	This is the basic commercial document showing particulars regarding description of goods - quantity and unit price - discounts and net price - names of consignor and consignee - payment particulars. - Contract or acceptance of order on the basis of which the goods are supplied.

(2) Packing specification	Giving particulars of the contents of each of each of the package in the consignment.
(3) Certificate of Origin	A certificate issued by the competent authority in the country of manufacture giving the extent of the manufacture in that country.
(4) Bill of Lading	A negotiable document given by the carriers of the cargo giving particulars of (a) Port of shipment (b) No. of packages covered by the consignment (c) Marks and numbers on the page (d) Name of the vessel in which the goods have been dispatched (e) Name of the consignee of the goods, (f) whether the freight has been pre-paid or is to be collected at the destination. It is a negotiable document which has to be surrendered to the carrier for getting delivery of the goods.
(5) Air Consignment Note	It is a document corresponding to Bill of Lading, in the case of cargo imported or exported by air.
(6) Indent	It is a document showing the particulars of the consignment for which the buyer has placed an order with the supplier. It normally gives particulars about (i) full description of the goods (ii) unit price (iii) mode of payment (iv) quantity required (v) delivery instructions.
(7) Quotation	It is a document, which indicates the price, the terms and other conditions on which the seller is willing to supply goods to the buyer.
(8) Acceptance	It refers to the formalisation of the contract of sale between the buyer and the seller. Once the seller of the goods sends his acceptance of the order of the buyer (the indent) the contract is complete. The acceptance will *inter alia* contain particulars of description of the goods to be supplied, unit price, including discounts and other charges, time and terms of delivery, penal clause for breach of contract, agreed terms of payment.
(9) Letter of Credit	This is an instrument delivered by the bank intimating the seller that the buyer has instructed the bank and the bank will according to these instructions pay the seller of the goods, the bill amount for the supply of the goods on presentation of certain documents evidencing shipment of the goods.

(10) Sight draft	A document evidencing the amount of money paid for the importation.
(11) Delivery Order	An authorisation given by the local agent of the carriers, on surrender of the original negotiable copy of the bill of lading or air consignment note, directing the custodian of the cargo to deliver the consignment to the importer or his agent.
(12) Mate's Receipt	A receipt given by the First mate or First officer or cargo supervisor of the conveyance certifying the total quantity of the consignment received on board the vessel or the aircraft. A bill of lading or air consignment note is issued by the agent of the Carrier Company on surrender of the mate's receipt.
(13) Retirement of documents	The original negotiable copies of the shipment documents like invoice, packing specification, certificate of origin.
(14) Non-negotiable documents	Since retirement of the original document takes time, non negotiable documents are given to the importer to facilitate clearance.
(15) Landing charges	The port authorities have to pay for (i) Unloading the cargo from the conveyance; (ii) Light house charges (iii) Forklift, warehouse crane charges if they are used for landing.
(16) Boat/Lighterage Charge	Some times the vessel is unable to get a berth alongside the quay in the harbour. The goods are then transported from the ship to the shore by boats / lighters. The charges paid therefore are called Boat / Lighterage charges.
(17) Custom House Agent	Since the importers / exporters may not be able to devote time and energy to clear imported goods or export goods, and since it involves running about to several organisations apart from customs, like Port, Trust, steamer agents, insurance companies, the assistance of agency organisation having adquate technical knowledge and expertise has been provided in the form of custom house agents.
(18) Insurance cover	It is customary to insure all goods in the course of international trade. The general cover relates to risk on account of loss, pilferage, fire, storm etc. However loss of goods on account of seizure of

	goods due to war, is a separate cover. It is therefore customary to refer to the insurance as marine risk insurance and war risk insurance. The policy and cover of such insurance is a relevant document for valuation.

5.4 Technical terms relating to value in the course of import or export

(1) Ex-Factory Price	It is the price of the goods as comes out of the factory. It includes cost of production and manufacturer's margin of profit.
(2) F.A.S (Free Alongside)	It is the cost at which the export goods are delivered alongside the ship, ready for shipment. It includes ex-factory +local freight + local taxes.
(3) F.O.B. (Free on Board)	Technically there is not much of a difference between FAS and FOB cost. FOB means the stage at which the goods are placed on board the conveyance carrying the vessel. It can be said to include FAS + loading charges + export duty cess.
(4) C.I.F. (Cost Insurance Freight)	It is the cost at which the goods are delivered at the Indian port. It covers cost of goods. Some times there is referred as CFC also.

5.5 Concept of indirect tax and valuation for the same

Customs duty is considered to be an indirect tax. It is a tax on the goods and it is not a tax on the person having or owning the goods. The charge of tax attaches to the goods. Unless the tax liability is discharged, the goods are not allowed to proceed further. It becomes therefore necessary for the importer, who desires to take clearance of the goods into town for home consumption, to discharge the duty liability. Similarly in case of baggage the passenger cannot take his goods, unless the duty liability is discharged.

The essence is simple. Like articles in similar situations should attract the same burden. As a corollary it follows that

(i) There should be uniformity in tax – burden.

(ii) Since the rate of duty is already fixed for like goods, the value of goods should be uniform for all imports / exports for like good at the same time and place.

(iii) The value of the goods should be proximate to the point of taxation i.e. in the case of import the value at the point of import is relevant.

(iv) Variations in the price/agreed in each transaction on account of factors other than in the course of normal international wholesale trade should be adjusted.

5.6 Two approaches for computing the assessable value

In the course of import, the goods take the following route.

1	2	3	4	5	6	7
Manufac-turer	→ Supplier	→ Port of shipment	→ Port of import	→ Cost to Importer	→ Cost to Wholesale Dealer	→ Cost to Retailer/ consumer

Theoretically the value of the goods at stages (1) (2) (3) (5) (6) (7) is tangible and ascertainable. Furthermore, these values are documented and capable of verification by comparison with corresponding values for such or similar goods. The documents involved in such stages are

(i) Manufacturer's price list / quotation / sale invoices.

(ii) Supplier's sale invoices/ market prices

(iii) Customs approved attested documents showing value adopted for levy of export duty and allied controls.

(iv) Importer's account books

(v) Sale invoices issued by importer to the wholesale dealer or the next purchaser. Market trend of the prices of the goods.

(vi) Sale invoices of wholesale dealers; and trend of prices in the market.

The invoice values normally give CIF or FOB values of the goods. The market value is the wholesale market price at which the importers are regularly selling imported goods. These two are the tangible and readily available data, at the hands of the customs officers to arrive at the "assessable value" a notional deducted value of the goods.

Thus, two well accepted approaches have evolved:

(i) one starting from the actual whole sale market price of the goods in question and giving necessary abatements to adjust the post – importation costs;

(ii) the second, to take as base, the value given in the invoice and make necessary adjustments for factors influencing the price in individual transactions.

5.7 Valuation of goods based on section 14

Section 14 of the Customs Act, 1962 prescribes the mode of computing the value of imported or export goods for the purpose of payment of customs duty. The provisions of section 14 are discussed below: -

Transaction value

(i) Sub-section (1) lays down that for the purposes of the Customs Tariff Act, 1975, or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods.

(ii) In case of export goods, the transaction value shall be

- the price actually paid or payable for the goods
- when sold for export **from** India
- for delivery at the time and place of exportation
- where the buyer and seller of the goods are not related and
- price is the sole consideration for the sale.

However further conditions may be specified in the rules made in this behalf.

(iii) In case of imported goods, the transaction value shall be

- the price actually paid or payable for the goods when sold for export **to** India
- for delivery at the time and place of importation
- where the buyer and seller of the goods are not related and
- price is the sole consideration for the sale.

However, in this case also further conditions may be specified in the rules made in this behalf.

Such transaction value shall also include in addition to the price as aforesaid, any amount paid or payable for costs and services, including:

- commissions and brokerage,
- engineering,
- design work,
- royalties and licence fees,
- costs of transportation to the place of importation,
- insurance
- loading,
- unloading and
- handling charges

to the extent and in manner specified in the rules made in this behalf.

(iv) Such rules may provide for:

(a) the circumstances in which the buyer and the seller shall be deemed to be related;

(b) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(c) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section.

Conversion dates

(v) For imported goods, the conversion in value shall be done with reference to the rate of exchange prevalent on the date of filing bill of entry under section 46.

(vi) For export goods, the conversion in value shall be done with reference to the rate of exchange prevalent on the date of filing shipping bill (vessel or aircraft) or bill of export (vehicle) under section 50.

In case of *Samar Timber Corporation v. ACC 1995 (79) E.L.T. 549 (Bom.*), it was held that relevant date in respect of rate of duty payable is the date of presentation of Bill of Entry and not date of re-presentation after correction.

Currency conversion rate

(vii) The rate of exchange is notified by three agencies- the Central Board of Excise and Customs (Board), the Reserve Bank of India and the Foreign Exchange Dealers' Association of India. For the purpose of customs valuation, "rate of exchange" means the rate of exchange-

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct,

for the conversion of Indian currency into foreign currency or foreign currency into Indian currency. Thus, for the purpose of valuation under customs laws, rate notified by CBEC (Board) shall be taken into account.

The CBEC notifies the rates on a monthly basis applicable from the first day of the month. There are separate rates for imported goods (selling rate) and export goods (buying rate).

(viii) "Foreign currency" and ''Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999.

Tariff value

(ix) Sub-section (2) provides that the Board may fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods by notification in the Official Gazette if it is satisfied that it is necessary to do so.

(x) Where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value. Provisions of sub-section (2) have an overriding effect on the provisions of sub-section (1).

5.8 Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

Notification No. 94/2007 Cus. (NT) dated 13.09.2007 notified Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. They have come into force from 10.10.2007. They apply to imported goods. The rules are given below:

Rule 2 – Definitions : (1)In these rules, unless the context otherwise requires, -

(a) "computed value" means the value of imported goods determined in accordance with rule 8.

(b) "deductive value" means the value determined in accordance with rule 7.

(c) "goods of the same class or kind", means imported goods that are within a group or range of imported goods produced by a particular industry or industrial sector and includes identical goods or similar goods.

(d) "identical goods" means imported goods –

(i) which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;

(ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods.

(e) "produced" includes grown, manufactured and mined.

(f) "similar goods" means imported goods –

(i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;

(ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported

goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods.

(g) "transaction value" means the value referred to in sub-section (1) of section 14 of the Customs Act, 1962.

(2) For the purpose of these rules, persons shall be deemed to be "related" only if –

(i) they are officers or directors of one another's businesses;

(ii) they are legally recognised partners in business;

(iii) they are employer and employee;

(iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family.

Explanation I. – The term "person" also includes legal persons.

Explanation II. – Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

In case of *East African Traders v. CC 2000 (115) E.L.T. 613 (S.C.),* it was held that Customs authorities and Tribunal can pierce the veil of the respondent company to determine whether or not the buyer and the seller were 'related persons within the scope of rule 2(2) of the erstwhile Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 [now rule 2(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

Rule 3 – Determination of the method of valuation: (1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10.

(2) Value of imported goods under sub-rule (1) shall be accepted:

Provided that-

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which –

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.

(3) (a) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.

(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time.

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods.

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related.

(c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

(4) If the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9.

Rule 4 – Transaction value of identical goods: (1) (a) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued.

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

(c) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated

evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

(2) Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

(3) In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods.

Rule 5 – Transaction value of similar goods: (1) Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued.

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(2) The provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of rule 4 shall, mutatis mutandis, also apply in respect of similar goods.

Rule 6 – Determination of value where value can not be determined under rules 3, 4 and 5: If the value of imported goods cannot be determined under the provisions of rules 3, 4 and 5, the value shall be determined under the provisions of rule 7 or, when the value cannot be determined under that rule, under rule 8.

Provided that at the request of the importer, and with the approval of the proper officer, the order of application of rules 7 and 8 shall be reversed.

Rule 7 – Deductive value: (1) Subject to the provisions of rule 3, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions: —

(i) either the commission usually paid or agreed to be paid or the additions usually made for profits and general expenses in connection with sales in India of imported goods of the same class or kind;

(ii) the usual costs of transport and insurance and associated costs incurred within India;

(iii) the customs duties and other taxes payable in India by reason of importation or sale of the goods.

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1), be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.

(3) (a) If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.

(b) In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1).

Rule 8 – Computed value: Subject to the provisions of rule 3, the value of imported goods shall be based on a computed value, which shall consist of the sum of:-

(a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;

(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India;

(c) the cost or value of all other expenses under sub-rule (2) of rule 10.

Rule 9 – Residual method: (1) Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India.

Provided that the value so determined shall not exceed the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale or offer for sale.

(2) No value shall be determined under the provisions of' this rule on the basis of —

(i) the selling price in India of the goods produced in India;

(ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;

(iii) the price of the goods on the domestic market of the country of exportation;

(iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;

(v) the price of the goods for the export to a country other than India;

(vi) minimum customs values; or

(vii) arbitrary or fictitious values.

The residuary method can be considered if valuation is not possible by any other method. *[Sanjay Chandiram v. CC 1995 (77) E.L.T. 241 (S.C.)]*

Rule 10 – Cost and services: (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods:

(a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials.

(b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the Imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods.

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

Explanation.- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

(2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include –

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance :

Provided that —

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);

(iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods.

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii).

Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a).

Explanation.- The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on charted vessels, lighterage or barge charges.

(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.

Rule 11 – Declaration by the importer: (1) The importer or his agent shall furnish –

(a) a declaration disclosing full and accurate details relating to the value of imported goods; and

(b) any other statement, information or document including an invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person other than the manufacturer or producer, as considered necessary by the proper officer for determination of the value of imported goods under these rules.

(2) Nothing contained in these rules shall be construed as restricting or calling into question the right of the proper officer of customs to satisfy himself as to the truth or accuracy of any statement, information, document or declaration presented for valuation purposes.

(3) The provisions of the Customs Act, 1962 relating to confiscation, penalty and prosecution shall apply to cases where wrong declaration, information, statement or documents are furnished under these rules.

Rule 12 – Rejection of declared value : (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such

importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.-(1) For the removal of doubts, it is hereby declared that:–

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include –

  (a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

  (b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

  (c) the sale involves special discounts limited to exclusive agents;

  (d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

  (e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

  (f) the fraudulent or manipulated documents.

Rule 13 – Interpretative notes: The interpretative notes specified in the Schedule to these rules shall apply for the interpretation of these rules.

Interpretative Notes

General Note:

Use of generally accepted accounting principles

1. "Generally accepted accounting principles" refers to the recognized consensus or substantial authoritative support within a country at a particular time as to which economic resources and obligations shall be recorded as assets and liabilities, which changes in assets

and liabilities should be recorded, how the assets and liabilities and changes in them should be measured, what information should be disclosed and how it should be disclosed and which financial statements should be prepared. These standards may be broad guidelines of general application as well as detailed practices and procedures.

Notes to Rules

Note to rule 2

In rule 2(2)(v), for the purposes of these rules, one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

Note to rule 3

Price actually paid or payable

The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.

Activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in rule 10, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the value of imported goods.

The value of imported goods shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:

(a) Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;

(b) The cost of transport after importation;

(c) Duties and taxes in India.

The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value.

Rule 3(2)(a)(iii): Among restrictions which would not render a price actually paid or payable unacceptable are restrictions which do not substantially affect the value of the goods. An example of such restrictions would be the case where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year.

Rule 3(2)(b): If the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued, the transaction value shall not be acceptable for customs purposes. Some examples of this include-

(a) The seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities;

(b) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;

(c) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semifinished goods which have been provided by the seller on condition that he will receive a specified quantity of the finished goods.

However, conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value. For example, the fact that the buyer furnishes the seller with engineering and plans undertaken in India shall not result in rejection of the transaction value for the purposes of rule 3. Likewise, if the buyer undertakes on his own account, even though by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of the value of imported goods nor shall such activities result in rejection of the transaction value.

Rule 3(3)

1. Rule 3(3)(a) and rule 3(3)(b) provide different means of establishing the acceptability of a transaction value.

2. Rule 3(3)(a) provides that where the buyer and the seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the value of imported goods provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the proper officer of customs has no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For example, the proper officer of customs may have previously examined the relationship, or he may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.

3. Where the proper officer of customs is unable to accept the transaction value without further inquiry, he should give the importer an opportunity to supply such further detailed information as may be necessary to enable him to examine the circumstances surrounding the sale. In this context, the proper officer of customs should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price. Where it can be shown that the buyer and seller, although related under the provisions of rule 2(2), buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to him, this would demonstrate that the price

had not been influenced by the relationship. As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced.

4. Rule 3(3)(b) provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value previously accepted by the proper officer of customs and is therefore acceptable under the provisions of rule 3. Where a test under rule 3(3)(b) is met, it is not necessary to examine the question of influence under rule 3(3)(a). If the proper officer of customs has already sufficient information to be satisfied, without further detailed inquiries, that one of the tests provided in rule 3(3)(b) has been met, there is no reason for him to require the importer to demonstrate that the test can be met. In rule 3(3)(b) the term "unrelated buyers" means buyers who are not related to the seller in any particular case.

Rule 3(3)(b): A number of factors must be taken into consideration in determining whether one value "closely approximates" to another value. These factors include the nature of the imported goods, the nature of the industry itself, the season in which the goods are imported, and whether the difference in values is commercially significant. Since these factors may vary from case to case, it would be impossible to apply a uniform standard such as a fixed percentage, in each case. For example, a small difference in value in a case involving one type of goods could be unacceptable while a large difference in a case involving another type of goods might be acceptable in determining whether the transaction value closely approximates to the "test" values set forth in rule 3(3)(b).

Notes to rule 4

1. In applying rule 4, the proper officer of customs shall, wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used:

(a) a sale at the same commercial level but in different quantities; or

(b) a sale at a different commercial level but in substantially the same quantities; or

(c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:

(a) quantity factors only;

(b) commercial level factors only; or

(c) both commercial level and quantity factors.

3. For the purposes of rule 4, the transaction value of identical imported goods means a value, adjusted as provided for in rule 4(1)(b) and (c) and rule 4(2) which has already been accepted under rule 3.

4. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustment, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only identical imported goods for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a value under the provisions of rule 4 is not appropriate.

Note to rule 5

1. In applying rule 5, the proper officer of customs shall, wherever possible, use a sale of similar goods at the same commercial level and in substantially the same quantities as the goods being valued. For the purpose of rule 5, the transaction value of similar imported goods means the value of imported goods, adjusted as provided for in rule 5(2) which has already been accepted under rule 3.

2. All other provisions contained in note to rule 4 shall mutatis mutandis also apply in respect of similar goods.

Note to rule 7

1. The term "unit/price at which goods are sold in the greatest aggregate quantity" means the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales take place.

2. As an example of this, goods are sold from a price list which grants favourable unit prices for purchases made in larger quantities.

Sale quantity	Unit price	Number of sales	Total quantity sold at each price
1 -10 units	100	10 sales of 5 units 5 sales of 3 units	65
11-25 units	95	5 sales of 11 units	55
Over 25 units	90	1 sale of 30 units 1 sale of 50 units	80

The greatest number of units sold at a price is 80, therefore, the unit price in the greatest aggregate quantity is 90.

3. As another example of this, two sales occur. In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units are sold at a price of 90 currency units each. In this example, the greatest number of units sold at a particular price is 500, therefore, the unit price in the greatest aggregate quantity is 95.

4. A third example would be the following situation where various quantities are sold at various prices.

(a) Sales

Sale quantity	Unit price
40 units	100
30 units	90
15 units	100
50 units	95
25 units	105
35 units	90
5 units	100

(b) Totals

Total quantity sold	Unit price
65	90
50	95
60	100
25	105

In this example, the greatest number of units sold at a particular price is 65, therefore, the unit price in the greatest aggregate quantity is 90.

5. Any sale in India, as described in paragraph 1 above to a person who supplies directly or indirectly free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods any of the elements specified in rule10(l)(b), should not be taken into account in establishing the unit price for the purposes of rule 7.

6. It should be noted that "profit and general expenses" referred to in rule 7(1) should be taken as a whole. The figure for the purposes of this deduction should be determined on the basis of information supplied by or on behalf of the importer unless his figures are inconsistent with those obtaining in sales in India, of imported goods of the same class or kind. Where the importer's figures are inconsistent with such figures, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the importer.

7. The "general expenses" include the direct and indirect costs of marketing the goods in question.

8. Local taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of rule 7(1)(iii) shall be deducted under the provisions of rule 7(1)(i).

9. In determining either the commissions or the usual profits and general expenses under the provisions of rule 7(1), the question whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis by reference to the circumstances involved. Sales in India, of the narrowest group or range of imported goods of the same class or kind, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of rule 7 goods of the same class or kind" includes goods imported from the same country as the goods being valued as well as goods imported from other countries.

10. For the purposes of rule 7(2) the "earliest date" shall be the date by which sales of the imported goods or of identical or similar imported, goods are made in sufficient quantity to establish the unit price.

11. Where the method in rule 7(3) is used, deductions made for the value added by further processing shall be based on objective and quantifiable data relating to the cost of such work. Accepted industry formulas, recipes, methods of construction, and other industry practices would form the basis of the calculations.

12. It is recognized that the method of valuation provided for in rule 7(3) would normally not be applicable when, as a result of the further processing, the imported goods lose their identity. However there can be instances where, although the identity of the imported goods is lost, the value added by the processing can be determined accurately without unreasonable difficulty. On the other hand, there can also be instances where the imported goods maintain their identity but form such a minor element in the goods sold in the country of importation that the use of this valuation method would be unjustified. In view of the above, each situation of this type must be considered on a case-by-case basis.

Note to rule 8

1. As a general rule, value of imported goods is determined under these rules on the basis of information readily available in India. In order to determine a computed value, however, it may be necessary to examine the costs of producing the goods being valued and other information which has to be obtained from outside India. Furthermore, in most cases, the producer of the goods will be outside the jurisdiction of the proper officer. The use of the computed value method will generally be limited to those cases where the buyer and seller are related, and the producer is prepared to supply to the proper officer the necessary costings and to provide facilities for any subsequent verification which may be necessary.

2. The "cost or value" referred to in clause (a) of rule 8 is to be determined on the basis of information relating to the production of the goods being valued supplied by or on behalf of the producer. It is to be based upon the commercial accounts of the producer, provided that such accounts are consistent with the generally accepted accounting principles applied in the country where the goods are produced.

3. The "cost or value" shall include the cost of elements specified in clauses (1)(a)(ii) and (1)(a)(iii) of rule 10. It shall also include the value, apportioned as appropriate under the

provisions of the relevant note to rule 10, of any element specified in rule 10(I)(b) which has been supplied directly or indirectly by the buyer for use in connection with the production of the imported goods. The value of the elements specified in rule 10(I)(b)(iv) which are undertaken in India shall be included only to the extent that such elements are charged to the producer. It is to be understood that no cost or value of the elements referred to in this paragraph shall be counted twice in determining the computed value.

4. The "amount for profit and general expenses" referred to in clause(b) of rule 8 is to be determined on the basis of information supplied by or on behalf of the producer unless the producer's figures are inconsistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India.

5. It should be noted in this context that the "amount for profit and general expenses" has to be taken as a whole. It follows that if, in any particular case, producer's profit figure is low and his general expenses are high, the producer's profit and general expenses taken together may nevertheless be consistent with that usually reflected in sales of goods of the same class or kind. Such a situation might occur, for example, if a product were being launched in India and the producer accepted a nil or low profit to offset high general expenses associated with the launch. Where the producer can demonstrate a low profit on his sales of the imported goods because of particular commercial circumstances, his actual profit figures should be taken into account provided that he has valid commercial reasons to justify them and his pricing policy reflects usual pricing policies in the branch of industry concerned. Such a situation might occur for example, where producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or where they sell goods to complement a range of goods being produced in India and accept a low profit to maintain competitivity. Where the producer's own figures for profit and general expenses are not consistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the producer of the goods.

6. The "general expenses" referred to in clause (b) of rule 8 covers the direct and indirect costs of producing and selling the goods for export which are not included under clause (a) of rule 8.

7. Whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis with reference to the circumstances involved. In determining the usual profits and general expenses under the provisions of rule 8, sales for export to India of the narrowest group or range of goods, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of rule 8 "goods of the same class or kind" must be from the same country as the goods being valued.

Note to rule 9

1. Value of imported goods determined under the provisions of rule 9 should to the greatest extent possible, be based on previously determined customs values.

2. The methods of valuation to be employed under rule 9 may be those laid down in rules 3 to 8, inclusive, but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of rule 9.

3. Some examples of reasonable flexibility are as follows:

(a) Identical goods. The requirement that the identical goods should be imported at or about the same time as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of rules 7 and 8 could be used.

(b) Similar goods. The requirement that the similar goods should be imported at or about the same time as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of rules 7 and 8 could be used.

(c) Deductive method. The requirement that the goods shall have been sold in the "condition as imported" in rule 7(1) could be flexibly interpreted; the ninety days requirement could be administered flexibly.

Note to rule 10

In rule 10(l)(a)(i), the term "buying commissions" means fees paid by an importer to his agent for the service of representing him abroad in the purchase of the goods being valued.

Rule 10(1)(b)(ii)

1. There are two factors involved in the apportionment of the elements specified in rule 10(l)(b)(ii) to the imported goods – the value of the element itself and the way in which that value is to be apportioned to the imported goods. The apportionment of these elements should be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.

2. Concerning the value of the element, if the importer acquires the element from a seller not related to him at a given cost, the value of the element is that cost. If the element was produced by the importer or by a person related to him, its value would be the cost of producing it. If the element had been previously used by the importer, regardless of whether it had been acquired or produced by such importer, the original cost of acquisition or production would have to be adjusted downward to reflect its use in order to arrive at the value of the element.

3. Once a value has been determined for the element it is necessary to apportion that value to the imported goods. Various possibilities exist. For example, the value might be apportioned to the first shipment if the importer wishes to pay duty on the entire value at one time. As another example, the importer may request that the value be apportioned over the number of units produced up to the time of the first shipment. As a further example, he may request that the value be apportioned over the entire anticipated production where contracts or firm

commitments exist for that production. The method of apportionment used will depend upon the documentation provided by the importer.

4. As an illustration of the above, an importer provides the producer with a mould to be used in the production of the imported goods and contracts with him to buy 10000 units. By the time of arrival of the first shipment of 1000 units, the producer has already produced 4,000 units. The importer may request the proper officer of customs to apportion the value of the mould over 1,000 units, 4,000 units or 10,000 units.

Rule 10(1)(b)(iv)

1. Additions for the elements specified in rule 10(l)(b)(iv) should be based on objective and quantifiable data. In order to minimize the burden for both the importer and proper officer of customs in determining the values to be added, data readily available in the buyer's commercial record system should be used in so far as possible.

2. For those elements supplied by the buyer which were purchased or leased by the buyer, the addition would be the cost of the purchase or the lease. No addition shall be made for those elements available in the public domain, other than the cost of obtaining copies of them.

3. The case with which it may be possible to calculate the values to be added will depend on a particular firm's structure and management practice, as well as its accounting methods.

4. For example, it is possible that a firm which imports a variety of products from several countries maintains the records of its design centre outside the country of importation in such a way as to show accurately the costs attributable to a given product. In such cases, a direct adjustment may appropriately be made under the provisions of rule 10.

5. In another case, a firm may carry the cost of the design centre outside the country of importation as a general overhead expense without allocation to specific products. In this instance, an appropriate adjustment could be made under the provisions of rule 10 with respect to the imported goods by apportioning total design centre costs over total production benefiting from the design centre and adding such apportioned cost on a unit basis to imports.

6. Variations in the above circumstances will, of course, require different factors to be considered in determining the proper method of allocation.

7. In cases where the production of the element in question involves a number of countries and over a period of time, the adjustment should be limited to the value actually added to that element outside the country of importation.

Rule 10(1)(c)

1. The royalties and licence fees referred to in rule 10(1)(c) may include among other things, payments in respect to patents, trademarks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.

2. Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the country of importation of the imported goods.

Rule 10(3)

Where objective and quantifiable data do not exist with regard to the additions required to be made under the provisions of rule 10, the transaction value cannot be determined under the provisions of rule 3. As an illustration of this, a royalty is paid on the basis of the price in a sale in the importing country of a litre of a particular product that was imported by the kilogram and made up into a solution after importation. If the royalty is based partially on the imported goods and partially on other factors, which have nothing to do with the imported goods (such as when the imported goods are mixed with domestic ingredients and are no longer separately identifiable, or when the royalty cannot be distinguished from special financial arrangements between the buyer and the seller), it would be inappropriate to attempt to make an addition for the royalty. However, if the amount of this royalty is based only on the imported goods and can be readily quantified, an addition to the price actually paid or payable can be made.

Circular No. 38/2007 Cus. dated 09.10.2007 **has been** issued to clarify the major changes in the new Import Valuation Rules i.e., Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 notified vide *Notification No 94/2007-Cus (NT) dated 13-9-2007.*

The clarifications are given below for proper application of the Valuation Rules, i.e., Customs Valuation (Determination of Value of Imported Goods) Rules, 2007:-

(i) Transaction Value has been defined to mean the value referred to in sub-section (1) of section 14 of the Customs Act, 1962.

(ii) A 'proviso' has been added to rules 4(1)(a) and 5(1) concerning identical goods and

similar goods respectively, to the effect that the value of the goods provisionally assessed under section 18 of the Customs Act, 1962, shall not be the basis for determining the value of any other goods.

(iii) In the residual method of Valuation, which has been renumbered as Rule 9 (erstwhile Rule 8), a proviso has been added with a view to keeping Rule 9 in line with Article 7 of the WTO Valuation Agreement which corresponds to the said Rules and refers to the provisions of Article VII of the GATT.

(iv) An 'Explanation' has been added to Rule 10(1) [erstwhile Rule 9(1)] to clarify that the royalty, licence fee or any other payment for using a process, when they are otherwise includible in terms of clause (c) or (e) of Rule 10(1), shall be added to the price actually paid or payable, notwithstanding the fact that such goods may be subjected to the said process after their importation. At times, royalty, license fee or any other payment for a process to be paid by the importer may be linked to post–importation activity like running of the machine/ plant, when the process is put to use. This Explanation has been added in the context of the Supreme Court judgement in the case of *J.K. Corporation Ltd. v. Commissioner of Customs (Port) Kolkata 2007 (208) ELT 485 (SC)* so as to clarify that such royalty, license fee, etc., if otherwise includible in terms of clauses (c) or (e) of Rule 10, will be includible in the value of the goods irrespective of the fact that such royalty, licence fee, etc., relates to a process which is made operational during the running of the machines, i.e., after importation of the goods.

(v) An 'Explanation' has been added to Rule 10(2) clarifying that the cost of transport of the imported goods includes ship demurrage charges on chartered vessels, lighterage charges or barge charges. This Explanation is to take care of cases of imports by time chartered vessels or bulk carriers discharging goods on high seas needing additional expenditure for delivery of the goods at the "Place of Importation" mentioned in Rule 10(2)(a). The 'place of importation', as observed by the Supreme Court in the case of *Garden Silk Mills Ltd Versus Union of India 1993 (113) E.L.T. 358 (S.C)* means the place where the imported goods reach the landmass of India in the Customs area of the port, airport or land customs station, or if they are consumed before reaching the landmass of India, the place of consumption. Therefore, in cases where ship demurrage charges are paid by the importer for detention of the ship in the harbour before touching the landmass at the docks or at the place of consumption, these charges would be includible in the cost of transportation. Similarly, in cases where the big mother vessels cannot enter the harbour for any reason and goods are brought to the docks by smaller vessels like barges, small boats, etc., the cost incurred by the importer for bringing the goods to the landmass or place of consumption, such as lighterage charges, barge charges will also be included in the cost of transportation.

(vi) An 'Explanation' has been added to Rule 12, which relates to rejection of declared value, to bring more clarity and objectivity in exercising the authority for rejection of declared value. The Explanation clarifies that this rule as such does not provide a method for determination of value, and that it merely provides a mechanism and procedure for rejection of declared value in certain cases. It also clarifies that where the proper officer is satisfied after consultation with the importer, the declared value shall be accepted. This Explanation also gives certain illustrative reasons which could form the basis for having doubt about the truth or accuracy of the declared value.

Valuation of goods cleared from a 100% EOU to a depot from where the sale to DTA is effected through consignment agents: *Circular No. 933/23/2010 CX dated 16.08.2010* clarifies that the value of goods cleared from a 100% Export Oriented Undertaking to a depot from where the sale thereof to Domestic Tariff Area is effected through consignment agents will have to be determined by sequential application of Rules 3 to 9 of the Customs Valuation Rules (Determination of Price of Imported Goods), 2007.

Determination of assessable value in case of sale of warehoused goods before being cleared for home consumption

Issue: Whether the assessable value of the warehoused goods which are sold before being cleared for home consumption should be taken as the price at which the original importer has sold the goods, before a Bill of Entry for home consumption is filed?

Clarification: Section 14 of the Customs Act provides that the value of the imported goods is the transaction value of goods. Transaction value is defined to mean the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. In the instant case, the goods are sold after being warehoused, therefore, it cannot be said that export of goods is not complete and thus the sale of warehoused goods cannot be considered a sale for export to India. Hence, the price at which the imported goods

are sold after warehousing them in India does not qualify to be the transaction value as per section 14.

[Circular No.11/2010 dated 03.06.2010]

5.9 Customs Valuation (Determination of Value of Export Goods) Rules, 2007

Notification No. 95/2007 Cus. (NT) dated 13.09.2007 has notified Customs Valuation (Determination of Value of Export Goods) Rules, 2007. They shall come into force from 10.10.2007. They shall apply to the export goods.

Rule 2 – Definitions : (1)In these rules, unless the context otherwise requires, -

(a) "goods of like kind and quality" means export goods which are identical or similar in physical characteristics, quality and reputation as the goods being valued, and perform the same functions or are commercially interchangeable with the goods being valued, produced by the same person or a different person; and

(b) "transaction value" means the value of export goods within the meaning of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962).

(2) For the purposes of these rules, persons shall be deemed to be "related" only if –

(i) they are officers or directors of one another's businesses;

(ii) they are legally recognised partners in business;

(iii) they are employer and employee;

(iv) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family.

Explanation I. - The term "person" also includes legal persons.

Explanation II. - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule.

Rule 3 - Determination of the method of valuation : (1) Subject to rule 8, the value of export goods shall be the transaction value.

(2) The transaction value shall be accepted even where the buyer and seller are related, provided that the relationship has not influenced the price.

(3) If the value cannot be determined under the provisions of sub-rule (1) and sub-rule (2), the value shall be determined by proceeding sequentially through rules 4 to 6.

Rule 4 - Determination of export value by comparison : (1) The value of the export goods shall be based on the transaction value of goods of like kind and quality exported at or about the same time to other buyers in the same destination country of importation or in its absence another destination country of importation adjusted in accordance with the provisions of sub-rule (2).

(2) In determining the value of export goods under sub-rule (1), the proper officer shall make such adjustments as appear to him reasonable, taking into consideration the relevant factors, including-

(i) difference in the dates of exportation,

(ii) difference in commercial levels and quantity levels,

(iii) difference in composition, quality and design between the goods to be assessed and the goods with which they are being compared,

(iv) difference in domestic freight and insurance charges depending on the place of exportation.

Rule 5 - Computed value method : If the value cannot be determined under rule 4, it shall be based on a computed value, which shall include the following:-

(a) cost of production , manufacture or processing of export goods;

(b) charges, if any, for the design or brand;

(c) an amount towards profit.

Rule 6 - Residual method: (1) Subject to the provisions of rule 3, where the value of the export goods cannot be determined under the provisions of rules 4 and 5, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules provided that local market price of the export goods may not be the only basis for determining the value of export goods.

Rule 7 - Declaration by the exporter: The exporter shall furnish a declaration relating to the value of export goods in the manner specified in this behalf.

Rule 8 - Rejection of declared value: (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any export goods, he may ask the exporter of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such exporter, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, the transaction value shall be deemed to have not been determined in accordance with sub-rule (1) of rule 3.

(2) At the request of an exporter, the proper officer shall intimate the exporter in writing the ground for doubting the truth or accuracy of the value declared in relation to the export goods by such exporter and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation - (1) For the removal of doubts, it is hereby declared that-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 6.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth or accuracy of the declared value after the said enquiry in consultation with the exporter.

(iii) The proper officer shall have the powers to raise doubts on the declared value based on certain reasons which may include –

(a) the significant variation in value at which goods of like kind and quality exported at or about the same time in comparable quantities in a comparable commercial transaction were assessed.

(b) the significantly higher value compared to the market value of goods of like kind and quality at the time of export.

(c) the misdeclaration of goods in parameters such as description, quality, quantity, year of manufacture or production.

Analysis: *Circular No. 37/2007 Cus. dated 09.10.2007* has been issued regarding the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 notified vide *Notification No 95/2007 Cus. (NT) dated 13.09.2007*. The Customs Valuation (Determination of Value of Export Goods) Rules 2007 have been framed in a format similar to the Valuation Rules for the imported goods. Conceptually also, acceptance of Transaction Value for export goods has been emphasized in the said rules, in as much as Rule 3 specifically provides for it.

Rule 3 of the said rules also stipulates that the Transaction Value for export goods shall be accepted even where buyer and seller are related, provided that the relationship did not influence the price of the goods. Where the relationship is found to influence the price, as determined by the proper officer on receipt of further information from the exporter, the value of the export goods shall be determined by proceeding sequentially through rules 4 to 6 of the said Valuation Rules. The persons who shall be deemed to be 'related' have been specified in Rule 2(2) of the said Valuation Rules, and this provision has been adopted from the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

Thus transaction value is the primary basis for valuation of export goods and the method specified under Rule 3 will be applicable in the vast majority of cases of export by acceptance of declared value. In cases where the transaction value is not accepted, the valuation of the export goods shall be done by application of Rules 4 to 6 sequentially.

Acceptance of transaction value is, however, subject to the provision of Rule 8 which provides for rejection of declared value for the export goods in certain exceptional cases. These are situations where the assessing officer has reasons to doubt the truth or accuracy of the declared value and further enquiry or investigation is needed to determine the appropriate value. It is hereby instructed that when an investigation / enquiry is undertaken to determine

whether or not the Declared Value should be accepted as Transaction Value, the export consignment shall not be ordinarily detained. Wherever there are doubts about the declared value of the export goods, the proper officer shall retain representative sealed samples, wherever considered necessary and feasible, and allow the goods to be exported after due processing. However, it is clarified that in a situation of serious violation such as outright mis-declaration of goods, attempt to export the goods unauthorisedly, i.e., smuggle the goods out of the country, or where there is forgery or fraudulent documentation, the goods may be detained or seized as required. No export consignment shall be detained for reasons of doubts regarding valuation without the approval of the jurisdictional Principal Commissioner/Commissioner of Customs.

An 'Explanation' relating to rejection of declared value of export goods has been added to Rule 8 to bring clarity and objectivity in exercising the authority for rejection of declared value. The Explanation clarifies that this rule as such does not provide a method for determination of value, and that it merely provides a mechanism and procedure for rejection of declared value of export goods in certain cases. It also clarifies that where the proper officer is satisfied after consultation with the exporter, the declared value shall be accepted. This Explanation also gives certain illustrative reasons which could form the basis for having doubt about the truth or accuracy of the declared value.

While raising doubt about truth or accuracy of the declared value in terms of Rule 8, the proper officer shall issue a query memo specifying reasons for such doubt. Meanwhile, the goods will be released for export against a simple undertaking after drawal of representative sample as indicated in para 5. The decision to initiate the process of investigation into valuation aspects, if any, shall be taken at the earliest at the level of Joint /Additional Commissioner.

In a case where transaction value cannot be determined or the declared value is rejected under Rule 8, and export value has to be determined by comparison in terms of Rule 4, the proper officer shall take utmost care in selecting an export product for an in-depth inquiry. The proper officer will make the adjustments objectively on the basis of the relevant factors, some of which have been illustrated at sub rule (2) of Rule 4.

Where the value has to be determined by Computed value method under Rule 5, the proper officer shall give due consideration to the cost-certificate issued by a Cost Accountant or Chartered Accountant or Government approved valuer, as produced by the exporter.

It is clarified that the main purpose of introducing the Export Valuation Rules is to provide for a sound legal basis for the valuation of export goods. It is also expected to check deliberate overvaluation of export goods and mis-utilization of value based export incentive schemes. At the same time due care has to be taken to facilitate the movement of bonafide export goods which is vital for the country's economic growth. The assessing officers shall, therefore, exercise due caution to avoid unnecessary queries regarding truth or accuracy of the declared export value. The Export Valuation Rules are not intended to bring about any significant change in the existing pattern of valuation of export goods. It is the responsibility of the supervisory officers to monitor regularly the export valuation practices, so as to ensure proper

implementation of the said Valuation Rules without hindering the flow of bona fide export goods.

Rule 7 of the Export Valuation Rules calls for a declaration relating to the value to be filed by the exporter. A declaration format for this purpose has been designed and the same is enclosed as Annexure-A. Since it may be sometime before the format is notified to the trade by the respective Commissionerates, care should be taken to ensure that no export consignments are held up for want of such declaration which may for the time being be obtained subsequent to exports. The filing of the declaration along with the shipping bill should however be enforced with effect from 12th November 2007.

5.10 Date for determination of rate of duty and tariff value

For imported goods [section 15]: Section 15 of the Customs Act, 1962 specifies that the relevant date for determining the rate of duty and tariff valuation of imported goods. They are different for different situations as given below:

(a) Goods are entered for home consumption under section 46 – The relevant date for the three modes of transport as laid down by section 15(1)(a) read with proviso would be as follows:

(i) For goods imported by vehicle at land customs station – the relevant date is the date of filing the B/E under section 46 or date of arrival of vehicle, whichever is later.

(ii) For goods imported by a vessel at a customs port – the relevant date is the date of filing the B/E under section 46 or date of entry inwards to vessel under section 31, whichever is later.

(iii) For goods imported by aircraft at a customs airport – the relevant date is the date of filing the B/E under section 46 or date of arrival of aircraft, whichever is later.

(b) Goods cleared from a warehouse under section 68 – the relevant date is the date on which a bill of entry for home consumption in respect of such goods is presented.

(c) In the case of any other goods – the relevant date is the date of payment of duty.

These provisions relating to determination of relevant date do not apply to baggage and imports by post, in which sections 78 and 83 apply respectively.

For export goods [section 16]: The relevant date for export goods is determined as per section 16. However, the provisions do not apply to baggage and imports by post.

The provisions are as follows:

(a) In case of goods entered for export (irrespective of the mode of transport) – the relevant date is the date of the 'let export' order of the proper officer permitting export and loading of cargo on board under section 51.

(b) In case of any other goods – the relevant date is the date of payment of duty.

5.11 Special provisions for classification of sets of articles and

accessories

Section 19 of the Customs Act provides that:

Except as otherwise provided in any law for the time being in force, where goods consist of a set of articles, duty shall be calculated as follows: -

(a) Articles liable to duty with reference to quantity shall be chargeable to that duty;

(b) Articles liable to duty with reference to value shall, if they are liable to duty at the same rate, be chargeable to duty at that rate, and if they are liable to duty at different rates, be chargeable to duty at the highest of such rates;

(c) Articles not liable to duty shall be chargeable to duty at the rate at which articles liable to duty with reference to value are liable under clause (b).

However, -

(a) Accessories of, and spare parts or maintenance and repairing implements for, any article which satisfy the conditions specified in the rules made in this behalf shall be chargeable at the same rate of duty as that article;

(b) If the importer produces evidence to the satisfaction of the proper officer or the evidence is available regarding the value of any of the articles liable to different rates of duty, such article shall be chargeable to duty separately at the rate applicable to it.

As per the Accessories (Conditions) Rules, 1963, accessories of and spare parts and maintenance or repairing implements for, any article when imported along with that article shall be chargeable at the same rate of duty as that article, if the proper officer is satisfied that in the ordinary course of trade such accessories, parts and implements are compulsorily supplied along with that article and no separate charge is made for such supply and their price being included in the price of the relevant article.

6

Administrative Aspects of Customs Act, 1962

6.1 Appointment of customs ports, airports, warehousing stations, etc.

The entry/exit of carriers/passengers etc., is regulated in India by the Customs Act, 1962 which governs/regulates this entry/exit of different categories of vessels/crafts/goods/ passengers etc., into or outside the country.

Under the Customs Act, Government has given powers to appoint Customs ports and airports where alone the imported goods can be brought in for unloading or export goods loaded on ships or air crafts. Similar powers have been given to the Government to notify the places which alone shall be the Land Customs Stations for clearance of imported goods or goods to be exported by land or by inland water. Even the routes of passage by land and inland water into or out of the country can be regulated and these provisions have been made use of specially for regulating traffic for our neighboring countries like Nepal.

6.1.1 Customs port, airport, etc: Section 2(10) defines a customs airport as any airport appointed under clause (a) of Section 7 to be a customs airport and includes a place appointed under clause (aa) of that section [as mentioned below] to be an air freight station. Section 2(11) defines a customs area to mean the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by customs authorities. In turn Section 2(13) defines a customs station to mean any customs port, customs airport or land customs station.

Section 7 of the Customs Act, 1962 empowers the Board to appoint by notification in the Official Gazette:

(a) customs ports and customs airports,

(aa) inland container depots or air freight stations, for the unloading of imported goods and the loading of export goods or any class of such goods,

(b) land customs stations for the clearance of goods imported or to be exported by land or inland water or any class of such goods,

(c) the routes by which alone goods or any class of goods specified in the notification may pass by land or inland water into or out of India, or to or from any land customs station from or to any land frontier,

(d) the coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India.

Some of the notified customs ports are Port Blair, Vishakapatnam, Daman and Diu, Panaji Port, Kandla, Porbandar, New Mangalore, Cochin, etc.

Some of the notified customs airports are Port Blair Hyderabad Borjhar (Guwahati) Patna Delhi Ahmedabad Srinagar Bangalore Cochin, etc.

Some of the Inland Container Depots are at Hyderbad, Tuglakbad (Delhi), Ahmedbad, Baroda, Faridabad, Bangalore Balasore, Amritsar, etc.

Some of the notified Land Custom Stations are Amritsar Railway Station, Delhi Railway Station, Calcutta Jetties No 4 and 6, Howrah Railway Station, Phulbari, Foreign Post Office of Exchange, New Delhi, Sub-foreign Post Office in Special Economic Zone Complex, Cochin, Sub-foreign Post Office in Noida Export Processing Zone, Noida, etc.

6.2 Power to approve landing places and specify limits of customs area

Section 8 of the Customs Act, 1962 empowers the Principal Commissioner/Commissioner of Customs to:

(a) approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods;

(b) specify the limits of any customs area.

6.3 Administrative set up

6.3.1 Classes of Officers: The administration of the Act has to be done by certain officers of customs. The Customs Act also specifies the class of officers who are responsible for the functioning of the law.

Section 3 of the Customs Act, specifies the classes of officers of customs namely:

(a) Principal Chief Commissioner of Customs;

(b) Chief Commissioners of Customs;

(c) Principal Commissioner of Customs;

(d) Commissioners of Customs;

(e) Commissioners of Customs (Appeals);

(f) Joint Commissioners of Customs;

(g) Deputy Commissioners of Customs;

(h) Assistant Commissioners of Customs; and

(i) Such other class of officers of customs as may be appointed for the purposes of this Act.

Among the other classes of officers of customs, the more important ones are:

(a) Appraisers of customs, who do the assessment work of import and export goods, including classification, valuation and examination of the goods; and

(b) Preventive Officers of Customs, who do the executive duties like

(i) Boarding and checking ships and aircrafts;

(ii) Clearing passengers and crew and their baggage;

(iii) Surpervision and control over loading and unloading of cargo;

(iv) Preventing smuggling by checking suspects, patrolling the customs area, searching suspected premises, persons and vehicles.

(v) Interrogating suspects/witnesses and investigation.

(c) Ministerial officers who maintain records, keep accounts, etc.

(d) Chemical examiner, who tests samples of imported/export cargo for determination of true character of the goods for proper classification and value, necessary for determination of customs duty.

The above is the normal setup in the organization at the major ports of Bombay, Calcutta, Madras, Cochin, Visakapatnam, Kandla, Goa, known as major custom houses. In other customs ports/customs airports/land customs station, the job is carried out by the Central Excise Officers, who are having territorial jurisdiction, with similar designations.

6.3.2 Officers of CE Department: The other class of officers of the Central Excise Department are known as Superintendents and Inspectors of Central Excise. Since these officers are not officers of customs, it becomes necessary to empower them to be officers of customs for the purposes of doing customs work. Section 4(1) enables the Central Board of Excise and Customs (CBEC*)* to appoint such persons as it thinks fit to be the officers of Customs. This power was earlier vested with the Central Government. All Central Excise officers managing customs formations have been duly appointed by the Central Government in this behalf. All Superintendents of Central Excise Class I have been duly appointed to discharge the duties of Assistant Commissioner or Deputy Commissioner of Customs in their respective jurisdiction. [Refer M.F. (D.R. & I.) Notification No.144-Cus., dt. 1-11-1969]

6.3.3 Officers of other departments: Apart from the regular customs and central excise formation, it becomes necessary to administer customs laws and regulations in all border areas where there are no customs formations. These places are manned or controlled by other Government officials like:

(1) Border Security Police

(2) Indo Tibetan Border Police

(3) Coast Guard etc.

Similarly there are areas, where there is not much customs or central excise activity like Andaman and Nicobar Island, Lakshadweep, Mizoram, Manipur, Nagaland, Tripura and other North Eastern States. It has been found convenient to empower local revenue authorities and central & state officials in this regard. The power to empower these officers with the powers and responsibilities of customs officers, is given to the Central Government under section 6 of the Act.

6.3.4 Powers of officers of customs (Section 5): The Board (CBEC) may appoint such persons as it thinks fit to be officers of customs. As per section 5 of the Customs Act, 1962,

the powers of officers of customs are as under:

(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(2) An officer of customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him.

(3) However, the Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV (Appeals and Revision) and section 108 (Power to summon persons for giving evidence).

6.3.5 Entrustment of functions of customs officers on certain other officers (Section 6): The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or local authority any functions of the Board or any officer of customs under this Act.

6.4 Warehousing stations

It might so happen that the importer is not in a position to clear the imported goods into the country immediately owing to the financial requirement reasons. A facility had therefore been given under the law enabling such importers to store imported goods. The goods can be cleared for home consumption at a later date after payment of duty. The importer is charged with warehousing charges for this facility. This warehousing facility is a special feature of the Customs Act.

The Central Board of Excise and Customs (the Board) may, by notification in the Official Gazette, declare places to be warehousing stations at which alone public warehouses may be appointed and private warehouses may be licensed.

Warehouse is defined as a public warehouse appointed under section 57 or a private warehouse licensed under sec. 58 [Sec.2 (43)].

6.4.1 Warehousing Stations notified under Section 9: Some of the major notified warehousing stations in different states are listed below:

State	Notified Warehousing stations
Gujarat	Ahmadabad City, Baroda, Gandhinagar, Indore, Mandvi (Kutch), Nadiad
Uttar Pradesh	Agra, Gorakhpur, Kanpur, Lucknow, Varanasi
Maharashtra	Ahmednagar, Bombay, Nagpur City, Pune City, Thane
Rajasthan	Alwar, Jaipur, Jodhpur city
Karnataka	Bangalore, Mangalore
Orissa	Bhubaneshwar
West Bengal	Calcutta, Falta Export Processing Zone(FTZ)
Kerala	Cochin, Trivandrum, Kozhikode, Port Blair in Andamans
Tamil Nadu	Coimbatore, Cuddalore, Madras, Manali

Delhi	Delhi, Noida Export Processing Zone (FTZ)
Sikkim	Gangtok City
Bihar	Garhara, Patna
Assam	Gauhati
Madhya Pradesh	Gwalior City
Andhra Pradesh	Hyderabad, Kakinada, Vishakapatnam
Pondicherry	Pondicherry

6.4.2 Appointment of Public Warehouses: At any warehousing station, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may appoint public warehouses wherein dutiable goods may be deposited. [Section 57]

It is incorrect to hold that reference to "public bonded warehouses" in this section is limited to only public bodies running a warehouse. There is nothing in this section which requires that only public bodies be appointed to run public warehouse. It only empowers the Assistant/Deputy Commissioner of Customs to appoint the public warehouse. This only means the warehouses where public may deposit goods without payment of duty. These public warehouses are situated within the city declared as warehousing station and is under the control of mainly Central Warehousing Corporation or the Municipal authorities of that City. The Act does not require that only warehouse owned by the Government or Government undertaking will be treated as public warehouses.

6.4.3 Licensing of private warehouses: At any warehousing station, the Assistant/Deputy Commissioner of Customs may license private warehouses wherein dutiable goods imported by or on behalf of the licensee, or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited. [Section 58(1)]

The power to renew warehousing licence is a discretionary act. Merely because an application for renewal is made before expiry of existing licence, the authority is not bound to grant extension, particularly when the original licence is granted for a limited duration.

7

Importation, Exportation and Transportation of Goods

7.1 Introduction

The principles governing levy and exemption from customs duties have already been discussed in the previous chapters. There are various procedures under the Customs Act which govern assessment, collection, transportation and other important aspects. The procedures relating to assessment and collection of customs duty are discussed in this chapter.

The provisions relating to transportation are well understood when studied with the importation and exportation procedures since both chapters are governed by the same legal provisions. Hence the procedures relating to transportation have been covered in the current chapter under the relevant headings.

7.2 Importation

In this chapter, we will consider the procedure for assessment and collection of customs duty in respect of the following six situations of imports:

1. Goods imported by Sea
2. Goods imported by Air
3. Goods imported by Land
4. Goods imported by Post
5. Goods imported by passengers as their baggage
6. Ship stores considered to be imported and charged to customs duty

While the first three types of imports are governed by the normal provisions of the Customs Act, special provisions have been made in respect of the later three imports.

7.3 Definitions of important terms

7.3.1 Import: [Section 2(23)] with its grammatical variations and cognate expressions, means bringing into India from a place outside India.

The definition of imports is not restricted only to commercial imports. It only means bringing of goods from any place outside India into India.

The meaning of import has been one of the most contentious issues in Customs. There are two school of thoughts. One school of thought is that import gets completed when the vessel carrying goods crosses the territorial waters of India. The other school of thought is that the import is complete only when the goods mingle with the landmass of India. Now the settled law is in favour of second school of thought. It has been held in *Garden Silk Mills .v. UOI 1999 (113) ELT 358 (SC)* that import of goods into India commences when the goods enter the territorial waters of India, but continue and complete only when the goods become part of mass of goods within the country. The taxable event occurs only when the goods reaches the customs barrier and the bill of entry for home consumption is filed.

7.3.2 Imported Goods: [Section 2(25)] means any goods brought into India from a place outside India but does not include goods, which have been cleared for home consumption.

7.3.3 Importer: [Section 2(26)] in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.

The definition of importer includes not only the owner but also any other person holding out to be an importer. Owner is a person who is holding the documents of title to the goods. On the other hand importer also includes any person holding himself to be the importer for purpose of clearance of goods. It has been held that a State Financial Corporation, which financed the import and has also cleared the goods on payment of duty, is liable to pay the differential duty and cannot plead that it is not the actual importer. [*Karnataka State Financial Corporation v. Collector of Customs 1994 (72) ELT 904 (Tri.)].* Also in the case of *Traditional Craft v. Commissioner of Customs [2000 (125) ELT 513 (Tri.)]* the Tribunal has held that the person who has not caused the actual import but clears the goods from warehouse would be an importer within the meaning of this section.

In case of *Agrim Sampada Ltd. v. UOI 2004 (168) E.L.T. 15 (Del.),* it was held that the goods being abandoned by original importer, ownership thereof continues to vest in foreign supplier. The goods transferred to petitioner and petitioner holding document of title to be regarded as 'importer' under Section 2(26) of the Customs Act, 1962.

7.3.4 India: [Section 2(27)] includes the territorial waters of India.

The definition of India is an inclusive definition and includes not only the land mass of India but also the territorial waters of India. The territorial waters extend to 12 nautical miles into the sea from the appropriate base line.

7.3.5 Goods: [Section 2(22)] includes

(a) vessels, aircrafts and vehicles

(b) stores

(c) baggage

(d) currency and negotiable instruments and

(e) any other kind of movable property.

7.3.6 Coastal goods [Section 2(7)]: means goods, other than imported goods, transported in

a vessel from one port in India to another.

7.3.7 Stores [Section 2(38)]: means goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting.

7.3.8 Baggage [Section 2(3)]: includes unaccompanied baggage but does not include motor vehicles.

7.3.9 Vehicle [Section 2(42)]: means conveyance of any kind used on land and includes a railway vehicle.

7.3.10 Conveyance [Section 2(9)]: includes a vessel, an aircraft and a vehicle.

7.4 Statutory provisions

From the above it is seen that import is an act of bringing anything into India from a place outside India and it gets completed once the goods culminate with the land mass of India. Also goods include Vessels, Aircrafts, Vehicles, Stores, Baggage, Currency, and other movable property and are subject to duty of Customs. The provisions for procedure for importation of goods are given in section 29 to 38 and 46 to 49 of Customs Act, 1962. The same has been discussed in detail in the subsequent paragraphs.

7.4.1 Arrival of vessels and aircrafts in India [Section 29]: This section provides that the person-in-charge of a vessel or an aircraft entering India from any place outside India shall not cause or permit the vessel or aircraft to call or land -

(a) for the first time after arrival in India; or

(b) at any time while it is carrying passengers or cargo brought in that vessel or aircraft;

at any place other than a customs port or a customs airport, as the case may be, unless permitted by the Board.

In other words, vessels or aircrafts entering India from outside India can only call or land at a customs port or a customs airport. However, the Central Board of Excise and Customs can permit calling/landing of vessels and aircrafts at any place other than customs port or customs airport.

Exception: The above provisions are not applicable in relation to any vessel or aircraft, which is compelled by accident, stress of weather or other unavoidable cause to call or land at a place other than a customs port or customs airport. However, the person in charge of the vessel has the following obligation cast on him:

1. He will have to report the arrival of the vessel or the landing of the aircraft to the nearest customs officer or officer in charge of police station, and produce the log book if demanded.
2. He should not allow any unloading of goods without permission, and should not allow any passengers or crews to leave the immediate vicinity of the vessel or aircraft. However the goods can be removed or the passengers and crews can be allowed to depart if the same is necessary for reason of health, safety or preservation of life or property.

3. He should comply with all the directions given by such officers with respect to any such goods.

Any failure on the part of the person in charge of the vessel to comply with the above provisions will not only render him to be liable to penalty under section 112 of the Customs Act but also render the imported goods liable to confiscation under section 111 (b) and 111 (c) of the Customs Act and the conveyance liable to confiscation under section 115 (1) of the Customs Act under certain circumstances.

7.4.2 Delivery of import manifest or import report [Section 30]: After ensuring that the vessels are landed only in approved customs port or airports, further duty is cast upon the person in charge of the vessel to deliver the import manifest.

Import manifest or import report is a detailed information to customs about goods in the vessels/air crafts which have been brought in at any port/airport for unloading at that particular port/international airport as also that which would be carried further for other ports/airports. Declarations of such cargo has to be made in a prescribed form (which is termed 'Import General Manifest' or IGM)

Time limit for delivery of IGM/IR: The person-in-charge of a vessel, or an aircraft, or a vehicle, carrying imported goods or any other person as may be specified by the Central Government, by notification in the Official Gazette, in this behalf shall, in the case of a vessel or an aircraft, deliver to the proper officer an import manifest by presenting electronically prior to the arrival of the vessel or the aircraft, as the case may be, and in the case of a vehicle, an import report within twelve hours after its arrival in the customs station, in the prescribed form.

Particulars	Import Document	Time limit for presentation of IM/IR	Mode of presentation
Where the imported goods are brought in a vessel	Import Manifest	Any time prior to the arrival of the vessel	Electronic filing*
Where the imported goods are brought in an aircraft	Import Manifest	Any time prior to the arrival of the aircraft	Electronic filing*
Where the imported goods are brought in a vehicle	Import Report	Within twelve hours after its arrival in the customs station	Manual filing

*Note: In cases where it is not feasible to deliver import manifest by presenting them electronically, the Principal Commissioner/Commissioner of Customs may, allow the same to be delivered in any other manner.

If the import manifest or the import report or any part thereof, is not delivered to the proper officer within the specified time and if the proper officer is satisfied that there was no sufficient cause for such delay, the person-in-charge would be liable to a penalty up to ₹ 50,000. The person delivering the import manifest or import report shall make and subscribe a declaration as to the truth of its contents as a footnote thereof.

Belated filing of IGM: Import manifest/Report filed belatedly may also be accepted by the proper officer on valid justified grounds.

Amendment to IGM: If the proper officer is satisfied that the import manifest or import report is in any way incorrect or incomplete and there is no fraudulent intention, he may permit it to be amended or supplemented. [Section 30(3)].

Subsequent amendment of IGM relates back to the date of filing of IGM and is not a separate event. By the time supplementary IGM is filed, if entry inward has already been granted, the rate of duty applicable will be as on the date of presentation of bill of entry. *[Associated Forest Products (P) Ltd. V. Assistant Commissioner of Customs, 1992 (59) ELT 264, 277-78 (Cal),* affirmed by the Supreme Court in *2000 (115) ELT 37 (SC).]*

Contents and Form of IGM/IR (Import General Manifest/Import Report): Different forms of IGM/IR have been prescribed for the aircrafts, vessels and the vehicles. The form of IGM/IR is prescribed by:-

(a) The Import Manifest (Vessels) Regulations 1971 in the case of vessels;

(b) The Import Manifest (Aircraft) Regulations 1976 in the case of aircrafts;

(c) The Import Report (Form) Regulations1976 in the case of vehicles.

All the three regulations are substantially similar and provide for the following:-

(i) The manifest/report should be delivered in duplicate and should cover all the goods carried in the aircraft/vessel/vehicle.

(ii) The manifest/import report has to be in four parts as under-

1. General declaration.
2. Cargo declaration.
3. Vessels stores list.
4. a list of private property in the possession of the master, officers and crew.
5. Passenger manifest in case of aircrafts.

(iii) The cargo list is categorized in the manifest/report into the following categories and shall be delivered in separate sheets.

(1) cargo to be landed; (2) unaccompanied baggage;

(3) goods to be transshipped; (4) same bottom or retention cargo.

(iv) In the cargo declaration, there should be separate mention about

(i) arms (ii) ammunition (iii) explosives

(iv) narcotics (v) dangerous drugs (vi) gold and

(vii) silver.

This declaration should be given irrespective of whether these are for landing, or for transshipment, or for being carried as same bottom cargo. The details about the above

should be given in separate sheets and should be set out in the order of ports of loading. If the vessel/vehicle does not carry any of these cargo a nil declaration should be made.

(v) The person delivering the import manifest or report should subscribe in the declaration as to the truth of its contents.

The general declaration will give particulars about name of the vessel, nationality, tonnage, name of the shipping line, last port of call, port arrival and date and time of arrival, name of the master, nationality of the master, name and address of the local steamer/shipping agent, ports called during the present voyage, number of crew, number of passengers and the following documents are to be enclosed with the general declaration:

(a) cargo declaration; (b) store list (c) private property list;

(d) crew list (e) passenger list (f) maritime declaration of health.

7.4.3 Imported goods not to be unloaded from vessel until entry inwards granted [Section 31]: This section provides that the master of a vessel shall not permit the unloading of any goods until an order has been given by the proper officer granting ENTRY INWARDS to such vessels. This is specified only for vessels and not for aircrafts or vehicles.

Entry inwards is a term used to denote colloquially that the ship's entry papers like arrival report, manifest etc have been received and they have been found to be in order, the person in charge of the conveyance can commence further import operations namely unloading of the cargo and disembarking of the passengers. The overt action for this permission, is assigning a rotation number (a serial No) for the conveyance. All the documents and papers relating to imports by this conveyance will be docketed and processed under this rotation number.

Date of entry inward is the date on which the vessel found a berthing place for discharge of cargo. There is no provision requiring grant of entry inward forthwith, nor a duty cast on the Customs Officer to forthwith grant entry inward when IGM is presented. *[Devpal Dhir v. B. V. Kumar, Commissioner of Customs (Appeals) 1987 (32) ELT 459 (Bom*)]

Section 31(2) provides that Entry Inwards shall not be given until the import manifest has been delivered or the proper officer is satisfied that a valid reason is given for not delivering it. Grant of Entry Inwards is an acknowledgement of the fact that Customs Department is ready to supervise the unloading of the cargo, and is prepared to assess the goods to duty, as and when the concerned importer comes forward to clear the imported goods. Nothing in this section shall apply to the unloading of baggage accompanying a passenger or a member of the crew, mail bags, animals, perishable goods and hazardous goods.

The provision is in two parts:- one where there is a full satisfaction that the ship's papers are in order and the import operations can be allowed. The second part relates to a situation where the IGM or import report is not complete or is defective. This can be cured within a given time, i.e. the required documents and/or information can be obtained and given within a short time. An indemnity bond/undertaking is taken from the master of the vehicles/local agent to provide the requisite documents and/or material within a prescribed period, the entry inwards is then granted.

Though the master of the vessel cannot allow the goods to be unloaded until the grant of Entry Inwards, subsection (3) of section 31 provides that this provision is not applicable to unloading of baggage accompanying a passenger or a member of the crew, mail bags, animals, perishable goods and hazardous goods. Entry inwards date is crucial for the calculation of applicable rate of duty whenever bill of entry has been filed in advance.

7.4.4 Imported goods not to be unloaded unless mentioned in Import manifest or import report [Section 32]: Without the permission of the proper officer, the imported goods cannot be unloaded, unless they are mentioned in the Import General Manifest for being unloaded in that customs station.

The mention of any consignment in the ship's/aircraft's manifest or conveyances cargo list is a proof of the genuine nature of the import goods. If the goods are not mentioned in the manifest or import report delivered to the proper officer at a customs port/airport/station, there is every reason to believe that the goods were intended to be smuggled into India, either without payment of duty or in contravention of any prohibition in force. On the other hand if the full particulars of the import consignment are timely given in the manifest/import report prima facie, there is every reason to believe that it is a straight forward transaction. It is in this perspective that section 32 of the Customs Act has stipulated the above restriction.

7.4.5 Loading and unloading of goods at approved places only [Section 33]: Section 33 provides that loading and unloading of goods are to be undertaken only at places approved under section 8(a) of the Customs Act, 1962.

7.4.6 Goods not to be loaded or unloaded except under the supervision of Customs officer [Section 34]: Section 34 provides that loading and unloading of goods should be done under the supervision of the proper officer.

However, the Board may, by notification in the Official Gazette, give general permission and the proper officer may in any particular case, give special permission for any goods or class of goods to be unloaded or loaded without the supervision of the proper officer.

In almost all major ports, customs officers are deployed at the wharfs and berths where the goods are imported or exported. These officers supervise all loading and unloading, and shipping operations.

7.4.7 Restrictions on goods being water-borne [Section 35]: There are certain customs ports like Pondicherry, Tuticorin, Mangalore, Saurashtra, where the ships cannot come to the shore for unloading or loading. In these places the cargo is ferried from the ships anchored at mid-sea to the port in boats, otherwise known as lighters. Even in other ports like Calcutta, Bombay, Madras, Cochin etc. not all ships arriving in the port get a berth. They have to wait for some time before they get allotment of berth. At times the ships have tight itinerary. In such cases the import cargo is taken from the ship to the shore and the export cargo is taken from the shore to the ship in boats.

Section 35 of the Customs Act stipulates that no imported goods shall be water borne for being loaded in any vessel, and no export goods which are not accompanied by a shipping bill, shall be water borne for being shipped unless the goods are accompanied by a boat note in the prescribed form.

However, the board may, by notification give general permission and the proper officer may in any particular case, give special permission, for any goods or any class of goods to be water borne without being accompanied by a boat-note.

At present this exemption is in operation in

(1) Chennai Port – for both imports and exports

(2) Kolkata Port – for exports only.

Boat Note Regulations: The form and content of the boat note is prescribed under the Boat Note Regulations, 1976.

These regulations specify that

(1) normally the boat note should be issued by the proper officer;

(2) however, in a special case, the Principal Commissioner/Commissioner of Customs, may authorize an exporter or his authorized agent to issue a boat note;

(3) Every person who is authorised by the Principal Commissioner/ Commissioner as above, shall maintain proper account of boat notes issued by him and furnish to the proper officer such information as may be specified by the Principal Commissioner/ Commissioner.

(4) the boat notes should be of such dimension and colour as in prescribed forms;

(5) the boat notes should be in duplicate and machine numbered.

Separate forms are prescribed for export cargo, import cargo, and transshipment cargo (i'e transfer from one ship to another or for transshipment).

7.4.8 Other Controls: The following are further controls exercised on the conveyances and the loading/unloading of goods.

1. The goods cannot be loaded and unloaded on Sundays or other holidays observed by the Customs Department, or on any other day after the working hours unless the prescribed notice and the prescribed fee are paid. [Section 36]
2. The proper officer may, at any time, board any conveyance carrying imported goods ore export goods and may remain on such conveyance for such period, as he considers necessary. [Section 37]
3. The proper officer may require the person in charge of any conveyance to produce any document or answer any questions and such person shall be bound to comply with the same. [Section 38]

7.4.9 Flow Pattern for Import: The following steps would illustrate the complete operation in this regard.

1. The vessel is escorted into the harbor by the pilot vessel of the port.
2. After entering the harbour, the vessel is brought to the particular quay or berth, where it is berthed and anchored.

3. The health department officials and police officials go on board the vessel. The health officials check
   (a) Whether the vessel has called during its voyage at any port which is susceptible to epidemic diseases; and if so, whether the ship has been cleared by the Quarantine authorities.
   (b) Whether any crew or passenger in the vessel has any contagious or epidemic for contagious disease;
   (c) Whether the vessel or any crew/passenger requires to be quarantined;
   (d) Whether the vessel carries any cargo contaminated by such epidemic diseases, affecting the health of people or crop, etc.

   The immigration authorities check whether the ship has proper documents to call at an Indian airport.
4. The Customs Officer, who boards the vessel on its arrival alongside the health and police officials
   (a) Collects the arrival report with its supporting papers from the master of the vessel.
   (b) Scrutinizes the arrival report for details on
      (i) import cargo/same bottom cargo;
      (ii) Special goods like arms, ammunition, explosives, and dangerous drugs.
      (iii) Proper clearance from the last port of call, health certificate, payment of light dues etc.
   (b) Calls for necessary information/documents from the Master/mate/Chief officer/ Ship's doctor to carry out the above checks;
   (c) If satisfied, collects the arrival report and the Import Manifest if it has not been already filed and sends these papers to the Custom House.
   (d) If entry had been given by the proper officer, allows the unloading to commence.
5. Once the unloading of the cargo starts, supervises and checks whether the landing is done by proper tally maintained by Steamer Agents tally clerks and Port Trust's tally clerks.
6. Keeps a general surveillance to ensure that the goods are not illicitly removed from the ship or the storage godowns.

7.5 Procedure for clearance of imported goods

The procedures for clearance of imported goods are contained in Section 45 to Section 49 of the Customs Act. These procedures are not applicable to Baggage and Goods imported or to be exported by post.

7.5.1 Restrictions on custody and removal of imported goods [Section 45]: Once the imported goods have entered the Customs area, there arises the question of who is

responsible for the safe custody of goods.

This section requires that until the imported goods are cleared for home consumption or are warehoused or are exported for transhipment, they shall remain in the custody of such person as may be approved by the Principal Commissioner/Commissioner of Customs [Section 45(1)]. This person is called the custodian. The responsibility of the custodian commences in respect of imported goods the moment the ship is berthed in the harbour or the goods are ready for unloading from the aircraft. In major ports, the custodian is the Port Trust. In other places, the custodian are the ware house keepers. In Inland Container Depots, the Container Corporation of India is the custodian of the imported cargo. In case of air cargo, the custodian is the National Airport Authority. For goods brought by rail, the custodian is the Station Master.

Responsibility of Custodian of goods: During the time the goods are in the custody of the custodians, they have the following responsibilities [Section 45(2)].

1. Maintain a proper record of goods received from the carriers and send a copy of the record to the proper officer.
2. Not to permit such goods to be removed from the customs area or allow them to be dealt with otherwise except under the specific permission in writing of the proper officer.

In pursuance to this responsibility, the custodian is required to tally the particulars of the goods landed by a vessel, and send a report known as out turn statement to the customs authorities. This enables the customs authorities to check whether all goods manifested in the import general manifest for landing in a particular palace have actually been landed. In case of the goods are not so landed, action is taken against the carriers.

Liability of the Custodians [Section 45(3)]: This provision provides that notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading in any customs area, while in the custody the custodian, such custodian shall be liable to pay duty on such goods. Therefore, in respect of pilfered goods covered by section 13, the loss of revenue is compensated by the custodian. The duty shall be paid at the rate prevailing on the day of delivery of the import manifest or as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which such goods were carried.

This provision is intended to make the custodian of the imported goods lying in customs area liable for duty even if they are pilfered when they were in their custody. Earlier, in the matter of pilfered goods, the government has been losing the revenue, while the importer's interest was protected.

Section 45 holds the custodian responsible only in respect of the Customs duty in respect of pilfered goods. It does not extend to the value of goods lost. However in the case of *IAAI v. Ashok Dhawan, 1999 (106) E.L.T. 16 (SC),* the Supreme Court has held that if the custodian has no explanation at all to show how the loss occurred in respect of goods in its custody, applying the principle *res ipso locquitor,* the custodian is liable for loss of goods.

In the case of *Board of Trustees of the Port of Bombay v. Union of India 2009 (241) ELT 513 Bom*, it was held that no demand under section 45(3) from Port trust can be made as Port is not the person approved by the Principal Commissioner/Commissioner of Customs as is required under section 45(1).

7.5.2 Filing of Import Bill of Entry [Section 46(1)]: It is the duty of the importer of any goods to make an application electronically to the proper officer for clearance of the goods. The importer is required to make an electronic declaration to the Customs Computer Systems through network facility. The Bill of Entry (Electronic Declaration) Regulations, 1995, provides the details. After computerization, only two copies of Bill of Entry are generated-one for the importer and the other for the bond section.

However, the Principal Commissioner/ Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner. Hence, manual submission of Bill of Entry is allowable in cases where electronic submission is not feasible.

The goods may be cleared for home consumption or for deposit in a warehouse or for transit or transhipment. Therefore, there are three types of Bills of Entries prescribed for these three different purposes.

Form I (White) – for home consumption.

Form II (Yellow) – for warehousing (into bond).

Form III (Green) – for ex-bond clearance for home consumption (ex-bond).

The form of the bill of entry is governed by Bill of Entry (Forms Regulations, 1976). When Bill of Entry is filed electronically, it is in four copies:

(a) Original, meant for the customs authorities for assessment and collection of duty;

(b) Duplicate, intended as an authority to the custodian of the cargo to release cargo to the importer from his custody;

(c) Triplicate, as a copy for record for the importer; and

(d) Quadruplicate, as a copy to be presented to the bank or Reserve Bank of India for the purposes of making remittance for the imported goods.

The importer is required to declare in the Bill of Entry amongst other things the particulars of packages, the descriptions of the goods, in terms of the description given in the Customs Tariff to enable proper classification of the goods and the correct value of the goods for the determining the amount of duty. Since the assessment is based on the declaration made by the importer, the onus is cast upon him to make a declaration and solemn affirmation about the truth of the contents in the Bill of Entry.

Importer unable to furnish details: If for any reason the importer is unable to furnish these details, he may request the customs officials to examine the goods in his presence to enable him to ascertain the necessary details for making a proper declaration in the bill of entry. Alternatively, he can seek permission to deposit the goods in a public bonded warehouse appointed under section 57 pending receipt of the necessary information and the supporting

documents under section 49. This is also called warehousing without warehousing.

Such goods shall not be deemed to be warehoused goods for the purpose of the Act and accordingly warehousing provisions shall not apply to such goods.

Relevant case law

Goods deposited under section 49 cannot be deemed as warehoused goods

A demand was issued for duty on goods deposited under section 49 via warehouse with reference to date of removal from warehouse. It was held that there is no similarity between the warehousing facility referred to in section 49 and warehousing under section 59 because under section 49 it is explicitly made clear that such goods shall not be deemed to be warehoused goods for the purpose of the Act and, accordingly, warehousing provisions will not apply to such goods.

Normally, a bill of entry is required to be filed per consignment. However, the Principal Commissioner/Commissioner may, at his discretion, permit the importer to present separate bill of entries for clearance of part of consignment *[Sewing Systems (P) LTD. v. UOI 1989 (44) ELT 456 (Kar)].*

Conversion from home consumption to warehousing and vice-versa: It may so happen that an importer has filed the bill of entry for home consumption. He may subsequently find that he is not in a position to pay duty and remove the goods to town. He may seek permission to substitute the bill of entry for home consumption with a bill of entry for warehousing. The reverse proposition is also permissible. In either case, the proper officer of customs has to be satisfied that this request is made on genuine grounds and not a device to avoid duty. In other words, if the rate of duty is high and the importer expects the government to reduce the duty, he cannot seek permission to substitute the bill of entry for home consumption by a bill of entry of warehousing so that he would decide to remove the goods as and when the rate of duty is reduced.

Bill of Lading: The Bill of Lading given by the carrier of the goods is the importer's document of title to the goods. The Bill of Lading covers all the goods imported with full description.

Time limit for filing: According to Section 46(3) a bill of entry is to be normally filed after the delivery of the import manifest (vessel/aircraft)/import report (vehicle). However, it may be kept in mind that as per section 48, the cargo has to be cleared from the wharf within 30 days of unloading.

Prior entry Bill of Entry: The second proviso thereunder provided for the presentation of bill of entry even before the delivery of the import manifest if the vessel or aircraft or vehicle by which the goods have been shipped for importation into India is expected to arrive within thirty days from the date of such presentation. The permission under this prior entry system is applicable to goods brought by vessels, aircraft as well as vehicles. The prior entry Bill of Entry may be presented 30 days before the expected date of arrival of the vessel or aircraft or vehicle.

7.5.3 Assessment of goods: The provisions regarding the assessment of goods are contained in section 17 of the Customs Act. The provisions of the section 17 provide as under:-

(a) Duty to be self-assessed by the importer/exporter: An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85 (i.e. stores allowed to be warehoused without assessment of duty), self-assess the duty, if any, leviable on such goods.

(b) Verification by proper officer: The proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

For verification of self-assessment, the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(c) Reassessment of duty by the proper officer if self-assessment not done correctly: Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(d) Speaking order for re-assessment to be passed unless the importer agrees with the reassessment: Where any re-assessment done is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within 15 days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

(e) Audit at custom office / premises of importer or exporter: Where re-assessment has not been done or a speaking order has not been passed on re-assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.

7.5.4 Provisional assessment of duty [Section 18]: Provisional assessment can be resorted to in the following circumstances:

(a) where the importer or exporter is unable to make self-assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

(c) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry.

In any of the above cases, the proper officer may direct that the duty leviable on such goods be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed as the case may be, and the duty provisionally assessed [Sub-section(1)].

When the duty leviable on such goods is assessed finally or re-assessed by the proper officer in accordance with the provisions of this Act, then, -

(i) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed or re-assessed, as the case may be, and if the amount so paid falls short of, or is in excess of the duty finally assessed or re-assessed, as the case may be,, the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(ii) in the case of warehoused goods, the proper officer may, where the duty finally assessed or re-assessed, as the case may be, is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty [Sub-section(2)].

The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order or re-assessment order. The interest shall be payable at the rate fixed by the Central Government under section 28AB. This interest shall be payable from the first day of the month in which the duty is provisionally assessed till the date of payment thereof [Sub-section 3].

Subject to sub-section (5), if any refundable amount referred to in clause (a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment of duty finally or re-assessment of duty, as the case may be, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount [Sub-section 4].

The refund of duty and interest thereon shall be paid to the importer or the exporter, as the case may be, only if such amount is relatable to:

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75.

In all other cases, the amount of such refund and interest shall be credited to the Consumer Welfare Fund [Sub-section 5].

Customs (Provisional Duty Assessment) Regulations, 2011: The said regulations provide that duty can be provisionally assessed by the proper officer if an importer/exporter is unable to make self-assessment under section 17(1) of the Customs Act, 1962 or if the proper officer is not able to verify the self-assessment or make re-assessment of the duty on the imported/export goods.

The importer/exporter will have to execute a bond of an amount equal to the difference between the duty that may be finally assessed or re-assessed and the provisional duty and deposit twenty per cent of the provisional duty with the proper officer. The proper officer may require the bond to be executed along with such surety or security, or both. Any contravention to these regulations would attract penalty which may extend to ₹ 50,000.

7.5.5 Clearance of goods [Section 47]: Once the customs check and payment of duty is completed, the customs officers allow clearance of the goods. Section 47 provides that where the proper officer is satisfied that the goods entered for home consumption are not prohibited and the appropriate import duty has been paid, he can make an order permitting clearance of the goods for home consumption. On making this order, which is popularly known as "pass out of customs charge order" the bill of entry (duplicate) copy is produced to the custodian who delivers the goods to the importer.

Some major importers have been given the green channel clearance facility. It means clearance of goods is done without routine examination of the goods. They have to make a declaration in the declaration form at the time of filing of bill of entry. The appraisement is done as per normal procedure except that there would be no physical examination of the goods. Only marks and number are to be checked in such cases. However, in rare cases, if there are specific doubts regarding description or quantity of the goods, physical examination may be ordered by the senior officers/investigation wing like SIIB.

Interest: Further if the importer fails to pay import duty within 2 days (excluding holidays) of the determination of the duty amount, he is required to pay interest on the duty till the time he actually pays the duty and clears the goods.

The rate of interest shall be not below 10 percent and not exceeding 36 percent per annum and shall be fixed by the central government. However, the interest may be waived by the CBEC in public interest.

7.5.6 Mandatory electronic payment of duty: The Central Government has notified the following classes of importers who have to pay customs duty electronically, namely:-

(i) Importers registered under Accredited Clients Programme

(ii) Importers paying customs duty of ₹ 1 lakh or more per bill of entry

The importer desirous to make use of the e-payment facility first needs to have an internet account with a designated bank. The Board has set up a dedicated payment gateway called, 'ICEGATE'.

If the importer is registered on this Web site, it can easily use the e-payment facility with the current log-in facility. Those that are un-registered can also use the Web site as an 'unregistered user'.

The importer need not produce any proof of payment for the clearance of goods in case of e-payment.

Relevant Cases

1. Can the goods be confiscated after the order under section 47?

It has been held in *Madanlal Steel Industries (P) Ltd V. UOI 1991 56 ELT 705 (Mad)* that the order of clearance undr section 47 is not required to be set aside to effect seizue & commence confiscation proceedings. The above decision has been followed in the case of *Titanide Coating Pvt. Ltd v. Assistant Collector of Customs. 1993 (67) ELT 260 (Kar)* which held that the proceedings under section 28, 110, & 124 are not subject to the order under section 47 of the Act.

2. In case of detention of goods by the Department, who is to pay the demurrage charges?

In case there is detention of goods by Customs authorities for whatever reason, and goods so detained are given to the custody of approved custodian during the pendency of adjudication of rival claims between the department and the importer, the importer is entitled to be furnished with a detention certificate or an order detaining the goods indicating reasons which is to serve as the evidence of detention and as a receipt of the goods by the department. Upon the settlement of dispute, if the department succeeds in establishing that detention is justified, the importer has to bear the burden of demurrage, and if the department fails the department has to bear the same *[Tirupathi Plastics v. Assistant Collector of Customs 1990 (49) ELT 49 (Kar)].*

7.5.7 Procedure for disposal of goods not cleared [Section 48]: If there are any goods imported from a place outside India, which are not cleared within 30 days from the date of unloading, the custodian of the cargo is unnecessarily burdened with the custody of the goods. It also deprives the customs department of its legitimate revenue in the form of customs duty. The 30 days have been considered to be sufficient time for any importer to make up his mind whether the goods should be cleared into town on payment of duty or whether they should be transhipped or whether they should be deposited in a warehouse. If such imported goods are not cleared either for home consumption or for warehouse within 30 days or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, the custodian of the goods is permitted, with the approval of the customs department and after giving notice to the importer, to sell the goods by auction.

In the case of sensitive goods like animals, foodstuffs and hazardous goods etc. the custodian with the approval of the proper officer can sell the goods even before the expiry of the 30 days limit. Similarly in the case of arms or ammunition, which cannot be sold in public auction, the disposal is regulated by the rules made in this regard.

7.5.8 Storage of imported goods in warehouse pending clearance [Section 49]: Where due to some genuine difficulty, the importer is unable to clear the goods for home consumption within the stipulated time, the goods may be deposited in a warehouse, public or private, without double duty bond. While the goods can be stored for unlimited time in a private

warehouse they can be stored for a maximum period of thirty days in a public warehouse under this section. However, the Principal Commissioner/Commissioner of Customs may extend such period of storage for further 30 days at a time.

This facility is available irrespective of whether the goods are dutiable or not. This is another instance of warehousing without warehousing. However, in this case the warehouse may be public or private. Such warehousing will not be covered under Chapter IX of the Act.

7.6 Exportation

7.6.1 Important Definitions

(a) **Export** [Section 2(18)] with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

(b) **Export goods** [Section 2(19)] means any goods, which are to be taken out of India to a place outside India.

(c) **Exporter** [Section 2(20)] in relation to any goods at any time between their entry for export and the time when they are exported, includes any owner or any person holding himself out to be the exporter.

7.6.2 Control over Export Goods: It would be convenient at this juncture to discuss the provision relating to the export of the goods in so far as it applies to the master of the vessel or his agent. The steamer agent comes into the picture only after the customs have permitted the export goods to be shipped.

Loading of Export Goods [Section 40]: The first and foremost duty cast on the master of the vessel under section 40 is that export goods are not to be loaded unless duly passed by Proper Officer.

The person-in-charge of a conveyance shall not permit the loading at a customs station

(a) of export goods, other than baggage and mail bags, unless a shipping bill or bill of export or a bill of transshipment, as the case may be, duly passed by the proper officer, has been handed over to him by the exporter;

(b) of baggage and mail bags, unless their export has been duly permitted by the proper officer.

7.6.3 Entry outwards [Section 39]: One of the important requirements in this regard is that the vessel in question should be scheduled to go to the port of consignment. It is therefore, necessary that the vessel or conveyance in question should be cleared to go to on a foreign voyage and the port of destination should be in the vessel's itinerary. This permission to be granted by the Customs authorities is known as "Entry Outwards".

Section 39 stipulates that export goods are not to be loaded on vessel until entry outwards is granted. The master of the vessel shall not permit the loading of any export goods, other than baggage and mail bags, until an order has been given by the proper officer granting entry-outwards to such vessel. This restriction is for vessels and not for aircraft and vehicles. Therefore, for loading of goods for export, the following requirements are to be fulfilled:

(i) Entry outwards to be granted under section 39.

(ii) Shipping bill under section 50

(iii) 'Let-export' order under section 51

(iv) Boat note under section 35 in case the vessel is anchored away from the wharf and the goods are carried in a boat to the vessel.

7.6.4 Export goods not to be loaded unless duly passed by proper officer [Section 40]: This section applies to all types of conveyances. The goods can be taken on board only if they are accompanied by the following documents:

(i) In case of export goods other than baggage and mail bags – the goods shall be accompanied by

- Shipping Bill (at seaports/airports)
- Bill of Export (at Land Customs Station)
- Bill of Transhipment (for transhipment goods)

all duly passed by the proper officer.

(ii) In case of baggage and mail bags – they should be permitted by Customs for export.

7.6.5 Export General Manifest [Section 41]: This is the most important responsibility cast on the person-in-charge of the conveyance. He (including the Master of the vessel) has to give to the Customs Authorities a complete list of the cargo exported from India and taken by the conveyance under his charge.

Section 41(1) of the Customs Act, 1962 provides that the person-in-charge of a conveyance carrying export goods shall, before the departure of the conveyance from a Customs station, deliver to the proper officer, in the case of a vessel or aircraft an export manifest by presenting electronically, and in the case of a vehicle, an export report in the prescribed form. However, in cases where it is not feasible to deliver export manifest by presenting them electronically, the Principal Commissioner/ Commissioner of Customs may, allow the same to be delivered in any other manner.

The person delivering the export manifest or export report shall make and subscribe a declaration as to the truth of its contents as a footnote thereof.

Amendment to EGM: If the proper officer is satisfied that the export manifest or the export report is in any way incorrect and there was no fraudulent intention, he may permit such manifest or report to be amended or supplemented. [Section 41(3)]

Preparation of EGM/ER : The procedure for preparation of EGM/ER is as follows:

(i) In the case of shipment by sea, the ship's officer gives a receipt after he has received the consignment on board the ship. This receipt is called mate receipt. It is surrendered to the steamer agent or the agent who issues the bill of lading.

(ii) In the case of shipment by air, after the cargo is delivered to the airways for loading, the airways issues an air consignment note.

(iii) In the case of train and lorry a railway receipt or a lorry receipt as the case may be is issued as soon as the consignment is received by the carrier.

The export general manifest or report is the consolidated report of all such Bills of Lading/air consignment notes/railway receipts/lorry receipts issued.

Form & Content of Export General Manifest or Export Report: The form of the export general manifest/export report is prescribed under the following:

(a) The Export Manifest (Vessel) Regulations, 1976

(b) The Export Manifest (Aircraft) Regulations, 1976

(c) The Export Manifest (Form) Regulations, 1975

In all the three regulations the common features are as follows:

(1) The manifest/report shall be delivered in duplicate.

(2) It shall consist of

  (a) Cargo report

  (b) Vessel's store list,

  (c) Private property list of master, officers and crew

  (d) In case the vessel/aircraft/conveyance carries passengers, a passenger manifest.

(3) The cargo list shall give the following details in separate sheets.

  (a) Cargo shipped

  (b) Cargo transshipped,

  (c) Cargo lying in the vessel/aircraft, but not landed or transshipped (same bottom cargo)

  (d) Cargo in respect of which drawback is claimed.

  (e) In case of the vessel, the dutiable goods, including arms and ammunition forming part of the ordinary equipment of a vessel.

(4) Specific declaration should be made in respect of the following cargo, irrespective of whether it comprises same bottom cargo, shipment or transshipment

  (i) arms (ii) ammunition (iii) explosives (iv) narcotics (v) dangerous drugs or (vi) gold

  If the vessel/aircraft does not carry any such cargo, a nil report should be furnished.

7.6.6 No conveyance to leave without written order [Section 42]: The person-in-charge of the conveyance which has brought any imported goods or has loaded any export goods at a customs station shall not cause or permit the conveyance to depart from that customs station until a written order to that effect has been given by the proper officer.

Subsection (2) of section 42 stipulates that no such order shall be given until

(a) The person-in-charge of a conveyance has answered the questions put to him under Section 38;

(b) The provisions of section 41 have been complied with;

(c) The shipping bills or bills of export, the bills of transshipment, if any and such other documents, as the proper officer may require, have been delivered to him;

(d) All duties leviable on any stores consumed in such conveyance and all charges and penalties due in respect of such conveyance or from the person-in-charge thereof have been paid or the payment secured by such guarantee or deposit of such amount as the proper officer may direct;

(e) The person-in-charge of the conveyance has satisfied the proper officer that no penalty is leviable on him under section 116 or the payment of any penalty that may be levied upon him under that section has been secured by such guarantee or deposit of such amount as the proper officer may direct;

(f) In any case where any export goods have been loaded without payment of export duty or in contravention of any provision of this Act or any other law for the time being in force in relation to export of goods-

(i) Such goods have been unloaded, or

(ii) Where the Assistant Commissioner is satisfied that it is not practicable to unload such goods, the person-in-charge of the conveyance has given an undertaking, secured by such guarantee or deposit of such amount as the proper officer may direct, for bringing back the goods to India.

The obligations on the part of the conveyance and/or the person-in-charge have been numerated in sub-section (2). They are explained one by one below: -

(a) Apart from filing the IGM/Import report the person-in-charge of the vessel has to answer the questions put to him under section 38. Section 38 is invoked normally, when the particulars furnished, are inadequate and when the customs department feel that the person-in charge is deliberately suppressing some vital facts. If the same are not furnished in spite of use of section 38, obviously there is something wrong and the vessel cannot be permitted to depart without furnishing such information.

(b) Obvious fulfillment of provisions of section 41 is a pre-requisite for any conveyance leaving an Indian port. Either the Export General Manifest or Export Report should have been filed or the necessary undertaking given by the ship's agent and with necessary security deposit.

(c) The shipping bills and other shipping documents in respect of the exported goods have to be furnished to the proper officer of customs department. The original shipping bill/bill of export forms the voucher record of the duty and other amounts paid and duplicate the proof of quantity actually shipped. These are basic records relating to shipment.

(d) Technically speaking, all stores consumed during the stay of the conveyance at a particular customs station amount to import and home consumption. Thus customs duty is leviable on such stores. It is customary to have an inventory of ship stores at

the time of arrival and again at the time of departure of the conveyance. Customs duty is leviable on the difference.

(e) Similarly, a liability is cast on the person-in-charge of the conveyance, to account for all goods manifested for discharge at a particular station. If the goods manifested for discharge are not unloaded, the person-in-charge has to explain under section116 of the Customs Act, as to what happened to such goods. He can show that

(i) The goods were really unloaded at the particular customs station;

(ii) The goods were not unloaded but were over carried and brought back to that particular station later;

(iii) The goods were not unloaded, but were over carried and delivered in some other place.

If he does not give a satisfactory explanation with supporting documents, a presumption arises that such goods are surreptitiously landed in India and smuggled into the country, in which case he is liable to penalty equal to twice the amount that would be leviable on such goods as duty and other charges had such goods been properly landed in India.

As seen from above, the liability to penalty for short landing of goods is on the person-in-charge of the conveyance. The proceedings usually take a long time and if the notice is served on the pilot, the aircraft will have to be detained for a long time. Hence it is held that it is sufficient if the notice is served on the owner of the conveyance i.e. the airlines. *[Singapore Airlines v. UOI, 2000 (121) ELT 289 (Del)]*

7.7 Procedure for the Clearance of Export Goods

7.7.1 Entry of goods for exportation [Section 50]: The exporter is, under section 50 of the Customs Act, required to present electronically to a proper officer of customs a shipping bill in case of export by a vessel or by air and a bill of export, in case of export by a vehicle.

However, the Principal Commissioner/Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner. Hence, manual submission of shipping bill/bill of export is allowable in cases where electronic submission is not feasible.

The form of the shipping bill is regulated by the Shipping Bill (Forms & Regulations) Act, 1991.

The forms are as follows:

Dutiable goods	Yellow
Duty-free goods	While
With drawback claim	Green
Duty free ex-bond	Pink
Export under DEPB Scheme	Blue

Normally a shipping bill is permitted to be filed only after an entry outward has been granted for the particular vessel or aircraft by which the goods are to be exported. However, under special circumstances the Principal Commissioner/Commissioner of Customs may permit advance shipping bill to be filed. The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

7.7.2 Clearance of goods for exportation [Section 51]: After the shipping bill is filed, they are presented for the customs appraisal. Here also there are two parts namely, scrutinising assessment and physical check of assessment. Since the export regulations are not strict and rigid, these procedures are very simple. After the customs officer is satisfied that the goods are not prohibited and the exporter has paid the duty, he makes the order for shipment on the duplicate copy of the shipping bill. This is known as "Let Export" orders.

7.7.3 Notice of Short-Export of Goods: According to the Notice of Short Export Rules, 1963, if any goods mentioned in a shipping bill or bill of export and cleared for exportation are not exported, the exporter shall, within seven days, from the date of departure of the conveyance by which such goods were exported, furnish the prescribed information to the proper officer in respect of such goods.

7.7.4 Flow pattern for Export: Let us now consider the various steps and controls exercised by the Customs department on the export goods.

(i) The exporter files an application for export of goods known as Shipping Bill.

(ii) After the appraising department, assesses the export duty on the shipping bill, export cess etc. are collected.

(iii) Thereafter the Shipping Bill along with the export cargo is presented to the Customs officers in charge of supervision of the loading of the Cargo. (These officers are generally called Preventive Officers in the major Custom Houses.) The Preventive Officer after satisfying himself that all the customs checks including Export Trade Control license and export duty payment have been completed, will endorse the shipping bill with a "Let Ship" order.

(iv) On receipt of the cargo on board the ship, the master/mate/agent of the ship issues a receipt of the quantity and particulars of the cargo loaded on the ship.

(v) If the ship is not berthed alongside the quay and the goods have to be taken to the ship by boats/lighters the boat note procedure would be followed.

(vi) When the Shipping Bill is presented to the master/agent/mate of the vessel, the export cargo will be permitted to be loaded.

(vii) The Customs Officer endorses on the Shipping Bill the quantity of the goods loaded into the ship under the Shipping Bill.

7.8 Procedure for postal articles

7.8.1 Import and export of goods by post: In the case of goods imported by post the agency for the carriage of goods is the Government of India be it through sea, air or land. The control of the Customs Department is only on goods, whether imported or exported

(i) on which there is a duty; and

(ii) which are subject to prohibition or restriction under the Customs Act or any other law for the time being in force.

The customs have no concern over other goods or other mail.

7.8.2 Provisions under Indian Post Office Act: The Indian Post Office Act, 1898, contains certain provisions to facilitate this control. The first of these is section 24 of the Indian Post Office Act, which reads as under:

Power to deal with postal articles containing goods contraband or liable to duty [Section 24] : Except as otherwise provided in this Act, where a postal article suspected to contain any goods of which the import by post or the transmission by post is prohibited by or under any enactment for the time being in force, or anything is liable to duty, writing to the addressee, initiating him to attend, either in person, or by an agent, within a specified time at a post office, and shall in the presence of the addressee, or his agent, or if the addressee or his agent fails to attend as aforesaid, then in his absence open and examine the postal article.

It therefore, follows that

(1) The post office authority has a right and duty to open and examine a postal article.

(2) The right can be exercised only if he has a reasonable suspicion that the goods contained in the postal article are-(a) liable to duty of customs, or (b) subject to a prohibition under any law in force.

(3) Before opening and examining the postal article he should issue a notice in writing to the addressee asking him to be present at an appointed time and place for the opening of the postal article.

(4) The addressee can be present either in person or by an agent; and if the addressee or his agent does not turn up at the appointed time and place, the postal authorities are entitled to open and examine the postal article in his absence.

Delivery to customs authority: The power enabling the postal authorities to deliver such articles to the Customs authorities is enshrined in section 24A of the Indian Post Office Act. The relevant provisions read as follows:

The Central Government may, by a general or special order, empower any officer of the post office, specified in such order, to deliver any postal article, received from beyond the limits of India and suspected to contain anything liable to duty, to such customs authority as may be specified in the said order and such customs authority shall deal with such article in accordance with the provisions of the Sea Customs Act [now Customs Act, 1962] or any other law for the time being in force.

Thus, once the postal authorities have found some postal article to contain dutiable or prohibited goods, that authority should deliver the postal article in question to the customs authority for necessary action.

7.8.3 Provisions under Customs Act: After considering the provisions of the Indian Post Office Act, let us now consider the provisions under the Customs Act relating to goods imported or exported by post. Sections 82 to 84 of the Customs Act are substantive provisions

containing the various provisions.

Label or declaration accompanying goods to be treated as entry [Section 82] : In the case of goods imported or exported by post, any label or declaration accompanying the goods, which contains description, quantity and value thereof, shall be deemed to be an entry for import or export, as the case may be, for the purposes of this Act.

Relevant date for Rate of duty and tariff valuation in respect of goods imported or exported by post [Section 83] : (1) The rate of duty and tariff value, if any, applicable to any goods imported by post shall be the rate and valuation in force on the date on which postal authorities present to the proper officer a list containing the particulars of such goods for the purposes of assessing the duty thereon.

However, where the postal goods arrive on a vessel, and the list containing the particulars is available and is filed by the Post Master, before the arrival of the vessel, the list shall be deemed to have been filed on the date of arrival of the vessel.

The effect of this proviso is that the relevant date for imports by post is the date of submission of the list by the Post Master or the date of arrival of the vessel, whichever is later.

(2) The rate of duty and tariff value applicable to any goods exported by post shall be the rate and valuation in force on the date on which the exporter delivers such goods to the postal authorities for exportation.

Power of the Central Board of Excise and Customs to make regulations [section 84]: This section empowers the Board to make regulations providing

(a) the form and manner in which an entry may be made in respect of any specified class of goods imported or to be exported by post, other than goods which are accompanied by a label or declaration containing the description, quantity and value thereof;

(b) the examination, assessment to duty, and clearance of goods imported or to be exported by post

(c) the transhipment or transit or goods imported by post from one Customs station to another or to a place outside India.

7.8.4 Rules Regarding Postal Parcels & Letter Packets from Foreign Ports in/out of India

Landing: The rules and regulations under the old Sea Customs Act (which are valid under the Customs Act) provide that the boxes or bags containing the parcels would be labelled, like "Postal Parcels" "Parcel Mail" "Letter Mail". They would be allowed to land at

(i) Foreign Post Dept. at G.P.O. Calcutta

(ii) Foreign Post Dept. at Bombay.

(iii) Foreign Post Office at G.P.O. Madras

(iv) Sorting air mail office at Delhi.

(v) Foreign Post Dept. at New Delhi.

(vi) Foreign Parcel department of Golakganj.

Clearing: The procedure to be followed is as under:

1. The Postmaster at Foreign Post Department will prepare in relation to all post parcels subject to customs scrutiny a list or sheeet containing
   (i) Parcel Nos.
   (ii) Parcel Bills/sender's declarations/labels/despatch notes
   (iii) Any other information relevant to the assessment of the parcels.
2. The mail bags other than those containing registered mail are checked in the sorting office as soon as they are received in India, to eliminate and detail mail containing dutiable or prohibited goods.
3. On receipt of the parcels, the customs appraiser would segregate them into the following
   (a) those that can be assessed to customs duty on the basis of the label or customs declaration;
   (b) those that can be assessed to customs duty after opening the parcel and physical examination of the goods;
   (c) those for which further information or further documents are necessary for determining the customs duty, restrictions on importation etc. These documents will be called from the addressee of the letter mail article.
      (i) The parcels to be opened will be opened by the postal authorities in the presence of the customs authorities and after the customs authorities have ascertained the necessary details for determination of the duty and prohibition aspects they shall close the letter mail articles or the parcels as the case may be.
      (ii) In the case of parcels, letter mail articles, detained for further details or information a letter of call will be issued by the customs authorities. The postal articles will be presented to the customs authorities once again as soon as the requisite information is received.
      (iii) As soon as the parcels are assessed to duty, the customs will indicate on the parcel assessment sheet, the value of the goods, description of the goods and the duty recoverable on the goods. The postal authorities shall inscribe the duty amount on the label of the parcel.
      (iv) The postal authorities will collect the duty when the parcel s are delivered to the addressee.
      (v) The duty amount is credited to the customs authorities periodically. The duty amount is collected at the time of delivery of the postal article to the addressee.

Section 13 of the Post Office Act provides that customs duty paid as postage is recoverable as postage. This provision states that when a postal article, on which any duty of customs is payable, has been received by post from any place beyond the limits of India, and the duty

has been paid by the postal authorities, at any customs port or elsewhere, the amount of duty shall be recoverable as if it were postage due under the (Post Office) Act.

Imports through courier service: The provisions applicable for postal goods do not apply to imports/exports made through courier agencies. They are governed by Courier Import and Exports (Clearance) Regulations, 1998.

The Courier Imports and Exports (Clearance) Regulations 1998 provide for the following:

1. Import through courier by air is permitted from Delhi, Mumbai, Chennai, Bangalore, Hyderabad, Ahmedabad, Kochi, Trivandrum, Coimbatore, Jaipur, Kolkatta and from any land customs station except two stations in West Bengal.
2. The weight of an individual package should not exceed 70 kgs.
3. Import through courier requiring testing of samples of animals and parts thereof, plants and parts thereof, perishables, publications containing maps depicting incorrect boundaries of India, precious and semi-precious stones, gold or silver in any form thereof on reference to the relevant statutory authorities or experts before their clearance is not allowed.
4. The authorized courier must be registered with the Principal Commissioner/ Commissioner of Customs and should disclose all information to the authorities in connection with the imported goods.
5. The courier bags should be kept separately and shall be dealt only as per the directions of the Principal Commissioner/ Commissioner of Customs.
6. The authorized courier is required to submit a declaration in the prescribed form and has to file a bill of entry.
7. Export through courier is permitted by air from the same places as in the case of import and the courier has to file a statement before the departure of any flight along with the Courier Shipping Bill.
8. The system of export through courier is not available for items which attract export duty, export under claim for drawback, export under various other export promotion schemes where the value of consignment is more than ₹ 25000 and the transaction involves foreign exchange.
9. Samples upto ₹ 50000 in respect of exports and ₹ 10000 for imports and free gifts upto ₹ 25000 in respect of exports and ₹ 10000 for imports per consignment is allowed.
10. Import of gems and jewellery of EOU/SEZ is and export of cut and polished diamonds, gems and jewellery is permitted provided the value of each consignment does not exceed ₹ 25 Lakhs.
11. A person who intends to operate as an authorized courier should make an application to the Principal Commissioner/Commissioner of Customs having jurisdiction over the area from where the goods are to be imported or exported. The authorized courier who is registered shall transact the business in all customs station within the country subject to

intimation in a specified form to the Principal Commissioner/Commissioner of Customs having jurisdiction over the customs station where he has to transact business.

12. A courier files a consolidated bill of entry.

7.9 Special provisions relating to stores

The term "stores" has got a special significance in the course of import and export under the Customs Act. The term "stores" has been defined under section2(38) of the Customs Act to mean "goods for use in a vessel or aircraft, and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting".

The ambit of the term "stores" can be understood if the following needs of the vessel or conveyance are taken into account:

(i) The food, drink and other needs of the passengers and crew and other human beings on board the vessel, aircraft or conveyance.

(ii) Stock of the fuel necessary for running the vessel, aircraft, conveyance, for example diesel oil and furnace oil for ships, aviation, turbine fuel for the aircrafts, petrol or diesel or automobiles run on road, coal, diesel of locomotive etc.

(iii) The conveyance has to carry with it certain essential spare parts for the maintenance and repair of the conveyance during the journey.

(iv) Certain essential medical items like first aid boxes, medicine chest, oxygen etc are also necessary during the voyage.

(v) Life saving things, life boats, life belts, etc. are also statutorily required to be kept on board the vessel/conveyance.

(vi) If the voyage is long and tedious, certain entertainment to keep the passengers engaged is a commercial requirement. They include alcoholic liquors, musical instruments/ videos/radio systems, small games, toys and other entertainment items for the children, long chain, etc. on ocean liners etc.

The emphasis is that all these items are not imported into or exported out of India in the course of international trade, but by the very fact of their being brought into India from a place outside India, and vice versa, they attract the rigours of the controls on import and export of goods. This has necessitated special provisions to deal with such stores. Sections 85 to 90 of the Customs Act contain detailed provisions relating to treatment of Stores under the Act.

7.9.1 Provisions of IGM/EGM: A specific provision has been made in the Import General Manifest to be filed with customs authorities on arrival at a customs port/airport/station that the "Store list" in the prescribed form should be made out separately in the Manifest. A similar provision has been made in the Export General Manifest required to be filed at the time of departure from a customs port/airport/land customs station.

Before we go through the statutory provisions as aforesaid we shall analyse the movement of the vessels/aircrafts and the various possible circumstances that may arise. Since the stores are not landed and cleared for home consumption, the collection of duty on an assessment document does occur. There are three different situations:

(i) The vessel/aircraft/conveyance terminates its journey at this port, or

(ii) They proceed towards Indian coastal ports only and as such the stores continue to remain in Indian customs/territorial waters or Indian territory alone, or

(iii) It proceeds towards a destination outside India.

The journey inside India is called coastal run in the case of vessels, domestic flight in the case of aircraft and internal movement in the case of other transportation by land.

7.9.2 Transit & Transhipment of Stores [Section 86 and 87]: Section 86 of the Customs Act provides that

1. Any stores imported in a vessel or aircraft, may remain on board such vessel or aircraft, without payment of duty, while it is in India. (Transit)
2. Any stores imported in a vessel or aircraft may, with the permission of the proper officer be transferred to any vessel or aircraft as stores for consumption therein. (Transhipment)

   No duty on consumption of stores on board a foreign going vessel/aircraft [Section 87]:

Therefore, when a foreign going vessel or aircraft enters territorial water, sub-section (i) of section 86 permits the stores on board such vessel or aircraft to remain on board without payment of duty during its stay in Indian waters.

Again, in transhipment cases, when such stores are transferred to any foreign going vessel or aircraft or to an Indian naval vessel for consumption, they are permitted to do so without payment of any duty vide sub-section (2) of this section.

Section 87 of the Customs Act provides that any imported stores on board a vessel or aircraft (other than stores to which section 90 applies) may, without payment of duty, be consumed during the period such vessel or aircraft is a foreign going vessel or aircraft.

This covers the situation between the first Indian port/airport of arrival to the final Indian port/airport of departure to a destination outside India.

In other words, no duty is leviable as long as the vessel/aircraft is a foreign going vessel/ aircraft. However, if the vessel/aircraft ceases to be so and converts to a total run/local flight, duty will be chargeable on the stores on board.

As a result of these two specific provisions of law, it follows that in other cases normal law of levy and assessment to import duty would apply. Thus, in the case of:

(i) vessels/aircraft arriving in India and terminating their voyage at the port of arrival:

(ii) vessel/aircraft arriving in India and subsequently converting into coastal voyage/run or domestic flight import duty would be chargeable on the unconsumed stores brought by the vessel/aircraft/conveyance at the point of its entry into India. The stores list in the import manifest forms the basic document for determination of duty liability.

7.9.3 Warehousing of Shipstores [Section 85]: It has been found convenient to allow imported shipstores to be kept in a bonded warehouse and thereafter supply it to vessels/aircraft as and when required. Normally when imported goods are allowed to be kept in a warehouse the importer is required to bind him to pay the duty on the imported goods. It

is customary to assess the imported goods to determine the amount of duty payable thereon before permitting such imported goods to be warehoused. In the case of shipstores such a detailed procedure is considered to be unnecessary.

Hence section 85 provides for warehousing ship-stores without assessment to duty. It provides that "where any imported goods are entered for warehousing and the importer makes and subscribes to a declaration that the goods are to be supplied as stores to vessels or aircraft, without payment of import duty under this chapter the proper officer may permit the goods to be warehoused without the goods assessed to duty."

Bonded Aircraft Stores (Procedure) Regulation, 1965: A regulation has been made to regulate such warehousing of shipstores and is called the Bonded Aircraft Stores (Procedure) Regulations, 1965. The regulation provides that,

(1) Whenever any imported goods intended for supply for use in a foreign going aircraft are to be entered for warehousing, an application under the prescribed form should be made to the Assistant Commissioner of Customs or Deputy Commissioner of Customs.

(2) This application will be treated as a Bill of Entry.

(3) On receipt of the said application, the Assistant Commissioner or Deputy Commissioner of Customs may permit the goods specified in the application to be warehoused without the goods being assessed to duty.

(4) When the said warehoused goods are to be cleared for use as stores in a foreign going aircraft, an application has to be made to the Assistant Commissioner or Deputy Commissioner in the prescribed form.

(5) This application will be treated as a Shipping Bill.

(6) On receipt of the said application, the Assistant Commissioner or Deputy Commissioner may permit clearance of the warehoused goods specified in the application for being taken on board the foreign going aircraft as stores.

7.9.4 Application of Section 69 and Chapter X to Shipstores [Section 88]: This section provides that the provisions of Section 69 and chapter X shall apply to stores other than those covered by section 90. Thus it follows that,

(i) Section 69 allows warehoused goods to be exported without payment of import duty. By virtue of section 88, this benefit as available to warehoused goods if they are taken on board any foreign going vessel or aircraft as stores.

(ii) Further, as per section 74, where duty paid imported goods are exported within two years then subject to certain conditions, such duty shall be repaid as drawback. By virtue of section 88, this benefit has been made available to imported shipstores.

In case of imported shipstores, which have been re-exported after the import duties for the same have been paid, the original import duty paid is eligible as drawback. However a special provision has been made in this regard for stores like fuel and lubricants oil taken on board any foreign going aircraft whereby the whole of the import duty paid is eligible as drawback as against 98% eligible for other imported goods.

In case of *M.J. Exports Ltd. v. CEGAT 1992 (60) E.L.T. 161 (S.C.)*, the Supreme Court held that the imported goods can be exported without clearing it for home consumption on payment of duty from the warehouse under Section 69.

7.9.5 Supply of Ship Stores [Section 89]: Section 89 of the Customs Act covers the case of indigenous goods, which are supplied to a vessel as ship stores. It states that goods produced or manufactured in India and required as stores on any foreign going vessel or aircraft may be exported free of duty in such quantities as the proper officer may determine having regard to the size of the vessel or aircraft, the number of passengers and the crew and the length of the voyage or journey on which the vessel or aircraft is about to depart. In a nutshell, the duty free supply of shipstores, should be reasonable and not in commercial quantities.

7.9.6 Special provisions regarding shipstores supplied to Indian Naval vessels [Section 90]: Following are the special provisions in relation to supply of stores to Naval vessels:

(i) Stores for the use in a ship of the Indian Navy and stores supplied free by the Government for the use of the crew of a ship of the Indian Navy, in accordance with their conditions of service, may be supplied without payment of duty to be consumed on board the ship of Indian Navy.

(ii) The provisions of section 69 and Chapter X shall apply as they apply to other goods. However they will be entitled to drawback of the whole of the duty of customs if any paid therein, instead of 98% alone otherwise applicable.

7.10 Special procedures relating to clearance of baggage

7.10.1 Baggage: The term "baggage" has been defined under section 2(3) of the Customs Act, to include unaccompanied baggage as well but does not include motor vehicles. The term baggage is a comprehensive term which means the luggage of a passenger accompanied or unaccompanied, and comprises of trunks or bags and the personal belongings of the passenger. It is not limited to the meaning of bonafide baggage as defined in clause 3 of Tourist Baggage Rules, 1958.

The term "goods" has been defined under section 2(22) of the Customs Act, to include *inter alia,* baggage also. Therefore, the restrictions and regulations governing the import and export of goods will apply *mutatis mutandis* to baggage also.

7.10.2 Issues relevant to baggage: There is a popular belief that baggage consists of personal belongings of an individual or family and is essential for the day to day life of such persons.

There is another popular belief that customs duty is on trade and merchandise only and the goods brought into India or taken out of India in the course of international trade alone are liable to customs duty and customs regulations. The customs duty is an indirect tax. It is on the goods. It is no way influenced by the parties to the transaction or the nature of the transaction. The only relevant factors are:

(i) whether the goods are imported into India;

(ii) whether they are subject to the levy of customs duty under provisions of the Customs Act and

(iii) whether there is any relief of payment of duty.

It is in this context that the provisions of the Customs Act have to be examined in their applicability to baggage.

The duty cast on the person-in-charge of the conveyance is to file an Import General Manifest in the case of imported goods and an Export General Manifest in the case of export goods. In both the cases, "baggage goods" are required to be declared in separate sheets.

7.10.3 Statutory Provisions: The statutory provisions relating to Baggage are covered by sections 77 to 81 of the Customs Act.

Entry of baggage by owner [Section 77] : Under this section the owner of the baggage has to make a declaration of its contents to the proper officer of customs, for the purpose of clearing it. This is known as Baggage Declaration Form.

In *Naresh Lokumal Serai v. CC 2006 (203) ELT 580 (Tri.)* [maintained by SC] , it was held that declaring packing list is sufficient declaration.

Rate of duty and tariff valuation applicable to baggage [Section 78]: Section 78 of the Customs Act stipulates that the rate of the duty and tariff valuation, if any applicable to baggage shall be the rate of and valuation in force on the date on which a declaration is made in respect of such baggage under section 77. Therefore the relevant date is the date of filing baggage declaration under section 77.

Rate of duty on baggage is 35% ad valorem. This rate is not applicable to motor cycles, scooters or mopeds; fire arms; cartridges of fire arms exceeding 50; cigarettes, cigars or tobacco in excess of the quantity prescribed for importation free of duty under the relevant baggage rules; textile fabrics in excess of rupees five hundred in value and goods imported through a courier service.

In *Naresh Lokumal Serai Vs. CC 2006 (203) ELT 580*, it was held that there are no separate rules for valuation of baggage. Therefore, valuation rules apply to valuation of baggage also.

Duty exemption to baggage [Section 79] : Section 79(1) of the Customs Act refers to the duty relief available in respect of baggage. It stipulates that the proper officer, may subject to any rules made under sub-section (2) pass free of duty

(a) any article in the baggage, of a passenger or a member of the crew, in respect of which the said officer is satisfied that it has been in his use for such minimum period as may be specified in the rules;

(b) any article in the baggage of a passenger in respect of which the officer is satisfied that it is for the use of the passenger or his family or is a bonafide gift or souvenir, provided that the value of each such article and the total value of all such articles does not exceed such limits as may be specified in the rule.

The law thus envisages two categories of baggage, namely those belonging to (a) passengers; and (b) members of the crew.

Similarly it envisages three classes of goods, namely (a) personal effects, which have been in the use of the person for a minimum period; (b) household effects, which is used by the family including the person; and (c) gifts and souvenirs.

Sub-section (2) of section 79 enables the Central Government to make rules for the purposes of carrying out the provisions of section 79(1). It also stipulates that such rules may specify

(a) the minimum period for which any article has been used by a passenger or a member of the crew for the purposes of [clause (a) of sub-section(1)] determining personal effects;

(b) The maximum value of any individual article and the maximum total value of all the articles which may be passed free of duty [under clause (b) of sub-section (1)] i.e., household effects, gifts, souvenirs etc;

(c) the conditions to be fulfilled before or after clearance subject to which the baggage may be passed free of duty. Sub-section(3) of section 79 provides that different rules may be made for different classes of persons.

7.10.4 Passenger Baggage Rules: In pursuance of the powers conferred under section 79 of the Customs Act, the Government has passed the Baggage Rules 1998. The content of the Baggage Rules, 1998 can be explained briefly as under:

Tourist: This means a person not normally resident in India who enters India for a stay of not more than six months for legitimate non-immigrant purposes such as touring, recreation, sports, health, family reasons, study, religious pilgrimage or business.

On arrival in India such a person shall be entitled to duty free clearance of his bonafide baggage to the following extent: [Appendix 'E' read with rule 7]

Class of Tourist	Articles allowed free of duty
(a) Tourists of Indian origin coming to India other than tourists of Indian origin coming by prescribed land routes.	(i) used personal effects and travel souvenirs, if - (a) these goods are for personal use of the tourist, and (b) these goods, other than those consumed during the stay in India, are re-exported when the tourist leaves India for a foreign destination. (ii) articles as allowed to be cleared under rule 3 or rule 4.
(b) Tourists of foreign origin, other than those of Pakistani origin coming from Pakistan, coming to India by air.	(i) used personal effects (ii) articles other than those mentioned in Annexure I up to a value of ₹ 8000 for personal use of the tourist or as gifts and travel souvenirs if these are carried on the person or in the accompanied baggage of the passenger.
(c) Tourists – (i) of Pakistani origin coming from Pakistan other than by land routes; (ii) of Pakistani origin or foreign tourists coming by land routes as specified in Annexure IV; (iii) of Indian origin coming by prescribed land routes.	(i) used personal effects (ii) articles other than those mentioned in Annexure-I up to a value of ₹ 6000 for personal use of the tourist or as gifts and travel souvenirs if these are carried on the person or in the accompanied baggage of the passenger.

Passengers other than tourists: The basic allowance to such passengers consists of

(a) Used personal effects, excluding jewellery required for satisfying daily necessities of life.

(b) Other articles which are carried on the person or in his accompanying baggage.

There is no value limit for used personal daily necessities of life. However there is a value limit in respect of other articles of baggage (apart from the goods mentioned in Annexure-1) as categorized according to age of the passenger, country from which they returning and the number of days of stay abroad. The different allowances are tabulated below:

Sl. No.	Country coming from	Age of the Passenger	Duration of Stay	Value Limit
I	Nepal, Bhutan, Myanmar or China	10 Yrs. or more	More than 3 days	₹ 6,000/-
	-do-	upto 10 yrs.	-do-	₹ 1,500/-
II	Countries other than Nepal, Bhutan, Myanmar or China	10 Yrs. or more	More than 3 days	₹ 45,000/-
	-do-	-do-	3 days or less	₹ 17,500/-
	-do-	Upto 10 yrs.	More than 3 days	₹ 17,500/-
		-do-	3 days or less	₹ 3,000/-

It may be noted that these free allowances are per individual passenger only and shall not be allowed to be pooled with other passengers.

Additional allowances to professionals of Indian origin: If the non-tourist passenger, is of Indian origin who was engaged in his profession abroad, on his return to India he shall be entitled to duty free allowances in addition to those mentioned above at varying scales depending upon the duration of stay abroad. The additional allowances consists of

(i) used household articles and

(ii) professional equipment in use and belonging to the passenger.

Professional equipment has been defined to mean portable equipment, instruments, apparatus and appliance as are required in his profession like a carpenter, a plumber, a welder, a mason and the like and shall not include items of common use, such as cameras, cassette recorders, dictaphones, personal computers, typewriters and other similar articles

This additional allowance may be tabulated as follows:

Sl. No.	Duration of Stay	Used house hold articles	Professional equipment
1.	At least 3 months	₹ 12,000/-	₹ 20,000/-
2.	At least 6 months	₹ 12,000/-	₹ 40,000/-

3.	Minimum 365 days during the preceding 2 years and returning to India after termination of his work and who has not availed this concession in the preceding three years.	All used household articles and personal effects (which have been in possession and use abroad of the passenger or his family for at least six months) upto an aggregate value of ₹ 75,000/-. These exclude articles listed in Annex I, II or III of the Baggage Rules.

Jewellery brought by non-tourist Indian passenger: The additional duty free allowance is applicable to non-tourist passenger of Indian origin who had stayed abroad for period exceeding one year. Indian non-tourist passengers who had stayed abroad for a period less than a year are not eligible for this additional jewellery allowance. The jewellery brought by them is specifically excluded from the duty free allowance for used personal effects. It has to be covered under the normal baggage allowance only. The additional jewellery allowance is as follows:-

Gentleman Passenger - ₹ 50,000/-

Lady Passenger - ₹ 1,00,000/-

Transfer of residence: A passenger, who has been staying abroad and transferring his residence to India, has naturally been given greater baggage allowance. He is given in addition to the allowance he would be otherwise eligible as a non-tourist, duty free clearance of all used personal and house hold articles, other than those listed in Annex I or Annex II, but including the articles listed in Annexure III and jewellery upto an aggregate value of

₹ 50,000/- in the case of a gentleman

₹ 1,00,000/- in the case of lady passenger

This is subject to condition that

(i) the passenger has stayed abroad for a minimum period of two years, immediately preceding the date of his arrival on transfer of residence;

(ii) if the passenger had visited India, during the preceding two years, the sum total of such visits should not exceed six months; and

(iii) the passenger had not availed baggage concession available to passengers coming on transfer of residence during the preceding three years.

However, if the passengers or their family members had taken jewellery out of India at the time of their departure from India, they would be given duty free clearance thereof, if it is proved to the satisfaction of the Assistant Commissioner of Customs that the same has been taken out of India. Therefore, all passengers are advised to obtain jewellery Export Certificate from the Customs authority at the port of export/departure in respect of such jewellery. Further, jewellery which is normally worn is treated as "personal effects" and is exempt from duty even if export certificate is not issued.

7.10.5 Provisions relating to unaccompanied baggage: The various provisions in the above rules are also applicable to the unaccompanied baggage unless specifically excluded.

The unaccompanied baggage must be dispatched within one month of his arrival in India or such further period as the Assistant Commissioner may allow. The unaccompanied baggage can land in India even before the arrival of the passenger. The unaccompanied baggage may arrive within two months before the arrival of the passenger. However if the passenger is not able to arrive in India due to circumstances beyond his control like sudden illness to himself or any member of family, natural calamities, disturbed conditions etc. the Assistant Commissioner may extend the period of two months upto a maximum of one year for reasons to be recorded.

Goods listed in Annexure I & II

Annexure I:

1. Fire arms
2. Cartridges of fire arms exceeding 50.
3. Cigarettes exceeding 100 or cigars exceeding 25 or tobacco exceeding 125 gms.
4. Alcoholic liquor or wine in excess of two litres
5. Gold or silver in any form other than ornaments
6. Flat Panel (LCD/LED/Plasma) Television

Annexure II:

1. Colour Television/Monochrome television
2. Digital Video Disc Player
3. Video Home Theatre System
4. Dish Washer
5. Music System
6. Air conditioner
7. Domestic Refrigerators of capacity above 300 litres or its equivalent
8. Deep Freezer
9. Microwave Oven
10. Video camera or the combination of such video camera with one or more of the following goods viz.
    (a) Television receiver.
    (b) Sound recording or reproducing apparatus.
    (c) Video reproducing apparatus.
11. Word Processing Machine
12. Fax Machine
13. Portable Photocopying Machine

14. Vessel
15. Aircraft
16. Cinematographic films of 35 mm and above
17. Gold or silver in any form other than ornaments

Annexure III:

1. Video Cassette Recorder or Video Cassette Player or Video Television Receiver or Video Cassette Disk Player
2. Washing Machine
3. Electrical or Liquefied Petroleum Gas Cooking Range
4. Personal computer (Desktop Computer)
5. Laptop Computer (Notebook Computer)
6. Domestic Refrigerators of capacity up to 300 litres or its equivalent.

Crew Baggage: These baggage rules are applicable to the members of the crew engaged in foreign going vessels, when they are finally paid off on termination of their engagement. However, a crew member of a vessel and aircraft shall be allowed to bring items like chocolates cheese, cosmetics and other petty gift items for their personal or family use which shall not exceed the value of ₹ 1500.

Temporary detention of baggage [Section 80]: It may so happen that a passenger has brought with him an article, which is prohibited. The passenger may not insist on taking it into the Indian Territory. On the contrary, he may opt to re-export it or take it with him when he leaves the country.

Similarly a passenger may not unnecessarily pay duty on an article, which he can conveniently avoid taking into the town, if the duty is heavy. In such case also, he may opt to take the article with him when he leaves the country.

In both the cases, he will have to deposit the article with the customs authorities and take it back at the port of his departure.

"Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India and if for any reason, the passenger is not able to collect the article at the time of his leaving India the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name".

Declaration – the essence: The declaration of the goods brought in is an absolute necessity. If the goods are not declared under section 77, the passenger cannot subsequently claim the benefit under section 80 and the goods are liable for confiscation. *[Md. Ibrahim v. Secretary, Ministry of Finance, 2000 (123) ELT 239 (Mad).]*

7.10.6 Regulations in respect of baggage [Section 81]: Since the provisions in respect of baggage are a complete code by themselves, it is desirable to supplement detailed procedures wherever necessary with the rule making powers. Section 81 therefore provides that the Board may make regulations in the following matters:

(a) providing for the manner of declaring the contents of any baggage;

(b) providing for the custody, examination, assessment to duty and clearance of baggage;

(c) providing for transit or transhipment of baggage from one customs station to another or to a place outside India.

Baggage declaration form: In exercise of these powers, the form of the baggage declaration has been prescribed and standardized. Transit or transhipment of baggage from one customs station to another becomes a necessity for convenient clearance of unaccompanied baggage.

Baggage (Transit to Customs Stations) Regulations: The Central Board of Excise & Customs has made the regulations for the transit of unaccompanied baggage from the customs station of arrival at Bombay, Delhi, Calcutta, Madras, Bangalore, Trivandrum, Hyderabad or Cochin to any other of the aforesaid customs stations.

Conditions: Where the unaccompanied baggage of any passenger arrives at the customs station at Bombay, Delhi, Calcutta, Madras, Bangalore, Trivandrum, Hyderabad or Cochin and the passenger desires that the said baggage may be cleared at any of the aforesaid customs stations, other than the customs station at which the baggage has arrived, then on a request made in this behalf by the passenger, such baggage may be permitted to be transported to the customs station at which the passenger desires the same to be cleared, by air or by passenger train or trucks, if-

(a) all arrangements are made by the passenger or his agent for the transport of such baggage from the customs station of arrival to the customs station at which he desires to have the baggage cleared for its booking to that station , and for its transport to the custom house in the place at which the station is located,

(b) the baggage remains under the supervision of an officer of customs, deputed for the purpose, except when it is under the custody of the airline or railway authorities, and the passenger pays for the services of the officer so deputed; and

(c) in case of goods to be transported by rail such of the goods as can be insured with the railways are so insured.

(d) in the case of goods to be transported by trucks, the carrier shall be responsible for carriage of goods to destination Customs in containerised truck after sealing of the same by one time bottle seal by Customs and on execution of bond and security to the satisfaction of the Principal Commissioner/Commissioner of Customs at the originating Airport / Air-Cargo Complex.

However the Principal Commissioner/Commissioner may at his discretion, allow the unaccompanied baggage to be transported to the customs station at which the passenger wants to have the same cleared by goods train if the goods are insured and the passenger or his agents satisfy the proper officer that the goods are not permitted to be transported in

passenger train having regard to the size and weight or that the transport by passenger train would cause undue financial strain on him. The Principal Commissioner/Commissioner of Customs shall, whenever Quick Transit Service is available, allow the transport of goods only through that Service.

7.11 Transit and transhipment

7.11.1 Transit and transhipment of import cargo – An Introduction: A conveyance may not carry goods intended for a particular customs station only. It may carry goods intended for other Indian ports and other foreign ports. There are two distinct possibilities:

(a) The conveyance may not call at all other Indian ports/customs stations and foreign ports for which it carries goods.

(b) The conveyance may call at all other Indian ports/customs stations and foreign ports for which it carries goods.

In the case of the former, the goods will have to be transferred to any other conveyance onward carriage to the destination. This is called transhipment. This will cover both goods intended for Indian ports and foreign ports.

In the latter situation, the goods will continue to be carried by the same conveyance. This is called transit of goods.

In both the situations, import duty is not collected on the goods even though the liability has already accrued. It would be necessary to ensure that

(a) in the case of goods intended for Indian ports, the goods have actually to be conveyed to the Indian port of destination and appropriate duty of customs is collected thereupon;

(b) in the case of goods intended for foreign ports, the goods are actually conveyed out of India and are not landed in any Indian customs station.

In case of *Kumar Trading Co. LLC v. UOI 2001 (132) E.L.T. 578 (Cal.),* imported containers containing ball bearings in transit to Nepal in terms of Indo-Nepal Treaty unlawfully and without jurisdiction detained by Customs at Calcutta for three years on a mere apprehension that the goods may be diverted for home consumption in India, till finally re-export to foreign supplier permitted. Finally it was re-exported after 3 years. The court held that demurrage and other port charges till the date of permitting re-export is to be paid by Customs department, as they have done the fault.

7.11.2 Difference between transit and transhipment: The essential difference between transit and transhipment lies in the continuity of records and documentation.

(a) In the case of transit of goods by the same conveyance, the record already made in the ship's/aircraft's manifest will continue. The goods would have to be shown in the manifest as same bottom cargo. The destination of the cargo consignment wise has to be shown in the same bottom cargo manifest. These entries have necessarily to figure in the export manifest of the conveyance. Thereafter when the conveyance calls at the next Indian customs port or airport the goods have to figure in the Import General Manifest

filed there as landing cargo or same bottom cargo as the case may be. Thus there is continuity in the record and there is no chance of the control over such transit goods being lost.

(b) The position of the transhipment is entirely different. In the first instance such transhipment goods are landed in the particular Indian customs station. There after they have to be shipped by a conveyance to the destination to be transhipped. These are the following stages where care and caution have to be exercised to ensure that the goods are not illicitly landed and smuggled into India.

(i) during the period when the transhipment goods lie in the Indian customs station;

(ii) when the goods are transhipped by another conveyance to their final destination;

(iii) where the transhipped goods are destined to another Indian customs station, care has to be taken at that station for actual landing and proper clearance.

7.11.3 Statutory Provisions: The statutory provisions relating to Transit and Transhipment of goods are covered in sections 52 to 56 of the Customs Act.

Exceptions to this chapter [Section 52]: The provisions of this chapter shall not apply to

(a) Baggage

(b) Goods imported by post and

(c) Stores

Transit of goods in the same vessel or air [Section 53]: Subject to the provisions of section 11 any goods imported in a conveyance and mentioned in the import manifest or the import report, as the case may be, as for transit in the same conveyance to any place outside India or any customs station may be allowed to be so transited without payment of duty.

Transhipment of goods without payment of duty [Section 54]: (1) Where any goods imported into a customs station are intended for transhipment, a bill of transhipment shall be presented to the proper officer in the prescribed form. Where the goods are being transferred under an international treaty or bilateral agreement between the Government of India and Government of a foreign country, a declaration for transhipment instead of a bill of transhipment shall be presented to the proper officer in the prescribed form.

(2) Subject to the provisions of sections 11, where any goods imported into a customs station are mentioned in the import manifest or the import report, as the case may be, as for transhipment to anyplace outside India, such goods may be allowed to be so transhipped without payment of duty.

(3) Where any goods imported into a customs station are mentioned in the import manifest or the Import report, as the case may be, as for transhipment:-

(a) to any major port as defined in the Indian Ports Act, 1908 (15 of 1908), or the customs airport at Mumbai, Calcutta, Delhi, or Chennai or any other custom port or customs airport which the board may, by notification in the Official Gazette, specify in this behalf, or

(b) to any other customs station and the proper officer is satisfied that the goods bonafide intended for transhipment to such customs station,

the proper officer may allow the goods to be transhipped without payment of duty, subject to such conditions as may be prescribed for the due arrival of such goods at the customs station to which transhipment is allowed.

Liability of duty on goods transited under section 53 or transhipped under section 54 [Section 55]: Where any goods are allowed to be transhipped under section 53 or transhipped under sub-section (3) of section 54 to any customs station, they shall, on their arrival at such station, be liable to duty and shall be entered in like manner as goods are entered on the first importation thereof and the provisions of this Act and any rules and regulations shall, so far as may be, apply in relation to such goods.

Transport of certain classes of goods subject to prescribed conditions [Section 56]: The provisions of sections 53 and 54 apply only to goods imported at an Indian customs port/airport and transmitted or transshipped to another Indian customs port/airport. They do not cover transport by land from one Indian land custom station to another Indian land customs station.

In the case of goods destined to foreign ports/airports/custom station, the problem had been specifically faced in the case where imported goods meant for Nepal landed at any Indian customs port/airport or land customs station. Such goods had to be transported by road or rail to Indian land customs station along the Indo Nepal Border and thereafter crossed over to the corresponding Nepalese customs station. Similarly there was rail traffic between West and East Pakistan before the latter was liberated and named Bangladesh. The movement across the Indian territory was found to be faster and cheaper compared to movement by sea around the Indian subcontinent. Such a situation is dealt with by section 56 of the Customs Act.

Section 56 specifically provides that Imported goods may be transported without payment of duty from one land customs station to another, and any goods may be transported from one part of India to another part through any foreign territory, subject to such conditions as may be prescribed for the due arrival of such goods at the place of destination.

In the first part there is a substantial exemption from customs duty. The second part technically amounts to export and subsequent re-import.

7.11.4 Goods Imported (Conditions of Transhipment) Regulations, 1995: The legal provisions relating to the transhipment of goods are discussed in section 54. However the procedures relating to the transhipment of goods are governed by Goods Imported (Conditions of Transhipment) Regulations, 1995. Broadly, the transhipment procedure is as follows:

1. **Transhipment Permit:** A 'transhipment permit' is the permission granted by the Customs, at the port/airport of unloading of imported goods, to shipping agents for carriage of goods to another port/airport/ICD/CFS in India. The shipping agent submits an application alongwith transhipment forms (5 copies), sub-manifest and a copy of IGM to the Customs. The Customs scrutinizes the details furnished by the shipping agents in the application for transhipment. In case, the documents are in order, permission for transhipment is granted by the Customs.

2. **Execution of Bond and Bank Guarantee:** To ensure that imported cargo, on which duty has not been paid, are not pilfered en-route to another port/airport/ICD/CFS and reach there safely, a bond with bank guarantee (@ 25% of bond value) is executed by the carrier engaged for the transhipment of the goods. The carriers in public sector i.e. CONCOR and CWC are exempted from the requirement of bank guarantee for transhipment of goods. The terms of the bond is that if the carrier produces a certificate from Customs of the destination port/airport/ICD/CFS for safe arrival of goods there, the bond stands discharged. In case such certificate is not produced within 30 days or within such extended period as the proper officer of Customs may allow, an amount equal to the value, or as the case may be, the market price of the imported goods is forfeited.

3. **Sealing of goods:** After issuance of transhipment permit and execution of bonds as mentioned above, containers are sealed with 'one time bottle seal' by the Customs. In case, containers are already sealed with 'one time bottle seal' by the shipping agents, containers are not required to be sealed again by the Customs. In such cases, shipping agents are required to inform the serial number of seals to Customs, which is just verified by the Customs.

8
Warehousing

8.1 Introduction

The concept of warehousing is a trade practice involving trade off between (a) the economics of importation and (b) the quantitative requirement of the importer at any given point of time. Warehousing is resorted to in case where the importer does not want to clear the goods immediately due to lack of storage facilities or in case of arrival of shipment much earlier than planned or in case of working capital issues. When goods are warehoused, no customs duty is payable on such goods at such point of time. Section 57 to 73 deals with warehousing provisions. This facility is available to traders as well as to direct importers.

For instance, the requirements of the importer at any given point of time is 50 tonnes. In case the supplier does not agree to sell that much quantity or the freight is not economical, the importer, in these circumstances, is forced to place an order for 200 tonnes. As soon as the goods are imported, duty has to be assessed on them. Therefore, instead of clearing the whole consignment the importer is allowed to clear the consignment in convenient lots after paying appropriate duty on that particular portion that is cleared. During the intervening period, the goods are held in custody in a place called warehouse. The consideration the importer is required to pay for this facility was that :-

(i) he should bind himself to pay to the government a sum equal to double the amount of total duty determined, with such surety or security as may be required (this is known as double duty bond) and

(ii) he should agree to pay duty on the goods cleared from such warehouse at the rate of duty and valuation prevalent on the date on which a bill of entry in respect of such goods is presented.

This facility is also necessary in another situation. Ship stores like liquors, cigarettes, preserved food were imported into India and supplied to vessels according to their requirements. The entire consignment imported is intended to be so shipped out of the country. The same was the case of fuel for the ship like furnace oil, diesel oil etc. Obviously there was no point in collecting import duty on the whole of the consignment and granting drawback piecemeal as and when such goods were exported. It was not also safe for the revenue point of view to allow such goods to lie in the port uncleared until they are exported/shipped as shipstores.

8.2 Parallel provisions for home consumption

In these circumstances, in addition to the concept of "clearance for home consumption" the concepts of "clearance for deposits in a warehouse" and "clearance for home consumption from the warehouse" came into being. As a result of the above, parallel provision had also been made corresponding to clearance for home consumption. The examples are: -

Section 46(1): The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form.

Section 15(1): The rate of duty and tariff valuation, if any, applicable to the imported goods shall be the rate and valuation in force-

(a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section.

(b) In the case of goods cleared from a warehouse under section 68, on the date on which a bill of entry in respect of such goods is presented.

8.3 Special provisions for warehousing

A separate chapter was therefore incorporated in the Customs Act, 1962, containing specific provisions relating to warehousing of imported goods. Chapter IX of the Customs Act, 1962 contains the following provisions: -

(1) Appointment of public warehouses – Section 57

(2) Licensing of private warehouses – Section 58

(3) Warehousing bond – Section 59

(4) Permission for deposit of goods in a warehouse – Section 60

(5) Period for which goods may remain warehoused – Section 61

(6) Control over warehoused goods – Section 62

(7) Payment of rent and warehouse charges – Section 63

(8) Owner's right to deal with warehoused goods – Section 64

(9) Removal of goods from one warehouse to another – Section 67

(10) Clearance of warehoused goods for home consumption – Section 68

(11) Clearance of warehoused goods for exportation – Section 69

(12) Allowance in the case of volatile goods – Section 70

(13) Goods not to be taken out of warehouse except as provided by this Act – Section 71

(14) Goods improperly removed from the warehouse – Section 72

(15) Cancellation and return of warehousing bond – Section 73

We shall examine each of the provisions separately in the subsequent paragraphs.

8.4 Important definitions

8.4.1 Warehouse [Section 2(43)]: means a public warehouse appointed under section 57 or a private warehouse licensed under section 58.

8.4.2 Warehoused goods [Section 2(44)]: means goods deposited in a warehouse.

8.4.3 Warehousing station [Section 2(45)]: means a place declared as a warehousing station under section 9.

The law makes a clear distinction between public warehouses and private warehouses. The public warehouse is owned and managed by a government body. In most of the cases it is Central Warehousing Corporation. A private warehouse is licensed in places where there is no public bonded warehouse. An important point to be remembered is the liability of the warehouse keeper. Normally such warehouses are kept under double lock one that of the warehouse keeper, and the other of the customs department. Further in the case of the private bonded warehouse the licensee has to pay for and acquire the services of a customs officer (on cost recovery basis) to be posted and stationed in the private warehouse.

The common features about these warehouses are:

(a) the warehouses should be situated in a warehousing station;

(b) the ground plan of the warehouse should be scrutinized for suitability and security of the building;

(c) there should be sufficient light and ventilation for proper storage of goods;

(d) the windows should be secured with shutters and stout iron bars. Superfluous windows should be closed up with brick work;

(e) the entrances should have strong and secured doors with strong locks. They should be capable of periodical check from outside and the doors are locked;

(f) there should be proper and prominent name board, showing the full name and full address of the warehouse.

8.5 Procedure for deposit in the warehouse and subsequent removal

The following are briefly the various stages and steps involved in deposit of imported goods in a private bonded warehouse and their subsequent removal. The removal can be normally for

(a) home consumption

(b) export; and

(c) transfer to another warehouse.

The stages in the processing of goods for deposit in warehouse are:

(a) Assessment of into-bond bill of entry at the port of import;

(b) Execution of double duty warehousing bond under section 59;

(c) Bonding of the goods in a warehouse at the port of import;

(d) Ascertain availability of space from the inland private bonded warehouse in the inland station;

(e) Superintendent-in-charge of private warehouse issues space availability certificate. In case of a private warehouse, EOU, STP, EHTP such certificate is not required.

(f) On the strength of the certificate, the officer-in-charge of the port warehouse would permit transfer of the goods under section 67;

(g) The necessary bond, for due transport and subsequent accounting of the goods, is executed. Bond should be accompanied with bank guarantee. However EOU, EHTP and STP units are not needed to give a bank guarantee.

(h) Licensee should file, before depositing the transferred goods, the copy of invoice, bill of lading, authenticated copy of bill of entry at the port of importation and section 59 bond;

(i) The jurisdictional Assistant Commissioner after necessary check of the documents will accept the section 59 bond and permit the transferred goods to be re-warehoused;

(j) Before permitting the deposit of the goods in the private warehouse, the packages will be examined externally to satisfy by marks and numbers that they were the same goods duly covered by the bill of entry filed at the port of import. If any of the packages were damaged or broken in transit, the contents would be examined. If the packages do not bear distinguishing marks or running serial number, they will be provided on the packages;

(k) During custody in the private bonded warehouse, the licensee will maintain

  (a) Stock account book; and

  (b) Into-bond bill of entry-wise account

(l) The licensee requiring clearance of the goods from the warehouse would present an ex-bond for home consumption (green bill of entry) at least 48 hours before the desired time for clearance. Duty is payable only on the quantity that is cleared from warehouse;

(m) After assessment of the ex-bond bill of entry and determination of the duty payable, the B/E will be returned along with challan in quadruplicate (for payment of duty);

(n) The licensee shall also inform the customs officer about the proposed removal well in advance;

(o) After payment of duty, the copies of the ex-bond bill of entry and one copy of the receipted challan to the superintendent-in-charge of the warehouse who will depute necessary officers to effect the release of the goods;

(p) The officer after examination and test weighment will allow the clearance if the packages are found to tally with the particulars given in the bill of entry;

(q) The officer will make necessary entries and endorsement on the warehouse register, stock card and bill of entry file.

8.6 Statutory provisions

8.6.1 Appointment of public warehouses [Section 57]: Under section 57 of the Customs Act, at any warehousing station, the Assistant Commissioner of Customs may appoint public warehouses wherein dutiable goods may be deposited.

In other words,

(i) the place should have already been declared as a warehousing station;

(ii) it is the Assistant Commissioner who is competent to declare a warehouse as a public bonded warehouse;

(iii) only dutiable goods can be deposited in the warehouse.

The Assistant Commissioners have appointed the public bonded warehouses and the Commissionerates have issued trade notices about such appointment of public bonded warehouses. Some of the Commissionerates have issued public notice giving detailed instructions for the working of the public bonded warehouse. From these public notices, it is apparent that:

(1) The policy of the Government is mainly to provide warehousing facility at selected places in the inland stations, having regard to the following:

   (a) the requirement of trade and industry

   (b) the proximity to port town

   (c) availability of customs expertise

(2) These public bonded warehouses are generally managed by Central Warehousing Corporations.

The points covered by these public notices are:

(1) obligations of the warehouse keeper;

(2) procedure for warehousing imported goods for the first time;

(3) procedure for warehousing on transfer from one warehouse to another;

(4) issue of space availability certificate before accepting warehouse goods;

(5) examination of goods before re-warehousing;

(6) ex-bond clearance;

(7) reassessment of warehoused goods;

(8) maintenance of stock card and accounts;

(9) permissible warehousing period;

(10) procedure for extension of warehousing period;

(11) failure to clear the goods from the ware house;

(12) penalty for goods improperly removed from the warehouse.

8.6.2 Licensing of Private Warehouses [Section 58]: The provisions with respect to licensing of private warehouses are discussed below –

(1) At any warehousing station, the Assistant Commissioner of customs or the Deputy Commissioner of Customs may license private warehouses, wherein dutiable goods imported by or on behalf of the licensee, or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited.

(2) The Assistant/Deputy Commissioner of Customs may cancel a license granted under sub-section (1)

(a) by giving one month's notice, in writing to the licensee; or

(b) if the licensee has contravened any provision of this Act or the rules or regulations or committed breach of any of the conditions of the license;

However, before any licence is cancelled under clause (b), the licensee shall be given a reasonable opportunity of being heard.

(3) Pending an enquiry whether a licence granted under sub-section (1) should be cancelled under clause(b) of sub-section (2) the Assistant/Deputy Commissioner may suspend the license.

8.6.3 Private warehouses not to be permitted under this section where public warehouses are available: Under this section, grant of private bonded warehouse where public bonded warehouses are available are clearly debarred. This view is upheld by the High Court in the case of *Shree Pipes Ltd. v. UOI, 1995 (79) ELT 405 (Raj).*

8.6.4 Procedure for permission of Private Warehouses: In case of Private Bonded Warehouses, the applications for such licences have been classified into two categories viz., storage of sensitive goods such as liquor, cigarettes, foodstuffs, consumable, cut and polished gemstones, etc. and other non-sensitive goods. Under Board's *Circular No.99/95 dated 20.9.1995*, the following guidelines in case of storage of sensitive goods have been provided:-

(i) Applicants should produce a Solvency Certificate from a Scheduled Bank of repute for a value not less than ₹ 50 lakhs;

(ii) Such warehouses may not be located in residential areas;

(iii) The premises should be secure, possess fire-fighting provisions and be easily accessible to the Customs Officers;

(iv) Goods deposited should be fully insured for a value at least equal to the customs duty;

(v) The proprietor/partner/director must not be involved in any Customs or Excise offence. In case of any involvement in such offences, the licence may be terminated after following the prescribed procedure;

(vi) In the case of individual consignments to be warehoused, a double duty-bond as prescribed under section 59 should be given by the licencee. In case of sensitive goods, a cash deposit/ bank guarantee equal to 25% of the duty liability (effective duty foregone) will be taken for each consignment. At the same time, a revolving bond with a single bank guarantee for a higher amount can be accepted if so requested for a number of

consignments.

In the case of non-sensitive goods, applicants for Private Bonded Warehouses have to abide by all provisions as pertaining to sensitive goods discussed above, except that the requirement of furnishing a Solvency Certificate has been waived. The applicant, however, should be solvent for ₹ 10 lakh and should possess a good record. A double duty bond with surety would suffice for storage of non-sensitive bonded goods. In case the Customs are not satisfied about the transactions of a particular bonder, the applicant may be asked to furnish a bank guarantee.

8.6.5 Warehousing Bond [Section 59]: Section 59 provides as follows:

(1) The importer of any goods, specified in sub-section (1) of section 61, which have been entered for warehousing and assessed to duty under section 17 or section 18, shall execute a bond binding himself in a sum equal to twice the amount of duty assessed on such goods,

   (a) to observe all the provisions of this Act and the rules and regulations in respect of such goods;

   (b) to pay on or before a date specified in a notice of demand

      (i) all duties, and interest if any, payable under sub-section(2) of section 61;

      (ii) rent and charges claimable on account of such goods under this Act, together with interest on the same from the date so specified at such rate not below eighteen percent and not exceeding thirty six percent per annum as is for the time being fixed by the central government by Notification in the Official Gazette, and

      (iii) to discharge all penalties incurred in violation of the provisions of this Act and the rules and regulations in respect of such goods.

(2) For the purpose of sub-section (1) the Assistant Commissioner or Deputy Commissioner of Customs may permit an importer to enter into a general bond in such amount as the Assistant Commissioner of Customs may approve in respect of the warehousing of goods to be imported by him within a specified period.

(3) A bond executed under this section by an importer in respect of any goods shall continue in force notwithstanding the transfer of the goods to any other person or the removal of the goods to any other warehouse;

However, where the whole of the goods or any part thereof are transferred to another person, the proper officer may accept a fresh bond from the transferee in a sum equal to twice the amount of duty assessed on the goods transferred and thereupon the bond executed by the transferor shall be enforceable only for a sum mentioned therein less the amount for which a fresh bond is accepted from the transferee.

The double duty indemnity bond plays a very important role in the entire concept of warehousing.

The rate of duty and valuation prevalent on the date of removal are applicable in terms of section 15(1) for piecemeal clearances. Normally the rates of customs duty have been

generally increasing. Therefore there has been no risk of loss of revenue on account of warehousing. Hence allowing for increase in duty rates, it was considered sufficient to cover double the duty amount by an indemnity bond with necessary surety or security. This is basically the underlying objective of the warehousing bond.

Determination of the bond amount: Subsection (2) specifies that instead of an individual double duty bond for each consignment, the importer may be permitted to file a general bond to cover imported goods to be warehoused by him during a particular period. The bond amount will be determined by the Assistant Commissioner of Customs, having regard to the

(a) Past imports warehoused and the duty involved in such consignments;

(b) Anticipated imports and expected revenue involved.

In practice, a running account is maintained with debit when imported goods are warehoused and credits when warehoused goods are cleared ex-bond on payment of duty. There is a concept that as long as the goods are available to customs duty leviable thereon, the duty can be recovered from sale of goods. In fact 72(2) provides for such a coercive method for the realization of duty.

Notification fixing higher rate of interest: Under *Notification No 35/2000-Cus (NT). dated 12.05.2000,* the Central Board of Excise and Customs has fixed the **rate of interest at 24% per annum,** for the purposes of sub-clause (ii) of clauses (b) of sub-section (1) of section 59 of the Customs Act.

8.6.6 Permision for deposit of goods in a warehouse [Section 60]: When the provisions of section 59 have been complied with in respect of any goods, the proper officer may make an order permitting the deposit of the goods in a warehouse.

8.6.7 Period for which goods may remain warehoused [Section 61]: The provisions of this sections are as under:

(1) Any warehoused goods may be left in the warehouse in which they were deposited or in any warehouse to which they may be removed-

(a) in the case of capital goods intended for use in any hundred percent export oriented undertaking, till the expiry of five years; and

(aa) Goods other than capital goods, intended for use in any hundred per cent export-oriented undertaking, can be warehoused till the expiry of three years.

(b) In the case of other goods till the expiry of one year, after the date on which the proper officer has made an order under section 60 permitting the deposit of the goods in a warehouse.

Provided that-

(i) In the case of any goods which are not likely to deteriorate, the period specified in clause (a) or clause (aa) or clause (b) may on sufficient cause being shown, be extended -

(A) in the case of goods intended for use in any hundred percent export oriented

undertaking by the Principal Commissioner/Commissioner of Customs, for such period as he may deem fit, and

(B) in any other case, by the Principal Commissioner/Commissioner of Customs, for a period not exceeding six months and by the Principal Chief Commissioner/Chief Commissioner of Customs for such further period as he may deem fit,

(ii) In case any goods referred to in clause (b) if they are likely to deteriorate, the Principal Commissioner/Commissioner of Customs may reduce the aforesaid period of one year, as he may deem fit.

Provided further that when the license for any private warehouse is cancelled, the owner of any goods warehoused therein shall, within seven days from the date on which notice of such cancellation is given or within such extended period as the proper officer may allow, remove the goods from such warehouse to another warehouse or clear them for home consumption or exportation.

(2) Where any warehoused goods

(i) specified in sub-clause (a) or sub-clause (aa) of sub-section (1), remain in a warehouse beyond the period specified in sub-section (1) by reason of extension of the aforesaid period or otherwise, interest at such rate as is specified in section 47 shall be payable at the time of clearance of the goods in accordance with the provisions of section 15 on the warehoused goods for the period from the expiry of said warehousing period till the date of payment of duty on the warehoused goods;

(ii) Specified in sub-clause (b) of sub-section (1), remain in a warehouse beyond a period of **ninety days****, interest shall be payable at such rate or rates not exceeding the rate specified in section 47, as may be fixed by the Board, on the amount of duty payable at the time of clearance of goods in accordance with the provisions of section 15 on the warehoused goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods.

However, the Board may, if it considers it necessary so to do, in the public interest by order and under circumstances of an exceptional nature, to be specified in such order waive the whole or part of any interest payable under this section in respect of any warehoused goods;

Provided further that the Board may, if it considers it necessary so to do in the public interest, by notification in the respect of which no interest shall be charged under this section.

Explanation: For the purposes of this section "hundred percent export oriented undertaking" has the same meaning as in Explanation 2 to sub-section (1) of section 3 of the Central Excise Act, 1994.

**The relevant date when the aforersaid period of 90 days would commence is the date of deposit of goods in the warehouse *[Circular No. 39/2013 Cus dated 01.10.2013]*.

CBEC vide *Notification No. 18/2003-cus-(NT) dated 1.03.2003* has fixed the **rate of interest at 15%** for the purpose of clause (ii) of section 61.

However, if no customs duty is payable at the time of clearance of goods from warehouse, no interest is payable. Interest is mere 'accessory' to principal *[Pratibha Processors v. UOI 1996 (88) E.L.T. 12 (S.C.)].*

In case of *Swil Ltd v. UOI 2005 (185) E.L.T. 251 (Guj.),* it was held that when the goods are re-exported after the prescribed time limit (90 days) for warehousing, there is no liability to pay duty. Therefore, no interest is leviable for warehousing beyond the prescribed time.

Main features of the provisions of section 61: The main features of section 61 can be analysed as follows:

(1) the three classes of warehoused goods for the purposes of different periods of warehousing are

   (a) capital goods intended for use in 100% export oriented undertaking and

   (b) goods other than capital goods intended for use in 100% export oriented undertaking, and

   (b) other goods.

(2) The warehousing period for capital goods and other goods used in 100% EOU is 5 years and 3 years respectively. For the rest of the goods it is 1 year.

(3) The power to extend the warehousing period beyond 5 years/3 years has been delegated to the Principal Commissioner/Commissioner of Customs for such further period as he may deem fit. The period of 1 year can be extended by the Principal Commissioner/Commissioner of Customs for further 6 months. However, for extending it further, authorisation of Principal Chief Commissioner/Chief Commissioner of Customs is required.

(4) The Explanation under section 3 of the Central Excise Act, 1944 defines hundred percent export oriented unit to mean an undertaking which has been approved as a hundred percent export oriented undertaking by the Board appointed in this behalf by the Central Government, in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 and the rules made under that Act.

(5) The goods that are likely to deteriorate fall under the category "others" alone. Their warehousing period can be reduced to a shorter period by the Principal Commissioner/Commissioner of Customs.

(6) The interest under section 47 is chargeable only after the expiry of warehousing period;

(7) The interest is chargeable on the amount of duty determined at the time of clearance of the warehoused goods under section 15.

(8) The Board has power to waive the above interest, in individual cases (ad hoc orders) and by Gazette notification in respect of any class of goods.

Application for extension of warehousing period: There is nothing in section 61 to indicate that application for extension of warehousing period must be made before expiry of the period of warehousing initially permitted. It would appear that unless the authorities have taken coercive measures to recover duty and warehousing or other charges, power to grant

extension of time does not come to an end. This was held by the Bombay High Court in the case of *Banswara Syntex Ltd. V. UOI, 1994, (74) ELT 522 (Bom).*

The guidelines to be followed while granting extension by customs authority are given in *Circular No. 47/2002-Cus dated 29.7.2002*. It should be ensured that the goods are not likely to deteriorate during the extended period of warehousing. Wherever necessary the goods should be tested for quality before granting extension of warehousing period. Whenever necessary interest accrued should be paid before granting extension.

If the warehousing period is reduced by any amendment to law, the reduced period will not be applicable to the goods which are warehoused prior to the amendment *[Bangalore Wire Rod Mills v. UOI 1992 (61) E.L.T. 37 (Kar.)]* [approved by SC].

8.6.8 Control over warehoused goods [Section 62]: Warehouse popularly called "bonded" warehouse has always been subjected to double lock. One of the locks was that of the owner of the warehouse-the custodian of the cargo and the second was that of customs department. This symbolically epitomized the customs control over the warehoused goods. This power has been placed on a statutory footing under section 62 of the Customs Act which provides as follows:

(1) All warehoused goods shall be subject to the control of the proper officer;

(2) No person shall enter a warehouse or remove any goods there from without the permission of the proper officer;

(3) The proper officer may cause any warehouse to be locked with the lock of the customs department and no person shall remove or break such lock.

(4) The proper officer shall have access to every part of a warehouse and power to examine the goods therein.

8.6.9 Payment of rent and warehouse charges [Section 63]

(1) The owner of any warehoused goods shall pay to the warehouse keeper, rent and warehouse charges at the rates fixed under any law for the time being in force and where no rates are so fixed, at such rates as may be fixed by the Principal Commissioner/Commissioner of Customs.

(2) If any rent or warehouse charges are not paid within ten days from the date when they became due, the warehouse keeper may, after notice to the owner of the warehoused goods and with the permission of the proper officer cause to be sold (any transfer of the warehoused goods notwithstanding) such sufficient portion of the goods as the warehouse keeper may select.

In the case of the public bonded warehouse, normally the port trust in the major ports and the central warehousing authorities in other interior places is the owner of the warehouse. Naturally these authorities will charge the owners of the warehouse for the storage. This cargo will generally consist of the storage rent and other maintenance charges like electricity, cleaning, security etc.

The rates for these charges may be fixed by the Government or quasi Government authorities

concerned. If they are not so fixed, the Customs Act gives the power to the Principal Commissioner/Commissioner of Customs concerned.

8.6.10 Owner's right to deal with warehoused goods [Section 64]: Section 64 provides as follows: With the sanction of the proper officer, and on payment of the prescribed fees, the owner of any goods either before or after warehousing the same-

(a) inspect the goods

(b) separate damaged or deteriorated goods from the rest;

(c) sort the goods or change their containers for the purpose of preservation, sale, export or disposal of the goods;

(d) deal with the goods and their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods

(e) show the goods for sale; or

(f) take samples of goods without entry for home consumption, and if the proper officer so permits, without payment of duty on such samples.

When the imported goods are warehoused, the temporary possession and the custody of the goods are passed on to the warehouse keeper. However the remaining titular rights of the goods vest with the owner. Thus the owner has every access to the goods. In the course of his dealings with the goods, he may be required to

(i) see and inspect the goods;

(ii) ensure that the goods do not deteriorate or get damaged during storage in the warehouse;

(iii) if some goods or some part of goods is already damaged, he has to segregate them from the good ones, and take appropriate measures to dispose them to the best advantage;

(iv) if any container of the goods is damaged and requires repair or replacement, the owner will have to attend to these requirements;

(v) again if the goods require to be repacked or the containers changed for the purposes of export of the goods or disposal for home consumption he should be permitted to carry out such operations;

(vi) show the goods to prospective buyers or local consumers for sale;

(vii) draw samples to check the quality of the goods;

(viii) draw such samples to show to prospective buyers or local consumers.

The only restriction on all these operations is that such operation should not cause any damage or deterioration to the goods. If such warehoused goods are so damaged or deteriorated, that the value of the goods depreciates, the duty leviable on the goods will come down and there will be loss of Government revenue.

8.7 Removal of Goods from the Warehouse

The warehoused goods can be removed for

(i) transfer from one warehouse to another; or

(ii) clearance for home consumption; or

(iii) clearance for exportation.

Each of the three is a different situation and separate procedures have to be followed. The interests to be safeguarded are different. As such separate provisions have been made for the above three situations under section 67, 68 and 69 respectively.

8.7.1 Removal of goods from one warehouse to another [Section 67]: Section 67 provides that the owner of any warehoused goods may, with the permission of the proper officer, remove them from one warehouse to another subject to such conditions as may be prescribed for the due arrival of the warehoused goods at the warehouse to which removal is permitted.

The entire emphasis here is on ensuring the proper receipt of the warehoused goods at the destination warehouse, so that there is no risk to revenue. The Board in exercise of the powers conferred by section 157 of the Customs Act, 1962 has made Warehoused Goods (Removal) Regulations, 1963 to govern the same.

8.7.2 Warehoused Goods (Removal) Regulations, 1963

1. **Conditions for transport of warehoused goods in the same town:** Where the goods are to be removed from one warehouse to another in the same town the proper officer may require the transport of the goods between the two warehouses to be under the supervision of an officer of customs, the owner meeting the cost of such supervision.
2. **Condition for transport of warehoused goods to another town:** Where the goods are to be removed from one warehouse to another in a different town, the proper officer may require the person requesting removal to execute bond in a sum equal to the amount of import duty leviable on such goods and in such form and manner as the proper officer deems fit.
3. **Terms of bond:** The terms of the bond shall be that if the person executing the bond produces to the proper officer, within three months or within such extended period as such officer may allow a certificate issued by the proper officer at the place of destination that the goods have arrived at that place, the bond shall stand discharged but otherwise an amount equal to the import duty leviable on the goods in respect of which the said certificate is not produced shall stand forfeited.
4. **Surety or Security:** The proper officer may require that the bond shall be with such surety or security or both as is acceptable to him.

8.7.3 Clearance of warehoused goods for home consumption [Section 68]: The importer of any warehoused goods may clear them for home consumption, if-

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty leviable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer.

However, the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of rent, interest, other charges and penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon.

It may be noted that the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods, regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Analysis of Section 68: The essential ingredients are

(i) an ex-bond bill of entry should be presented to the proper officer.

(ii) After assessment of the ex-bond bill of entry the duty determined should be paid.

(iii) Along with the import duty the charges payable under section 63, namely rent and warehouse charges should be paid.

(iv) If any penalty is imposed or levied on the warehoused goods, they should also be paid.

(v) Once the proper officer is satisfied that all the amounts payable by the owner of the goods including duty, warehouse rent, warehouse charges, interest under section 47, any penalty or fine or any other charges payable on the warehoused goods, have been paid, he may permit removal of the goods from the warehouse and pass a suitable order for clearance.

8.7.4 Brief outline of the procedure for clearance of warehoused goods for home consumption: In order to have a better understanding of the process of clearance of warehoused goods for home consumption, the following steps are relevant.

(1) The document of clearance of such warehoused goods is called ex-bond bill of entry. It is green in colour.

(2) It is filed in triplicate with the customs authorities at the place where the warehouse is situated.

(3) The particulars of ex-bond bill of entry, like bill of entry no. quantity and description of warehoused goods sought to be cleared, its quantity and value, tariff classification adopted are noted in the bond register and copy of into-bond bill of entry.

(4) The bill of entry is then assessed having regard to the provisions of section 15(1)(b) i.e. the rate of duty and tariff valuation in force on the date when bill of entry in respect of such goods is presented.

(5) In case any abatement is claimed under section 22(1)(c), the same is also examined.

(6) In the case of import licence regulations and other prohibitions on imports, the common sense law is that they are relevant to the date of actual importation into India. Subsequent changes in the import policy would not NORMALLY affect the warehoused goods. However the details of such changes if any would be applicable to the subject goods as a matter of abundant precaution.

(7) After assessment of the bill of entry namely; determination of the amount of duty, the duty and interest if any payable thereon would be paid to the customs.

(8) The goods would then be subjected to physical examination under section 17 to ensure that the goods proposed to be removed are in conformity with the declaration made in the ex-bond bill of entry particularly in respect of description of goods tariff classification, quantity and value.

(9) The owner of the goods would be required to get the amount of warehouse rent and other charges determined by the warehouse keeper and make necessary payment.

(10) The proper officer of customs would thereupon make the permitted clearance for home consumption order. The bill of entry copy with this order will be presented to the warehouse keeper.

(11) The warehouse keeper would make suitable entries in the stock card, warehouse register, into bond-bill of entry-wise file.

(12) The fact of actual removal of the warehoused goods will be communicated to the customs authorities concerned.

8.7.5 Clearance of warehoused goods for exportation [Section 69]: The third method of disposal of the warehoused goods is by exportation. This is normally adopted in the case of shipstores, which are meant to be exported only; goods meant for re-export and goods supplied to duty free shops and the like. Section 69 provides that:

(1) Any warehoused goods may be exported to a place outside India without payment of import duty, if-

  (i) a shipping bill or a bill of export in the prescribed form or a label or declaration accompanying the goods as referred to in section 82 has been presented in respect of such goods;

  (ii) the export duties, penalties, rent and other charges payable in respect of such goods have been paid; and

  (iii) an order or clearance of such goods for exportation has been made by the proper officer.

(2) Notwithstanding anything contained in sub-section (1), if the Central Government is of the opinion that warehoused goods of any specified description are likely to be smuggled back into India, it may, by notification, in the Official Gazette direct that such goods shall not be exported to any place outside without payment of duty or may be allowed to be so exported subject to such restrictions and conditions as may be specified in the notification.

Main ingredients of section 69

(1) Warehoused goods may be exported out of India.

(2) No Import duty will be levied on them if the procedure prescribed is followed.

(3) A shipping bill/bill of export/label or declaration in the prescribed form should be presented in respect of the warehoused goods sought to be cleared for export.

(4) The appropriate export duty including cess leviable on such goods on export should be assessed and paid.

(5) The import dues on the goods, namely penalties, warehouse rent, interest and other warehousing charges should be paid. Only payment of import duty otherwise leviable on such warehoused goods is waived.

(6) The proper officer of customs should satisfy himself that all regulations, restrictions and prohibitions in force in respect of export of such goods, is compiled with or fulfilled. After satisfying himself about this aspect as well as payment of all duties and other charges payable he will permit removal of the goods from the bonded warehouse for export.

(7) In case Government of India is of the opinion that goods of any specified description are likely to be smuggled back into India, it may

- demand payment of import duty payable otherwise, on the warehoused goods;
- prescribe conditions to be fulfilled including execution of an Indemnity bond undertaking to produce proof of export or pay the import duty otherwise leviable
- The Government of India, by notification prescribes the circumstances under which such conditions can be imposed.

8.7.6 Allowance in respect of volatile goods [Section 70]: Among the goods traditionally imported and warehoused are the following:

(1) Petroleum products

(2) Liquor and

(3) Ethylene dichloride and liquid helium.

Petroleum products like aviation turbine fuel, superior kerosene; high speed diesel oil, light diesel oil, motor spirit, vapourising stored in tanks, subjected to atmospheric pressure had a tendency to evaporate during long period of storage. Similarly, liquor like brandy and whisky were imported under over proof conditions, in wooden casks stored in bonded warehouses, were volatile in nature and there was considerable evaporation loss during storage. Even articles like wine, beer, suffered evaporation losses during storage. Among the lower order mineral products raw naptha, furnace oil and batching oil also were prone to evaporation. As such there was invariably difference between the bonded quantity and the quantity at the time of removal from the warehouse. This loss was due to natural causes and neither the importer nor the warehouse keeper can be found fault with. On the same grounds neither the importer nor the warehouse keeper could be called upon to bear the duty burden of this loss. This position has been recognised and placed on a legal footing under section 70 of the Customs

Act. Section 70 provides that

(i) When any warehoused goods to which this section applies, are at the time of delivery from a warehouse found to be deficient in quantity on account of natural loss, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may remit the duty on such deficiency.

(ii) This section applies to such warehoused goods the Central Government, having regard to the volatility of the goods and the manner of their storage, may be notification in the Official Gazette specify.

Essential ingredients of section 70(1):

(i) The goods should be warehoused goods;

(ii) The provisions of this section should apply to such goods by virtue of a notification under sub-section (2);

(iii) The goods should be found deficient in quantity at the time of removal;

(iv) The deficiency should be on account of natural loss;

(v) The import duty leviable on such deficiency may be remitted;

(vi) The Assistant Commissioner and the Deputy Commissioner are empowered to grant the remission.

The essential ingredients of section 70(2) are:

(a) The power to specify vests with the Central Government.

(b) Volatility and manner of storage will be the relevant factors;

(c) An official notification will have to be issued for this purpose;

(d) The remission under section 70(1) applies only to such specified warehoused goods.

Notification under section 70(2): Under MF(DR) *Notification No.122/63-Cus dt.11.5.1963* as amended subsequently the following goods have been specified as goods to which the provisions of section 70 apply when they are deposited in a warehouse, namely:

Aviation fuel	motor spirit	mineral turpentine
acetone	menthol	raw naptha
vaporising oil	kerosene	high speed diesel oil
batching oil	diesel oil	furnace oil

and Ethylene Dichloride kept in tanks and Liquid helium gas kept in containers; and wine, spirit and beer, kept in casks.

Remission under section 23 and section 70 – A Distinction: Section 23 is a general provision applicable to cases where goods are lost before clearance for home consumption is made. Whereas, section 70 provides for remission of duty in respect of loss during warehousing of only the goods notified by the Central Government under that section. Therefore, granting remission for loss during transit between two warehouses does not render

section 70 redundant. This view was taken by the Tribunal in the case of *Indian Oil Corporation v. Commissioner of Customs 1985 (21) ELT 881 (Tri.- LB)*

8.7.7 Prohibition on improper removal and penalty for such improper removal: Three methods of disposal have been prescribed for warehoused goods under section 67, 68 and 69. In addition, under section 64, the owner of the goods can take samples with or without payment of import duty. These are removals authorised by law and are termed as proper removals. As a corollary it follows that warehoused goods cannot be removed otherwise. Section 71 and Section 72 provide for such a prohibition and the penal action.

8.7.8 Goods not to be taken out of warehouse except as provided by the Act [Section 71]: Section 71 provides that no warehoused goods shall be taken out of a warehouse except on clearance for home consumption, or re-exportation, or for removal to another warehouse, or as otherwise provided by this Act.

8.7.9 Goods improperly removed from warehouse etc. [Section 72]

(1) In any of the following cases, that is to say-

(a) where any warehoused goods are removed from a warehouse in contravention of section 71;

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under section 61 to remain in the warehouse;

(c) where any warehoused goods have been taken under section 64 as samples without payment of duty;

(f) where any goods in respect of which a bond has been executed under section 59, and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer.

The proper officer may demand and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

(2) If any owner fails to pay any amount demanded under sub-section (1) the proper officer, may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select.

Section 72(1) provides for penal action for violation of section 71. As a natural corollary, provision has been made under sub-section (2) of section 72, to collect such penal amounts coercively, if the owner of the warehoused goods does not pay up the amounts voluntarily. In such a situation the proper officer cause, such portion of the warehoused goods belonging to the defaulter, to be detained and sold to realise the amounts due. According to principles of nature justice, a notice will have to be given before such a coercive action is taken.

Mafatlal Fine Spinning and Manufacturing Company Ltd. v. UOI 1987 (27) ELT 19 (Bom.): What will be the position in case the owner relinquishes the title to his goods under section 23(2) of the Customs Act, 1962. In the above case, it was decided that if he relinquishes his title before the order is passed by the Assistant Commissioner under provisions of section 72, no duty need to be paid. If, however, the relinquishment is made after the order is passed, he has to pay the duty.

Effect of goods not being removed from warehouse: Under clause (b) of section 72, goods which are not removed from the warehouse after the expiry of the period permitted for warehousing or extended, are deemed to be improperly removed. The rate of duty applicable will be the rate in force on the date of deemed removal, i.e. the date on which the permitted period or its permitted extension comes to an end. When the demand notice is issued is not relevant for determining the rate of duty. Section 15 (1) (b) applies only to the cases where a bill of entry is presented for removal from warehouse under section 68, and the payment of duty, interest, penalty, rent, etc. Section 15 (1) (b) has no application where the goods are removed from warehouse beyond the permitted period of warehousing. *[Kesoram Rayon vs CC 1996 (86) ELT 464 (SC)]*

8.7.10 Cancellation and return of the warehousing bond [Section 73]: When the whole of the goods covered by any bond executed under section 59 have been cleared for home consumption or exported or are otherwise duly accounted for, and when all amounts due on account of such goods have been paid, the proper officer shall cancel the bond as discharged in full and shall on demand deliver it, so cancelled, to the person who has executed or is entitled to receive it.

This provision is the final of the warehousing provisions. It implies that:

(i) all imported goods which have been warehoused have been duly accounted for in the proper manner provided therefor;

(ii) all the consequential charges on the goods as well as the owner of the goods like warehouse rent, warehouse charges, interest on the duty amount, penalty etc leviable from the importer have been paid;

(iii) all the conditions and obligations undertaken under the warehousing bond have been compiled with or duly fulfilled.

Then the bond gets discharged and the proper officer shall formally endorse cancellation thereof. Thereafter if the person who had executed the bond or any other person entitled to receive it demands the return of the cancelled bond, the proper officer shall return to that person. Otherwise the cancelled bond shall remain with the proper officer.

8.8 Manufacture in bonded warehouse

As mentioned earlier warehousing was considered in the initial stage as a device for:

(i) temporary storage of imported goods which were intended to be ultimately exported out of India;

(ii) piecemeal clearance of imported goods, for home consumption to suit importer's requirements.

As an improvement of the above facilities, certain operations were permitted to be carried out in the bonded warehouse itself before export of the goods. Gradually, this concept was extended to deliberate importation of raw materials, manufacture of goods in the bonded warehouse and final export of the finished goods out of India. In this scheme of things there was no:

(i) effective import of goods and clearance of goods for home consumption, involving payment of import duty of customs; and

(ii) effective export from the town, involving drawback of import duty etc. There was no problem or difficulty in ensuring the identity of the goods. There was also full security over the import duty otherwise payable on the imported goods through the medium of the warehousing double entry bond.

It may not be incorrect to say that this concept further evolved into the concept of Free Trade Zones within or adjacent to the customs area in the port, and subsequently extending this facility to interior places as an adjunct to inland bonded warehouses and finally evolving the concept of 100% Export Oriented Undertakings.

Statutory Provisions: The statutory provisions relating to the manufacture in the bonded warehouse are contained in sections 65 and 66 of the Customs Act, 1962. Now we can discuss the statutory provisions in detail.

8.8.1 Manufacture and other operations in relation to goods in a warehouse [Section 65]

(1) With the sanction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, and subject to such conditions and on payment of such fees as maybe prescribed, the owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods.

(2) Where in the course of any operations permissible in relation to any warehoused goods under sub-section (1), there is any waste or refuse, the following provisions shall apply:-

(a) If the whole or part of the goods resulting from such operations are exported, import duty shall be remitted on the quantity of the warehoused goods contained in so much of the waste or refuse as has arisen from the operations carried on in relation to the goods exported:

Provided that such waste or refuse is either destroyed or duty is paid on such waste or refuse as if it had been imported into India in that form.

(b) If the whole or any part of the goods resulting from such operations are cleared from the warehouse for home consumption, import duty shall be charged on the quantity of the warehoused goods contained in so much of the waste of refuse as has arisen from the operations carried on in relation to the goods cleared for home consumption.

8.8.2 Power to exempt imported material used in the manufacture of goods in warehouse [Section 66]: If any imported materials are used in accordance with the

provisions of section 65 for the manufacture of any goods and the rate of duty leviable on the imported materials exceeds the rate of duty leviable on such goods, the Central Government, if satisfied that in the interest of establishment or development of any domestic industry, it is necessary so to do, may, by notification in the Official Gazette, exempt the imported materials from the **whole or part of the excess rate of duty.**

Analysis of Section 65: The substantial ingredients of section 65(1) are

(i) The owner of any warehoused goods may carry on any manufacturing process or other operations in relation to warehoused goods;

(ii) This may be done with the specific sanction of the Assistant or Deputy Commissioner of Customs;

(iii) It will be subject to such conditions and on payment of such fees as may be prescribed.

Rules prescribing the conditions aforesaid: A comprehensive regulations called the Manufacture and Other Operations in Warehouse Regulations, 1966, was promulgated by the Board under its *Notification No. 155/66-Cus dated 30-7-1966*. These regulations superseded several rules made earlier covering individual situations.

The owner has to make an application giving full details regarding the process to be carried out, imported and other goods used, plan and description of warehouse and volume of manufacture anticipated. On getting permission the necessary bond has to be executed undertaking to observe the regulations and maintain accounts. Manufacture will not be under supervision of the customs officer. However the officers of customs department can visit the warehouse and control and supervise manufacturing process or imported and other goods. Detailed accounts are to be maintained of raw materials, stock, wip and production. Input-output norms maybe prescribed wherever considered necessary.

Subsection (2) of section 65 deals with any waste of refuse arising during the manufacturing operations or other processes done in the warehouse. The question that is considered in this provision is whether any import duty should be levied on the waste or refuse. The answer is dependent upon whether finished product manufactured out of the manufacturing process or other operations is exported out of India or cleared for home consumption.

Let us consider a few examples to understand the above provisions.

Example 1: Let us take the case of cutlery manufactured out of imported high speed cutting steel strips. Locally procured plastic is used for providing handles to the cutlery i.e. knife, fork, etc. In a batch process 200 kg imported steel strips and 100 kg plastic is issued for the manufacture of the cutlery items. 400 gross knives are manufactured and they are cleared for home consumption. The steel strip content in the above knives is 178 kg. The weight of the plastic handles is 85 kg. The waste is in the form of shaving etc. The total weight of the waste is [(200+100)-(178+85)=37kg]. The steel content of the waste is 22 kg. So import duty of customs at the rate applicable to steel strips should be collected on the waste.

The other alternative is where the finished goods are exported out of the country. Take the same example. In this case the manufacturer has two options. He can destroy the waste. Then he will not be required to pay duty on the steel strip content in the waste. If he does not choose to destroy the waste, then he has to pay duty on the steel strip content in the waste. Remission of duty on the imported material content in the waste or refuse is allowed only when the final product concerned is exported out of India and the waste is destroyed.

Example 2: Let us now take an example where the final products are both exported and cleared for home consumption. The question of appropriating the waste will have to be decided first. The imported raw material is rubber. The end product is motor vehicle tyre. The additional materials used are (1) beading wire, (2) tyre cord warp sheet (3) chemicals and (4) mineral oil.

Total quantity of rubber issued	1500kg
Weight of beadwire used	10kg
Weight of tyre chord warp sheet used	180kg
Weight of chemical used	4kg
Weight of mineral oil used	16kg
Total weight of raw materials issued	1710kg
Total no. of tyres manufactured	100pcs
Weight per tyre	16.5kg
Thus total weight 100 tyres	1650kg
Wastage	60kg
Total no. of tyres cleared for home consumption	25pcs.
Total no. of tyres exported	75pcs.

Wastage relatable to tyres exported 60kg $\times \frac{75}{100}$ = 45

Imported rubber content in the waste relatable to the exported tyres

$$= 45 \times \frac{1500}{1710} = 39.5 \text{ kg(appx)}$$

Import duty leviable on the import rubber content in the waste can be remitted if 45 kgs of the waste are destroyed.

Weight of waste relatable to tyres cleared for home consumption = 15 kg

Imported rubber content in the waste = 13.2 kg

Import duty is compulsorily leviable on this quantity of import rubber. The value would be the original import value; but the rate of duty would be that prevailing on the date of payment of duty.

Relevant date for determination of rate of duty leviable on import material content in the waste: The next question is the relevant date for valuation and tariff valuation of the import material content in the waste/refuse. Attention is invited to the provisions of section 15(1). In this case the goods are not

(i) cleared for home consumption on a bill of entry filed under section 46; or

(ii) cleared from the warehouse, where the date of presentation of bill of entry for home consumption is relevant. Hence in this case the third alternative, namely "the date of duty" under section 15(1)(c) applies. Hence in collecting the import duty on the imported material content in the waste or refuse, the rate of duty and tariff valuation prevalent on the date of payment of duty will apply.

Rate of duty leviable on the finished product: In the case of warehoused goods, the identity of the imported goods is retained at the time of clearance of the goods from the warehouse. When they are bonded in a warehouse and cleared as such the classification would not change. The rate of duty prevailing on the date of presentation of bill of entry for home consumption will apply. Normally it would not be less than the rate prevalent at the time of importation. Hence, there would normally be no loss of revenue on account of warehousing. With regard to the position in respect of manufacture in bonded warehouse, if the material undergoes change they have to be classified with regard to their finished condition.

Analysis of Section 66: The policy of the Government in permitting manufacture in bond had been to encourage growth of Indian industry. Thus instead of attaching the difference in duty, that is lost in the process of manufacture in bond, the Government is prepared to forego it totally or partially. Section 66 of the Customs Act deals with this power.

Ingredients of section 66: The main conditions of section 66 are:

(i) imported materials are used in the manufacture of any goods in accordance with the provisions of section 65

(ii) the import duty leviable on the imported materials exceeds the rate of duty leviable on the finished products

(iii) the Central Government is satisfied that in the interest of establishment or development of a domestic industry, it is necessary to give protection to the finished products. Then, the Central Government may by an official notification in the Gazette, exempt the imported material, from the whole or part of excess duty.

The use of manufacture-in-bond facility is now being resorted to less and less. The reasons are very simple. They are:

(i) there is step-by-step control and interference by Customs Authorities

(ii) the double duty bond under section 59 and the bond under section 65 cause undue financial burden on the manufacturers

(iii) the maintenance of detailed accounts and the control of Customs Officers over them is cumbersome

(iv) the looking of the imported material storage room by customs and issue of such material for manufacture at the discretion and control of the customs causes undue operational bottlenecks

(v) finally, the duty liability of imported material in the waste is another source of irritation.

8.9 Free Trade Zones, (Special Economic Zones) and Export Processing Zones (EOU, EHTP, BTP, Etc.)

The exemption of import customs duty on raw material and other equipment brought into these zones, subject to specific undertaking that the products manufactured out of these material will be exported out of India, has been found to be a more feasible and viable alternative to the manufacture-in-bonded warehouse procedure.

The shift of supervisory control from the Customs Authorities to the Administrators of the Zone, had certain inherent advantages, which were in the interests of the manufacturers and conducive to the growth of the industries.

Several ministries and departments were involved in the development and welfare of these zones -

- The Industries department offered facilities in the form of favourable policy.
- Banking department offered banking facilities including loans etc
- Railways offered quick transport facilities
- Civil supplies department looked after the marketing needs of consumer products.
- DGTD attended to the problems of technical expertise.

Customs & Excise as well as sales department provided necessary concessions and relief to make the ventures economically viable.

Over and above, there was an administrative set up, more interested in solving the problems and practical difficulties of the entrepreneurs. The administrator did not belong to or identify himself with any one of the above ministries or departments. As such he did not have any over-riding vested interest.

8.9.1 Qualification of the importer: The importer should have:

(a) been authorised to set up manufacturing unit or units in the zone;

(b) been granted necessary import license for the import of necessary plant and machinery, equipment and raw materials; and

(c) satisfied the Development Commissioner that the goods so imported will be used in connection with the production of goods and packaging them for export out of India or connected with the such export promotion.

8.9.2 Goods covered by the scheme: The goods covered by the exemption scheme are:

1. Capital goods (new or second hand);
2. Raw materials;

3. Components and intermediates;
4. Spares;
5. Consumables;
6. Packaging materials;
7. Office equipments, spares and consumables thereof;
8. Tools jigs, gauges, fixtures, moulds, dies, instruments and accessories;
9. Prototypes, technical and trade samples for development and diversification;
10. Drawing, blue prints and charts;
11. Material handling equipment, namely forklifts, overhead cranes, mobile cranes, crawler cranes, hoists and stockers;
12. Goods re-imported within 1 year from the date of exportation from the Zone due to the failure of the foreign buyer to take delivery;
13. Goods received for repairs or reconditioning, within three years of the date of exportation, for export after repairs or reconditioning.

The sweep of the coverage is very wide. It covers:

(a) Capital goods like plant and machinery, components and spaceports, ancillaries like tools, jigs fixtures etc;

(b) Auxiliary equipment, like handling equipment, forklifts cranes etc.;

(c) Establishment equipment like office equipment;

(d) Drawings, blue prints, prototypes, samples etc. for development of the product;

(e) Raw materials, components, packaging material and consumables;

(f) Goods returned without the buyer taking delivery; goods sent back for repair and return.

8.9.3 Maintenance of accounts: The importer shall maintain proper accounts of import, consumption and utilization of goods and accounts of exports made by him. He shall submit such account periodically to the Development Commissioner.

8.9.4 Execution of bond: The importer executes a Bond in Form B 17 fixed by the Assistant Commissioner of Customs, undertaking to fulfill the obligations and conditions stipulated

(a) in this notification

(b) under Import Control Policy

and also undertaking to pay on demand an amount equivalent to the duty leviable on the goods, which are not proved to the satisfaction of the Assistant Commissioner to have been used in the manufacture of articles for export. A general surety/security bond is to be executed by such units. It is for the provisional assessment of goods for export of goods to foreign countries without payment of duty and for accountal/disposal of excisable goods procured without payment of duty.

8.9.5 Temporary removal, transfer or export of imported goods/manufactured goods: Any imported goods or manufactured goods may be permitted to, subject to such conditions prescribed by the Principal Commissioner/Commissioner/Assistant Commissioner of Customs,

(a) be removed without payment of duty for repairs, processing or display: or

(b) be supplied or transferred to another unit in the zone or 100% EOU, with the permission of the Development Commissioner of the zone

(c) be re-exported out of the country with the permission of the Development Commissioner.

Note: The above particulars have been given only to enable the students to have a general idea of the duty and other concession that are extended in case of manufacture in bond in a Free Trade Zone, or 100% Export Oriented Unit or like export promotion schemes. For practical application they are advised to refer to the actual details in the relevant notification.

9

Demand and Appeals

9.1 Demand under Customs Act, 1962

The provisions relating to demand under Customs Act, 1962 are similar to the provisions under Central Excise law in respect of authority, powers, time limit, etc.

The word "demand" as per Black's Law Dictionary means assertion of a legal right; an imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act.

9.1.1 Notice for payment of duties, interest etc. [Section 28]: In accordance with the principles of natural justice the customs law rightly provides that before any action is taken against an assessee he must be given reasonable opportunity of presenting his case. One such situation would be that relating to the demand of duty not paid, short paid or erroneously refunded.

The show cause notice is invariably issued if the department contemplates any action prejudicial to the assessee. Thus, if on account of an infraction of the provisions of the customs law it is considered appropriate to penalise the defaulter, it is necessary to first issue a show cause notice. The show cause notice would detail the provisions of law allegedly violated and ask the noticee to show cause why action should not be initiated against him. Thus, a show cause notice gives the noticee the opportunity to present his case.

The provisions of section 28 are discussed as under:-

(1) Cases other than collusion, willful-misstatement etc.

Where any duty:-

(a) has not been levied

(b) has been short-levied

(c) has been erroneously refunded

OR

Where any interest payable:-

(a) has not been paid

(b) has been part-paid

(c) has been erroneously refunded

for any reason **other than the reasons of-**

- collusion
- any wilful mis-statement
- suppression of facts,

the following provisions become applicable:-

(a) Issuance of show cause notice (SCN) within ONE year*: The proper officer shall, within **one year* from the relevant date**, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice [Clause (a) of sub-section (1)].

***Period of stay to be excluded:** In computing the period of one year, the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded [Sub-section (7)].

Minimum amount for issue of SCN: Show cause notice will not be served if the amount involved is less than ₹ 100. In other words, there would be no recovery of the customs duty if the amount of customs duty involved is less than ₹ 100.

(b) Voluntary payment of duty or interest before issue of SCN: The person chargeable with the duty or interest, may pay before service of show cause notice under clause (a) on the basis of,—

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer,

the amount of **duty along with the interest** payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid [Clause (b) of sub-section (1)].

(c) Written intimation to the proper officer of such voluntary payment: The person who has paid the duty along with interest or amount of interest voluntarily, shall inform the proper officer of such payment in writing.

(d) No SCN would be issued if amount paid in full: The proper officer, on receipt of such information, shall not serve any show cause notice in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest [Sub-section (2)].

However, where notice under section 28(1)(a) has been served (non-fraud cases), penalty will not be imposed if the proper officer is of the opinion that amount of duty along with interest leviable under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within 30 days from the date of receipt of the notice. The proceedings in respect of such person or other persons to whom the notice is served will be deemed to be concluded.

(e) SCN may be issued for recovery if amount is short paid: Where the proper officer is of the opinion that the amount so paid falls short of the amount actually payable, then, he shall proceed to issue the notice in respect of such amount which falls short of the amount actually payable in the manner specified under sub-section (1) and the period of one year shall be computed from the date of receipt of information (i.e. written intimation sent by the person making voluntary payment) [Sub-section (3)].

(2) Cases of collusion, willful-misstatement etc.

Where any duty:-

(a) has not been levied

(b) has been short-levied

(c) has been erroneously refunded

OR

Where any interest payable:-

(a) has not been paid

(b) has been part-paid

(c) has been erroneously refunded

by reason of-

- collusion
- any wilful mis-statement
- suppression of facts

by the importer or the exporter or the agent or employee of the importer or exporter, the following provisions become applicable:-

(a) Issuance of show cause notice within FIVE years*: The proper officer shall, within **five years*** from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice [Sub-section (4)].

***Period of stay to be excluded:** In computing the period of five years, the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded [Sub-section (7)].

(b) Penalty reduced to *15% of duty* if duty, interest and penalty paid within 30 days of the notice: If the person to whom the SCN has been issued under sub-section (4) pays the duty in full or in part, as may be accepted by him, and the applicable interest within 30 days of the receipt of the notice and inform the proper officer of such payment in writing, the penalty would be reduced to ***15% of the duty*** specified in the notice or the duty so accepted by that person only if such reduced penalty is also paid by him along with the duty and interest [Sub-section (5)].

(c) Determination of duty or interest by the proper officer: Where the duty, interest and penalty have been paid under sub-section (5), the proper officer shall determine the amount of duty or interest and take either of the two actions discussed below depending upon the circumstances:

(i) Conclude the proceedings if amount paid in full: If duty, interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 will stand concluded [Sub-section (6)(i)].

(ii) Issue SCN for recovery if amount is short paid: If the duty, interest and penalty that has been paid falls short of the amount actually payable, then, show cause notice will be issued in respect of such amount which falls short of the amount actually payable in the manner specified under sub-section (1) and the period of one year shall be computed from the date of receipt of information under sub-section (5).

The important terms used here are fraud, collusion, willful mis-statement, suppression of fact and 'with an intent of evading the payment of duty'.

Fraud may be defined as "Deceit, imposture, criminal deception done with the intention of gaining an advantage".

Collusion may be defined as "to act in concert especially in fraud; a secret agreement to deceive".

Willful mis-statement may be explained as "stating wrongly or falsely deliberately**".**

Suppression of facts may also be explained as "to hold back the facts".

(3) Determination of amount of duty or interest after giving an opportunity of being heard to the concerned person: The proper officer shall, after allowing the concerned person, an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice [Sub-section (8)].

(4) Time-limit for determination of amount of duty: The proper officer, where it is possible to do so, determine the amount of duty/interest under sub-section (8) as per the time schedule given below [Sub-section (9)]:

Particulars	Time Limit (from the date of notice)
Cases involving willful suppression etc. [Sub-section (4)]	One year
Cases other than the above [Clause (a) of sub-section (1)]	Six months

(5) Payment of interest mandatory even if not specified in the order determining duty (passed under this section): Where an order determining the duty of excise is passed by the proper officer under this section, the person liable to pay the said duty shall pay the

amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately [Sub-section (10)].

Relevant date [Explanation 1 to section 28]

Event	Relevant date
Non-levy of duty or non-charging of interest	Date on which the proper officer makes an order for the clearance of goods
Provisional assessment of duty under section 18	Date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be
Erroneous refund of duty or interest	Date of refund
Any other case	Date of payment of duty or interest

Adjudication of cases where show cause notices are issued under section 28

Level of Adjudication officer	Nature of cases	Amount of duty involved
Customs Principal Commissioner/Commissioner	All cases	Without limit
Additional Commissioner/Joint Commissioner	All cases	Upto ₹ 50 lakhs
Assistant Commissioner/Deputy Commissioner	All cases	Upto ₹ 5 lakhs

9.2 Interest on delayed payment of duty in special cases [Section 28AA]

(a) Interest payable on delayed payment of duty : Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest at the specified rate, whether such payment is made voluntarily or after determination of the duty under section 28 **[Sub-section (1)]**.

(b) Rate and time period for computation of interest [Sub-section (2)] : Interest shall be paid by the person liable to pay duty in terms of section 28.

Rate of interest: Central Government may, by notification in the Official Gazette, fix the interest ranging between 10% and 36% per annum.

At present, Central Government vide *Notification No. 17/2011-Cus. (NT) dated 01.03.2011* has notified the rate of interest of 18% per annum.

Time period: Interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

(c) No interest payable subject to certain conditions: No interest shall be payable subject to the following conditions:-

(i) The duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 151A.

(ii) Full amount of duty is paid voluntarily within 45 days from the date of issue of such order, instruction or direction; and

(iii) No right to appeal against such payment at any subsequent stage is reserved.

9.3 Recovery of duties in certain cases [Section 28AAA]

The provisions of this section enable recovery of duty from the original holder of an instrument (duty exemption or remission scrip or duty credit scrip) that was obtained by fraudulent means. To illustrate, if an exporter was found to have obtained, say, a DEPB scrip, by means of collusion or willful misstatement of suppression of facts, then import duties related to use of that scrip by a transferee can be demanded from this original holder. At the same time, demand can also be raised under section 28 against the importer who used the scrip.

The provisions of the section are discussed below in detail:

Recovery of duty from the original holder of the instrument: Where an instrument issued to a person has been obtained by him by means of —

(a) collusion; or

(b) willful misstatement; or

(c) suppression of facts,

and such instrument is utilised by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued.

However, such recovery of duty against the person to whom the instrument was issued shall be without prejudice to an action against the importer under section 28.

Instrument means any scrip or authorisation or licence or certificate or such other document, by whatever name called, issued under the Foreign Trade (Development and Regulation) Act, 1992, with respect to a reward or incentive scheme or duty exemption scheme or duty remission scheme or such other scheme bestowing financial or fiscal benefits, which may be utilised under the provisions of this Act or the rules made or notifications issued thereunder.

The section is applicable to use of a scrip after 28th May 2012, even if the scrip was obtained before that date [Sub-section (1)].

Liability to pay interest: Interest will also be payable on the duty so recoverable at the rate fixed under section 28AA from the date of utilisation of the instrument till the date of recovery of such duty [Sub-section (2)].

Manner of recovery of duty and interest: The proper officer shall serve show cause notice on the person to whom the instrument was issued. Such person will have to reply to the

notice within 30 days from the date of receipt of the notice as to why the amount specified in the notice (excluding the interest) should not be recovered from him.

The proper officer will determine the amount of duty or interest or both to be recovered from such person and pass the order after giving that person an opportunity of being heard. Such person will have to repay the amount so specified in the notice within a period of 30 days from the date of receipt of the said order, along with the interest due on such amount, whether or not the amount of interest is specified separately [Sub-section (3)].

If such person fails to repay the amount within the period of 30 days, it shall be recovered in the manner laid down in sub-section (1) of section 142 [Sub-section (5).

Where an order determining the duty has been passed under section 28, no order to recover that duty can be passed under this section [Sub-section (4)].

9.4 Power of the Central Government not to recover duties [Section 28A]

Notwithstanding anything contained in this Act, if the Central Government is satisfied -

(a) that a practice was, or is, generally prevalent regarding levy of duty (including non-levy thereof) on any goods imported into, or exported from, India; and

(b) that such goods were, or are, liable -

  (i) to duty, in cases where according to the said practice the duty was not, or is not being, levied, or

  (ii) to a higher amount of duty than what was, or is being, levied, according to the said practice,

then, the Central Government may, by notification in the Official Gazette, direct that the whole of the duty payable on such goods, or, as the case may be, the duty in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice [Sub-section (1)].

Where any notification under sub-section (1) in respect of any goods has been issued, the whole of the duty paid on such goods, or, as the case may be, the duty paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 27.

The person claiming the refund of such duty or, as the case may be, excess duty, should make an application in this behalf to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, in the form referred to in sub-section (1) of section 27, before the expiry of six months from the date of issue of the said notification [Sub-section (2)].

9.5 Duties collected from the buyer to be deposited with the Central Government [Section 28B]

1. Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal, or any Court or in any other provision of this Act or the regulations

made there under, every person who is liable to pay duty under this Act and has collected any amount in excess of the duty assessed or determined or paid on any goods under this Act from the buyer of such goods in any manner as representing duty of customs, shall forthwith pay the amount so collected to the credit of the Central Government [Sub-section 1].

2. Every person, who

   - has collected any amount in excess of the duty assessed or determined or paid on any goods or
   - has collected any amount as representing duty of customs on any goods which are wholly exempt or are chargeable to nil rate of duty;

   from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government [Sub-section 1A].

3. Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1A) as the case may be and which has not been so paid, the proper officer may serve on the person liable to pay such amount, a notice requiring him to show cause why he should not pay the amount, as specified in the notice to the credit of the Central Government [Sub-section 2].

4. The proper officer shall, after considering the representation, if any, made by the person on whom the notice is served, determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined [Sub-section 3].

5. The amount paid to the credit of the Central Government under sub-section (1) or sub-section (1A) or sub-section (3) shall be adjusted against the duty payable by the person on finalisation of assessment or any other proceeding for determination of the duty relating to the goods referred to in sub-section (1) or sub-section (1A) [Sub-section 4].

6. Where any surplus is left after the adjustment made under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 27 and such person may make an application under that section in such cases within six months from the date of the public notice to the issued by the Assistant Commissioner of Customs for the refund of such surplus amount [Sub-section 5].

9.6 Provisional attachment of property pending adjudication [Section 28BA]

1. Provisional attachment of property can be resorted to by the proper officer during the pendency of the following proceedings:

   (i) Under section 28 in respect of cases not involving wilfull suppression, collusion etc. as well as in cases involving wilfull suppression, collusion etc.

(ii) Under section 28AAA in relation to fraudulent utilization of duty relatable to instruments issued under Foreign Trade (development and Regulation) Act. 1992.

(iii) Under section 28B in relation to duties collected from buyers but not deposited with the Central Government.

2. Such an attachment shall be done only when the proper officer is of the opinion that the attachment is necessary for the purpose of protecting the interests of revenue. However, a previous approval of the Principal Commissioner/Commissioner of Customs, by order in writing, is a prerequisite for such provisional attachment.

3. Such an attachment can be done for a period of 6 months. This period will commence from the date of the order of the Principal Commissioner/Commissioner of Customs permitting such provisional attachment.

4. However, this period may be extended by the Principal Chief Commissioner/Chief Commissioner of Customs by such further period or periods as he thinks fit. The reasons for such an extension shall be recorded in writing. It is to be noted that the total period of extension in any case shall not exceed 2 years.

5. If an application for settlement of a case under section 127B is made to the Settlement Commission, the period commencing from the date on which such an application is made and ending with the date on which an order under section 127C(1) is made shall be excluded from the extended period mentioned in point (4).

9.7 Appeals and revisions

Chapter XV deals with provisions relating to appeals and revisions.

9.7.1 Appellate Stages: Under this Chapter, both assessee and department have been conferred with a right of three stage remedies against the orders passed under Customs Act and Rules.

Briefly, it consists of three stages of appeal two stages of revision and further appeal to Supreme Court. The three stages of Appellate Authorities are the Commissioner (Appeals), CESTAT, High Court.

For orders passed by officers lower than the rank of Principal Commissioner/Commissioner of Customs, the first appeal lies to the Commissioner (Appeals) and there from to the Appellate Tribunal, and then to High Court and finally to the Supreme Court. Where the order of the Tribunal does not relate to determination of rate of duty or value of goods, an appeal is made to the High Court under sections 130, instead of appeal to Supreme Court. In cases where the order-in-original is passed by a Principal Commissioner/Commissioner of Customs, appeal lies directly to the Appellate Tribunal.

The provisions contained in sections 128 to 131C are similar to the provisions contained in sections 35 to 36 of the Central Excise Act.

9.7.2 Appeals to Commissioner (Appeals) [Section 128]: Any person aggrieved by any decision or order passed under this Act by an officer of Customs lower in rank than a Principal

Commissioner/Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order.

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal proceeding, grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

The appeal before the Commissioner (Appeals) is to be filed in Form No.C.A.1. in duplicate and is to be accompanied by a copy of decision or order appealed against. The grounds of appeal and the form of verification as contained in form No.C.A.1 is to be signed by the appellant.

The following are important with respect to this section:

1. The provisions of section 5 of the Limitation Act 1963 will apply only to courts. Therefore, quasi judicial authorities such as Collectors and Tribunals are not required to follow the provisions of that Act for computation of time. Even where the Act provides that the provisions of Limitation Act shall apply, section 5 of that Act will come into play only after computing the time prescribed under that particular statute *[Sakuru vs. Tanaju, 1985 (22) ELT 327 (SC)].*
2. A person who is not a party to the original proceeding cannot file an appeal. He is not an aggrieved person as none of his legal rights are affected.
3. Additional grounds cannot be raised in appeal as a matter of right, if these grounds had not been raised before the original authority. Although the appellate authority is competent to allow such grounds, it should be established that the additional grounds are bonafide and could not be raised earlier before the assessing officer.
4. In an appeal, several grounds can be raised including alternative grounds. It is not open to the authority to pick one of the grounds and reach a conclusion. Raising of a ground in the alternative does not mean that the appellants are claiming so. Such grounds are always without prejudice to other grounds. Therefore, it would be improper to pick up one of the grounds to come to the conclusion that that is all along the claim of the appellant *[Bombay Chemicals Pvt Ltd vs. UOI 1982 (10) ELT 171 (Bom)].*
5. CHA (Custom House Agent) cannot file an appeal on behalf of principal: Clause (f) of sub-section (2) of section 146 allows right of appeal against an order suspending his own licence. Nowhere this or other provisions allow a CHA to file an appeal in relation to imports or exports of his principal *[V.V. Dabke & Sons vs. CC 1983 (12) ELT 583 (T-D)].*

9.7.3 Procedure in appeal [Section 128A]

1. The Commissioner (Appeals) shall give an opportunity to the appellant to be heard if he so desires.

2. The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

3. The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.

   However, an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

   Further, where the Commissioner (Appeals) is of the opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 28 to show cause against the proposed order.

4. The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

5. The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed. [Sub-section 4A]

6. On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority, the Principal Chief Commissioner/ Chief Commissioner of Customs and the Principal Commissioner/ Commissioner of Customs.

9.7.4 Appellate Tribunal [Section 129]

1. The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.

2. A judicial member shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade I of that service or any equivalent or higher post for at least three years, or who has been an advocate for at least ten years.

   For the purposes of this sub-section, -

   (i) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(ii) in computing the period during which a person has been an advocate, there shall be included any period during which the person has held a judicial office, or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.

3. A technical member shall be a person who has been a member of the Indian Customs and Central Excise Service, Group A, and has held the post of Principal Commissioner/Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years.

4. The Central Government shall appoint —

(a) a person who is or has been a Judge of a High Court; or

(b) one of the members of the Appellate Tribunal, to be the President thereof.

5. The Central Government may appoint one or more members of the Appellate Tribunal to be the Vice-President, or, as the case may be, Vice-Presidents, thereof.

6. The Senior Vice-President or a Vice-President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing.

7. On ceasing to hold office, the President, Vice-President or other Member shall not be entitled to appear, act or plead before the Appellate Tribunal.

9.7.5 Appeals to Appellate Tribunal [Section 129A]

Orders appellable to Appellate Tribunal: Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the Principal Commissioner/Commissioner of Customs as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) under section 128A;

Orders not appealable: No appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

(a) any goods imported or exported as baggage;

(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) payment of drawback as provided in Chapter X, and the rules made thereunder.

In the following cases, the Appellate Tribunal may refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where –

(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or

(ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) the amount of fine or penalty determined by such order, does not exceed ₹ 2,00,000 [Sub-section 1].

Appeal by Committee of Principal Commissioner/Commissioners of Customs: The Board may, by order, constitute such Committees as may be necessary for the purposes of this Act. Such Committee shall consist of two Principal Chief Commissioners/Chief Commissioners of Customs or two Principal Commissioners/Commissioners of Customs [Sub-section (1B)]. Such Committee of Principal Commissioners/Commissioners of Customs may direct the proper officer to appeal on its behalf to the Appellate Tribunal against such order, if it is of the opinion that an order passed by the Commissioner (Appeals) under section 128 or under section 128A is not legal or proper [Sub-section (2)].

Difference in opinion in the Committee of Principal Commissioners/Commissioners of Customs: Where the Committee of Principal Commissioners/Commissioners of Customs differs in its opinion regarding appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Principal Chief Commissioner/Chief Commissioner of Customs. The Principal Chief Commissioner/Chief Commissioner shall direct the proper officer to appeal to the Appellate Tribunal against such order if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper.

It has also been explained that "jurisdictional Principal Chief Commissioner/Chief Commissioner" means the Principal Chief Commissioner/Chief Commissioner of Customs having jurisdiction over the adjudicating authority in the matter.'

Time limit for filing appeal: Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against was communicated to the Principal Commissioner/Commissioner or, as the case may be, the other party preferring the appeal.

Memorandum of Cross objections: On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

Form of Appeal: An appeal to the Appellate Tribunal under section 129A(1) shall be filed in Form CA3. A departmental appeal to the Appellate Tribunal under section 129A(2) shall be

filed in Form CA-5. Both the appeals shall be verified in such manner as may be specified by rules made in this behalf.

Fee for filling an appeal/ application: Sub-section (6) of section 129A prescribes the amount of fee for filing an appeal to the Appellate Tribunal.

Amount of duty, interest demanded and penalty levied	Fee for filing an appeal
Less than or equal to ₹ 5,00,000	₹ 1,000.00
More than ₹ 5,00,000 but not exceeding ₹ 50,00,000	₹ 5,000.00
More than ₹ 50,00,000	₹ 10,000.00

However, no such fee shall be payable in the case of an appeal preferred by Principal Commissioner/Commissioner of Customs. Also, no fee shall be payable in case of filing of a memorandum of cross-objections.

Sub-section (7) prescribes a fee of ₹ 500 for every application made before the Appellate Tribunal. The application can be an appeal for rectification of mistake or for any other purpose; or for restoration of an appeal or an application. However, no such fee shall be payable in the case of an application filed by or on behalf of the Principal Commissioner/Commissioner of Customs.

9.7.6 Orders of Appellate Tribunal [Section 129B]: The Appellate Tribunal may

- pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or
- may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

However, the Appellate Tribunal may pass such orders only after giving the parties to the appeal, an opportunity of being heard.

Adjournment by CESTAT: The Appellate Tribunal (CESTAT) may, if sufficient cause is shown, at any stage of proceeding, grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

Rectification of mistake: The Appellate Tribunal may, at any time within six months from the date of the order amend any order passed by it and shall make such amendments if the mistake is brought to its notice by the Principal Commissioner/Commissioner of Customs or the other party to the appeal. Such amendments shall be made with a view to rectifying any mistake apparent from the record.

An amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other party shall not be made unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

Time limit for deciding the appeal: Every appeal shall be decided by the Appellate Tribunal within a period of three years from the date on which such appeal is filed, if it is possible to do so.

Finality of the orders of the CESTAT: The Appellate Tribunal shall send a copy of every order passed to the Principal Commissioner/Commissioner of Customs and the other party to the appeal.

Save as otherwise provided in section 130 or section 130E, orders passed by the Appellate Tribunal on appeal shall be final.

9.7.7 Procedure of Appellate Tribunal [Section 129C]: The powers and functions of the Appellate Tribunal are to be exercised and discharged by the Benches constituted by the President of the Tribunal and such benches would be formed from amongst the members of the Appellate Tribunal. [Sub-section (1)]

Under sub-section (2) to Section 129C, it is provided that such bench shall consist of one judicial member and one technical member.

However, under sub-section (4) an exception to the above is provided that the President or any other member of the Appellate Tribunal authorized in this behalf by the President may sit singly and dispose of any case which has been allotted to the bench of which he is a member, subject to the condition that

(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under Section 125;

(ii) in any other disputed case other than case of determination of any question relating to the rate of duty of customs or to the value of goods for the purpose of assessment is in issue or is one of the points in issue the difference in duty involved or the duty involved

(iii) the amount of fine or penalty involved does not exceed ₹ 50 lakh.

If the members of the Bench differ in opinion on any point, such point shall be decided according to the opinion of the majority, if there is a majority. If the members are equally divided, they shall state the point on which they differ and make reference to the President, who will either hear himself or refer the case for hearing on such point and shall be decided according to the opinion of the majority of these members including those who heard it first.

Any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding and the Appellate Tribunal shall be deemed to be a Civil Court.

9.7.8 Powers of Committee of Principal Chief Commissioner/Chief Commissioner of Customs or Principal Commissioner/Commissioner of Customs to pass certain orders [Section 129D]: This section empowers the Committee of Principal Chief Commissioners/Chief Commissioners of Customs and Principal Commissioner/Commissioner of Customs to review certain orders. The provisions are discussed below in detail:

Review by Committee of Principal Chief Commissioners/Chief Commissioners of Customs: Section 129D(1) gives powers to Committee of Principal Chief Commissioner/Chief Commissioners or Principal Commissioner/Commissioner of Customs to pass certain orders.

The Committee of Principal Chief Commissioners/Chief Commissioners may of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner/Commissioner of Customs has passed any order so as to satisfy itself upon the legality or propriety of the order. Thereafter, the Committee of Principal Chief Commissioners/Chief Commissioners may direct such Principal Commissioner/Commissioner or any other Principal Commissioner/Commissioner to apply to the Appellate Tribunal to determine such points arising out of the decision or order as may be specified by it.

Difference in opinion in the Committee of Principal Chief Commissioners/Chief Commissioners of Customs: Where the Committee of Principal Chief Commissioners/Chief Commissioners of Customs differs in its opinion as to the legality or propriety of the decision or order of the Principal Commissioner/Commissioner of Customs, it shall state the point or points on which it differs and make a reference to the Board. If the Board is of the opinion that the decision or order passed by the Principal Commissioner/Commissioner of Customs if it is of the opinion that it is not legal or proper, it may direct such Principal Commissioner/Commissioner or any other Principal Commissioner/Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order.

Review by Principal Commissioner/Commissioner of Customs: Sub-section (2) of section 129D grants similar powers of review to the Principal Commissioner/Commissioner of Customs in respect of decisions taken by the adjudicating authority subordinate to him. The Principal Commissioner/Commissioner may direct such authority or any officer of customs subordinate to him to apply to the Commissioner (Appeals) to determine such points as may be specified by him.

Time limit for passing the order: Every order under sub-section (1) and sub-section (2) shall be made within a period of 3 months from the date of communication of the decision or order of the adjudicating authority [Sub-section (3)].

Board may, on sufficient cause being shown, extend the aforesaid period by another 30 days.

Time limit for making the application to CESTAT/Commissioner (Appeals): The time period available to the Principal Commissioner/Commissioner or the adjudicating authority to make an application to the Appellate Tribunal or the Commissioner (Appeals) is 1 month from the date of communication of the order of the Committee of the Principal Chief Commissioner/Chief Commissioner or Principal Commissioner/Commissioner. Such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals) as if such application were an appeal made against the decision or order of the adjudicating authority. The provisions regarding appeals, including the provisions of sub-section (4) of section 129A shall, so far as may be, apply to such application.

9.7.9 Revision by Central Government [Section 129DD]: The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order. The Central Government is vested with the powers to review orders of the Commissioner Appeals on an application made by any aggrieved person. The powers can be exercised as follows:

1. The Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.
2. The Principal Commissioner/Commissioner of Customs may, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 128A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.
3. An application under sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made. Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.
4. Where the central Government is of the opinion that there is short levy or non levy of duty no order levying or enhancing duty can be made unless show cause notice is given within the time limit prescribed in Section 28.

9.7.10 Deposit of certain percentage of duty demanded or penalty imposed before filing appeal [Section 129E]: This section provides as under:

(i) The Commissioner (Appeals) shall not entertain any appeal under section 128(1), unless the appellant has deposited 7.5% of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner/Commissioner of Customs;

(ii) The Tribunal shall not entertain any appeal against the decision or order passed by Principal Commissioner/Commissioner of Customs under section 129A(1)(a), unless the appellant has deposited 7.5% of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) The Tribunal shall not entertain any appeal against the decision or order passed by Commissioner (Appeals) under section 129A(1)(b), unless the appellant has deposited 10% of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:

(iv) The amount of pre-deposit shall not exceed ₹ 10 crores.

The provisions relating to making pre-deposits at first and second appellate stages are summarized as under:

Stage of appeal	Appellate Authority	Quantum of pre-deposit
First Appeal	Commissioner (Appeals) or	7.5% of the duty where only duty or both duty and penalty are in dispute OR

	CESTAT	7.5% of the penalty where only penalty is in dispute
Second Appeal	CESTAT	10% of the duty where only duty or both duty and penalty are in dispute OR 10% of the penalty where only penalty is in dispute

Points to be noted:

- Pre-deposit shall be computed as a percentage of only duty demanded even in cases where dispute involves both duty demanded and penalty levied. Only when penalty alone is in dispute, would the pre-deposit be computed on the basis of penalty.
- Interest payable is not included within the ambit of duty demanded. Thus, pre-deposit of 7.5%/10% would exclude interest, if any, payable on the duty demanded.
- It has been clarified by CBEC vide its Letter *DOF No. 334/15/2014 TRU dated 10.07.2014* that another 10% of the duty or penalty is to be paid at the time of filing second appeal before CESTAT.

CBEC has issued *Circular No. 984/08/2014 CX dated 16.09.2014* which clarifies the following:

Quantum of pre-deposit

- Where an appeal is made against the order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals). This amount may or may not be same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.
- Where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, pre-deposit would be calculated based on the aggregate of all penalties imposed in the order sought to be appealed against.

Payments made during investigation

- Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10% (subject to a limit of ₹ 10 crore), will be considered as payments towards pre-deposit for filing the appeals.
- Date of filing of appeal will be deemed to be the date of deposit of such payments.

Recovery of the amounts during the pendency of appeal

- No coercive measures for the recovery of balance amounts of demands of tax and penalties can be taken if the party/ assessee shows the proof of payment of pre-deposit (7.5% / 10%) and the copy of appeal memo.
- Recovery can be initiated only after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department unless order of Commissioner (Appeals)

or CESTAT is stayed by authority/higher court. The amount to be recovered will include interest calculated from the date duty became payable till the date of payment.

Refund of Pre-Deposit

- Refund of pre-deposit is not refund of duty and hence the same will not be governed by provisions of section 11B of Central Excise Act/section 27 of Customs Act, 1962. Therefore, once the appeal is decided in favour of the assessee, he can apply for refund of pre-deposit.
- Refund of pre-deposit along with interest will have to be made within 15 days of receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.
- Refund of pre-deposit should not be withheld on the ground that Department is proposing to file an appeal or has filed an appeal against the order granting relief to the party.

In the event of a remand, refund of the pre-deposit shall be payable along with interest.

Further, CBEC vide Circular No. 993/17/2014-CX dated 05.1.2015 has clarified that mandatory pre-deposit would be payable in cases of demand of drawback when the appeal is filed before Commissioner (Appeals) as the new section 129E of Customs Act, 1962 would apply to such cases. However, the ambit of section 129E does not extend to appeals under section 129DD before Joint Secretary (Revision Application).

Therefore, while mandatory pre-deposit would be required to be paid in cases of drawback, rebate and baggage at the first stage appeal before Commissioner(Appeals), no pre-deposit would be payable in such cases while filing appeal before the JS(RA).

9.7.11 Interest on delayed refund of amount deposited under section 129E [Section 129EE]: Where an amount deposited by the appellant under section 129E is required to be refunded consequent upon the order of the appellate authority, there shall be paid to the appellant interest at such rate, not below 5% and not exceeding 36% per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such amount from the date of payment of the amount till, the date of refund of such amount. At present, *Notification No. 70/2014 Cus (NT) dated 12.08.2014* specifies 6% as the rate of interest payable on delayed refund of pre-deposit.

9.7.12 Appeal to High Court [Section 130]: An appeal shall lie to the High Court from every order passed in appeal by the Appellate (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law [sub-section (1)].

The Principal Commissioner/Commissioner of Customs or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-

(a) filed within one hundred and eighty days from the date on which the order appealed

against is received by the Principal Commissioner/Commissioner of Customs or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved [sub-section (2)].

The High Court has power to condone the delay and admit an appeal after the expiry of the period of 180 days referred to in sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period [sub-section (2A)].

Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question [sub-section (3)].

The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. However, nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question [sub-section (4)].

The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit [sub-section (5)].

The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on any question of law [sub-section (6)].

When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges [sub-section (7)].

Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it [sub-section (8)].

The provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section [sub-section (9)].

9.7.13 Appeal to Supreme Court: The Customs Act, 1962, provides a two tier machinery for redressal of grievances against the decision of the Appellate Tribunal. In cases where the decision of the Appellate Tribunal relates to any question having relation with the determination of 'rate of duty' or 'value of goods' amongst other things, the same is directly appellable to the Supreme Court under Section 130E. However, where the order of the Appellate Tribunal does not relate to 'rate of duty' or 'value of goods', first an appeal is made to the High Court and thereafter an appeal against the judgment of the High Court can be

made to the Supreme Court provided the High Court certifies it to be a fit case for appeal to the Supreme Court.

Orders appealable to the Supreme Court: Section 130E specifies two types of orders which are appealable to the Supreme Court:

(a) an appeal shall lie to the Supreme Court from any judgment of the High Court delivered -

(i) in an appeal made under section 130,or

(ii) on a reference made under section 130 by the Appellate Tribunal before the 1st day of July, 2003, or

(iii) on a reference made under section 130A

if the High Court certifies the case to be fit for appeal to the Supreme Court. The High Court can certify any case on its own motion or on an oral application made by or on behalf of the aggrieved party, immediately after passing of the judgement.

(b) any order of the Appellate passed having relation to the determination of rate of customs duty or value of goods, among other things.

9.7.14 Non-filing of appeal in certain cases [Section 131BA]: Section 131BA provides that the Board is empowered to issue orders or instructions or directions fixing monetary limits for the purposes of regulating the filing of appeal, application, revision or reference by the Principal Commissioner/Commissioner of Customs.

The Principal Commissioner/Commissioner of Customs who has not been able to file an appeal/application/revision/reference against any decisions/order on account of such monetary limits, will not be precluded from filing any appeal/application/revision/reference in any other case involving the same or similar issues or questions of law.

The other party to the appeal will not be able to contend that the Principal Commissioner/Commissioner of Customs has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference.

The Commissioner (Appeals) or the Appellate Tribunal or the court hearing an appeal, application, revision or reference shall have regard to the circumstances under which the appeal, application, revision or reference was not filed by the Principal Commissioner/Commissioner of Customs in pursuance of orders or instructions or directions issued by the Board under this section.

10

Refund

10.1 Introduction

On import or export of goods, at times, it is found that duty has been paid in excess of what was actually leviable on the goods. Such excess payment may be due to lack of information on the part of importer/exporter or non-submission of documents required for claim of lower value or rate of duty. Sometimes, such excess payment of duty may be due to shortage/short landing, pilferage of goods or even incorrect assessment of duty by Customs. In such cases, refund of excess amount of duty paid can be claimed by the importer or exporter. If any excess interest has been paid by the importer/exporter on the amount of duty paid in excess, its refund can also be claimed.

10.2 Application for refund of import duty or interest [Section 27]

(i) Application for refund to be filed within one year of date of payment of duty/ interest: Any person claiming refund of any duty or interest-

(a) paid by him; or

(b) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner/Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest [Section 27(1)].

No limitation in case of duty paid under protest: However, the limitation of one year shall not apply where any duty or interest has been paid under protest. Hence, in case of duty/interest paid under protest, refund claim may be filed without any time-limit.

Minimum amount of refund: Refund claims involving customs duty of less than ₹ 100 will not be refunded. In other words, refund will be granted only when the duty amount involved is ₹ 100 or more.

For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

(ii) Documentary evidence to be furnished to prove that incidence of the duty/interest for which refund claim has been filed is not passed on to any other person: Refund application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty or interest, in relation to which such refund is claimed was collected from, or

paid by, him and the incidence of such duty or interest, has not been passed on by him to any other person [Section 27(1A)].

(iii) Manner of computation of limitation period of one year [Section 27(1B)]: The period of limitation of one year shall be computed in the following manner, namely:-

S.No.	Event	Limitation of one year to be computed from the
1.	Exemption of duty by a special order issued under section 25(2)	Date of issue of such order
2.	Refund of duty arising as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court	Date of such judgment, decree, order or direction
3.	Provisional payment of duty under section 18	Date of adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment.

10.3 Processing of refund claim [Section 27(2)]

The application of refund found to be complete in all respects by Customs, is processed to see if the whole or any part of the duty and interest paid by the applicant is refundable. In case the whole or any part of the duty and interest is found to be refundable, an order for refund is passed. However, in view of the provisions of unjust enrichment enshrined in the Customs Act, the amount found refundable has to be transferred/credited to the Consumer Welfare Fund. Only in following situations, the amount of duty and interest found refundable, instead of being credited to the Consumer Welfare Fund, is to be paid to the applicant:

(a) if the importer has not passed on the incidence of such duty and interest to any other person;

(b) if imports were made by an individual for his personal use;

(c) if the buyer who has borne the duty and interest, has not passed on the incidence of such duty and interest to any other person;

(d) if amount found refundable relates to export duty paid on goods which has returned to exporter as specified in section 26;

(e) if amount relates to drawback of duty payable under section 74 and 75;

(f) if the duty or interest was borne by a class of applicants which has been notified for such purpose in the Official Gazette by the Central Government.

10.4 Interest on delayed refund [Section 27A]

The Customs has to finalize refund claims immediately after receipt of the refund application in proper form along-with all the documents. In case, any duty ordered to be refunded to an applicant is not refunded within 3 months from the date of receipt of application for refund, interest is to be paid to the applicant. Such interest should not be below 5% and should not

exceed 30%. **Currently, the rate of interest is 6%** vide *Notification No. 75/2003-Cus (NT) dated 12.09.2003*. The interest is to be paid for the period from the date immediately after the expiry of 3 months from the date of receipt of such application till be date of refund of such duty. For the purpose of payment of interest, the application is deemed to have been received on the date on which a complete application, as acknowledged by the proper officer of Customs, has been made.

Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any Court against an order of the Assistant Commissioner/Deputy Commissioner of Customs, the order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or by the Court, as the case may be is deemed to be an order for the purpose of payment of interest on delayed refund.

The interest on delayed refund is payable only in respect of delayed refunds of Customs duty and no interest is payable in respect of deposits such as deposits for project imports, security for provisional release of goods etc.

10.5 Refund of export duty in certain cases [Section 26]

Where on the exportation of any goods any duty has been paid, such duty shall be refunded to the person by whom or on whose behalf it was paid, if -

(a) the goods are returned to such person otherwise than by way of re-sale;

(b) the goods are re-imported within one year from the date of exportation; and

(c) an application for refund of such duty is made before the expiry of six months from the date on which the proper officer makes an order for the clearance of the goods.

This provision is intended to compensate for a situation where the goods, which are exported are rejected and returned by the buyer.

10.6 Refund of import duty in certain cases [Section 26A]

Sub-section (1) of section 26A provides that the import duty paid on clearance of imported goods for home consumption shall be refunded to the person who has paid such duty subject to the fulfillment of the following conditions:

(a) Goods are defective/not as per specifications: The goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods. However, the goods should not have been worked upon, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;

(b) Goods identified as imported goods: The goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;

(c) No drawback claimed: The importer does not claim drawback under any other provisions of this Act; and

(d) Importer exports the goods/relinquishes title to goods/destroys or renders them commercially valueless

(i) the goods are exported; or

(ii) the importer relinquishes his title to the goods and abandons them to customs; or

(iii) such goods are destroyed or rendered commercially valueless in the presence of the proper officer

in the prescribed manner within 30 days from the date on which the proper officer makes an order for the clearance of imported goods for home consumption under section 47. However, the period of 30 days may, on sufficient cause being shown, be extended by the Principal Commissioner/Commissioner of Customs for a period not exceeding 3 months.

Goods in respect of which offence has been committed: It may be noted that the provisions of this section do not apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Application for refund of import duty: An application for refund of duty shall be made before the expiry of 6 months from the relevant date in such form and in such manner as may be prescribed [sub-section 2].

Meaning of relevant date: Explanation to sub-section (2) provides the relevant dates in various circumstances as under:-

S.No.	Case	Relevant date
1.	In case of goods exported out of India	Date on which the proper officer makes an order permitting clearance and loading of goods for exportation under section 51
2.	In case of relinquishment of title to the goods	Date of such relinquishment
3.	In case of goods being destroyed or rendered commercially valueless	Date of such destruction or rendering of goods commercially valueless

No refund in case of perishable goods: In respect of perishable goods and goods which have exceeded their shelf life or their recommended storage-before-use period, the refund shall not be allowed [Sub-section (3)].

The Board may, by notification in the Official Gazette, specify any other condition subject to which the refund may be allowed [Sub-section (4)].

10.7 Doctrine of unjust enrichment with respect to refund of duty

When an importer imports goods, he has to pay the customs duty on such goods. This duty is recovered from the purchasers when these goods are sold by the importer. In other words, the burden of duty is passed on to the purchaser. Subsequently, if the importer makes a claim for refund of duty and on acceptance of such claim if he retains the amount of refund with himself without passing it to the purchaser, then this would be called as unjust enrichment.

Therefore, wherever there is an over assessment or excess collection of duty, the refund shall be given only to the person who at the material time of grant of refund, bears the burden of duty and interest, if any. When the person who bears the burden of duty refunded is not identifiable or has not come forward to claim the refund, the refund shall be paid into a fund called 'Consumer Welfare Fund'. The importer or the clearing agent has to prove that he has not passed the burden of duty, in order to claim refund of duty.

♦ **Example:**

The importer has imported an article, which has been valued at ₹ 1000/-. The customs duty on this article comes to ₹ 250/-. Now the importer adds his profit margin of say ₹ 250/- and sells the article for ₹ 1500/-. Now the price charged by the importer consists of the duty element which has been passed on to the buyer.

If later on it is found that there was an error in assessment resulting in excess collection of duty, such excess collection is liable to be refunded. But as may be seen above, the importer has passed on the burden of duty to the purchaser and if any refund is granted to him, it would confer on him, the benefit to which he does not have a valid right. Therefore in such cases the refund is credited to the "Consumer Welfare Fund".

The most important decision on refund is by a Nine Member Bench of the Supreme Court in *Mafatlal Industries Ltd.* v. *U.O.I.*- 1997 (89) E.L.T. 247. The salient features of this judgment can be summarised as under:

a. The theory of unjust enrichment is valid and constitutional. However, the theory that the manufacturer would be unjustly impoverished in case of demands has not been agreed to.

b. Section 11B and section 27 (Customs Act) are self contained codes for refunds and resort to civil suits or writs is not permissible unless the taxing provision is struck down as unconstitutional. The general theory laid down in certain judgments of both the Supreme Court and High Courts that refund could be claimed within three years of discovery of mistake has been disapproved.

c. Unless the levy is struck down as unconstitutional, all Courts must exercise jurisdiction in terms of section 11B and refuse to grant relief if the incidence of tax has been passed on.

d. Whatever amount is collected as duty will have to paid to the Government. If excess is collected than that payable, it would be credited to the Consumer Welfare Fund or given as refund to the person who has borne the incidence of duty.

The Supreme Court has held in *Solar Pesticides case 2000 (116) ELT 401* that refunds will not be allowed on captive consumption of inputs as the incidence of duty paid on the inputs are passed on to the customers.

Further, the Supreme Court in the case of *CCE v. Allied Photographics 2004 (166) ELT 3* has held that doctrine of unjust enrichment applies even when duty is paid under protest. It has been held that even if there is no change in price before and after assessment (i.e. before and after imposition of duty), it does not lead to the inevitable conclusion that incidence of duty has been passed on to the buyer, as such uniformity may be due to various factors.

The principle of unjust enrichment applies in case of refund after provisional assessment as

what is paid at the time of provisional assessment is customs duty and not only deposit [*Bussa Overseas v. UOI 2003 (158) ELT 135(Bom.)*]. As per *CBEC Circular No. 40/2002-Cus. dated 17.07.2002*, unjust enrichment provisions apply to provisional assessment also.

Section 28D provides that every person who has paid duty under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

10.7.1 Exceptions to the Doctrine of Unjust Enrichment

As per first proviso to sub-section (2) of section 27 the doctrine of unjust enrichment does not apply to the refund of duty and interest, if any, paid on such duty if such amount is relatable to:

(i) drawback of duty payable under sections 74 and 75;

(ii) export duty as specified in section 26;

(iii) the duty and interest, if any, paid on such duty paid by the importer or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest to any other person;

(iv) the duty and interest on imports made by an individual for his personal use;

(v) the duty and interest borne by the buyer, if he had not passed on the incidence of such duty and interest to any other person;

(vi) the duty and interest borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify. However, no notification under clause (vi) shall be issued unless in the opinion of the Central Government the incidence of duty and interest has not been passed on by the persons concerned to any other person.

Important Judgments

If excess tax is paid, except cases involving the principles of unjust enrichment, the excess tax must be refunded	*Corporation Bank v. Saraswati Abharansala 2009 (233) ELT 3 (SC)*
Refund claim cannot be filed by the CH agent in his own name, without power of attorney	*Jaswant b. Shah v. CC 1996 (81) E.L.T. 669 (Tribunal)*
Burden of proof that incidence of duty has not been passed on to consumers is on assessee.	*Banmore Foam v. CCE 2006 (193) ELT 112*
Time limit is not applicable when the duty is paid under protest.	*Girish Foods v. CCE (2007) 211 ELT 388 (CESTAT)*
Interest on delayed refund is payable at the rates as applicable time to time and not at the rate applicable on day when refund was due.	*CCus. v Consolidated Solvents and Chemical Corporation (2009) 243 ELT 625 (Tri.)*

11

Duty Drawback

11.1 Introduction

An important principle in the levy of customs duty is that the goods should be consumed within the country of importation. If the goods are not so consumed, but are exported out of the country, the cost of export goods gets unduly escalated on account of incidence of customs duty.

The re-export of the goods imported into the country is broadly on two occasions:

(a) Where the goods are sent back as such to the foreign country owing to any of the following mentioned reasons:-

  (i) Goods not conforming to the specification of the order

  (ii) Goods not permitted to be imported into the country on account of trade-restriction.

  (iii) Goods after being imported are temporarily retained in the country and later taken out of the country. In other words, the very objective of the importation was limited to temporary retention in India.

(b) Where the goods are used in the manufacture of other articles and such other articles are exported.

The latest cause for relief of import duty paid is when the goods are ultimately exported. This factor gained greater importance with the establishment of 100% Export Oriented Units where goods manufactured are mainly exported to earn foreign exchange.

The principal method of encouraging the export of goods has been the drawback of customs and the central excise duties paid on inputs or raw materials and service tax paid on the input services used in the manufacture of export goods.

On parallel plane was placed the goods imported by tourists and other passengers transmitting through India. Under this category was the motor vehicles brought by tourists which were used in the country for a short period of 6-12 months alone. The grant of duty relief is contingent upon factual export of the goods.

This consequentially necessitated grant of the rebate or drawback at the port of export of the goods. This in turn necessitated formulation of certain rules and the procedure for regulating the application for grant of drawback and the rates at which such drawback could be granted. In subsequent paragraphs we propose to examine the matter in some detail.

11.2 Drawback allowable on re-export of duty paid goods [Sub-Section (1) and (3) of Section 74]

Sub-section (1) of section 74 provides that: when goods capable of being easily identified, which have been imported into India and upon which any duty has been paid on importation-

(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or

(ii) are to be exported as baggage and the owner of the baggage for the purposes of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation, or

(iii) are entered for export by post under section 82 and the proper officer makes an order permitting clearance of the goods for exportation,

98% of such duty, shall except as otherwise provided hereafter, be paid back.

Conditions to be satisfied in this regard:-

(a) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof.

However, in any particular case, the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period, as it may deem fit.

Sub-section (3) of section 74 provides that the Central Government may make rules for the purpose of carrying out the provisions of this section and, in particular, such rules may —

(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;

(b) specify the goods which shall be deemed to be not capable of being easily identified; and

(c) provide for the manner and the time within which a claim for payment of drawback is to be filed.

11.2.1 Analysis of sub-sections (1) and (3) of section 74:

Conditions under section 74: The substance of this provision is that

(a) The goods should have been imported into India

(b) The duty of customs should be paid thereon

(c) The goods should be capable of being easily identified as the goods, which were originally imported.

(d) The goods should have been entered for export either on a shipping bill through sea or air; or on a bill of export through land; or as baggage; or through post and the proper

officer after proper examination of the goods and after ensuring that there is no prohibition or restriction on their export should have permitted clearance of the goods for export.

(e) the goods are identified to the satisfaction of the Assistant or Deputy Commissioner of Customs as the goods, which were imported, and

(f) the goods are entered for export within two years from the date of payment of duty on the importation thereof

Once these conditions are satisfied, then the export goods are entitled to payment of drawback of an amount equal to 98%. The conditions could be amended or modified depending upon other factors.

Example: Section 74 is resorted to where there is an excess shipment or wrong shipment or goods have been imported for the purpose of participating in an exhibition and sent back etc.

11.2.2 Time limit for section 74 drawback: Under sub-clause (b) of section 74(1), it has been provided that such imported goods should be entered for export within two years from the date of payment of duty on the importation. It may be noted that the time period is related to the date of payment of duty and not date of importation.

For instance, if the importer warehoused the imported goods, the relevant date is the date on which the warehoused goods are cleared for home consumption and not the date when the goods are imported.

Extension of time-limit: In any particular case, if sufficient reason is shown by the importer as to why he was prevented from exporting the goods within the said period of two years, the Central Board of Excise and Customs may, in its discretion, extend the period further depending upon the merits of each case.

11.2.3 Identity of the goods

1. One of the important conditions is that the identity of the goods exported should be established as the one which has been imported earlier on payment of duty.
2. The authority who has to be satisfied in this behalf is the Assistant or Deputy Commissioner of Customs at the port of export.
3. The concerned authority can be satisfied:-
   (a) primarily by physical examination of the goods
   (b) and as alternative through the correspondence exchanged between the overseas seller of the goods and the Indian importer. In the course of physical examination emphasis will be laid on
      (i) description of the goods
      (ii) quantity and weight
      (iii) identifying markings/distinguishing features
      (iv) original packing of the goods.

Where the goods are at the time of import itself, intended to re-export later, it is desirable to have the above aspects ascertained during the customs examination of the imported goods and recorded on the Bill of Entry. A certified copy of the Bill of Entry with the customs examination report showing the above factors is obtained at the port of import and produced to the customs authorities at the port of export. The customs authorities would physically examine the goods with reference to the above recorded examination report recorded at the time of import. If identity is to be established through documents, the relevant materials are: -

(i) import documents including indent, acceptance, contract, invoice, packing specification, payment documents, triplicate copy of Bill of Entry, insurance and or other survey reports;

(ii) correspondence covering the circumstances necessitating return of the goods, the importation/test report thereon, the letter to supplier posing the problem and the subsequent full correspondence;

(iii) the terms and conditions on which the supplier is prepared to take the goods back, the financial settlement for the cost of the goods, import duty paid on the goods and all the expenditure incurred by the importer on the goods.

(iv) the clearance of appropriate authorities for the re-export and settlement of the financial aspect, whether refund or credit of cost etc. or free replacement etc.

11.2.4 Power to make rules under section 74: Central Government is empowered to make rules for the purpose of carrying out the provision of section 74 and in particular such rules may provide for the following:

(a) Establishing the manner of identification of goods imported in different consignments which are ordinarily stored together in bulk;

(b) Specifying the goods which shall be deemed to be not capable of being easily identified and

(c) The manner and the time within which a claim for payment of drawback is to be filed.

11.3 Amount of drawback where imported goods are used before re-exportation [Section 74(2)]

Under sub-section (2) of section 74, where the imported goods are used after importation, the amount of drawback will be at the reduced rates as fixed by the Central Government having regard to the duration of use, depreciation in value and other relevant circumstances prescribed by a Notification.

In this regard, ***Notification No.19/65 Cus dated 6-2-1965* as amended** provides as follows:

11.3.1 List of goods which are not entitled to drawback at all under this notification: As per this notification, no draw back of import duty will be allowed in respect of the following goods, if they have been used after their importation in India:

(i) Wearing Apparel;

(ii) Tea Chests;

(iii) Exposed cinematograph films passed by Board of Film Censors in India.

(iv) Unexposed photographic films, paper and plates, and X-ray films.

It implies that if these goods are not used after their importation into India and subsequently re-exported in the condition they were imported, then they would be entitled to 98% drawback.

11.3.2 Reduced drawback rates having regard to duration of use: Following percentages have been fixed as the rates at which drawback of import duty shall be allowed in respect of goods which were used after their importation and which have been out of Customs control.

S. No.	Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export	Percentage of import duty to be paid as Drawback
1.	Not more than three months	95%
2.	More than three months but not more than six months	85%
3.	More than six months but not more than nine months	75%
4.	More than nine months but not more than twelve months	70%
5.	More than twelve months but not more than fifteen months	65%
6.	More than fifteen months but not more than eighteen months	60%
7.	More than eighteen months	Nil

Even if imported goods are merely tested though not used, it will be treated as used after importation *[Seljegat Printers in Re 2002 (143) ELT 719 (GOI)]*.

11.3.3 Special rate of drawback in respect of motor vehicles: Having regard to the international practice, a different percentage of import duty to be paid as drawback has been prescribed in the case of motor vehicles and goods imported by the person for his personal and private use.

(i) If the car or specified goods are re-exported immediately: 98% of the duty paid is refundable.

(ii) If the car or specified goods are re-exported after being used: Percentage of reduction of the drawback is related to use of the motor vehicle per quarter as under:-

S.No.	Year	Drawback of duty shall be calculated by reducing the import duty by
1.	1st	4% per quarter or part thereof
2.	2nd	3% per quarter or part thereof
3.	3rd	$2\frac{1}{2}$ % per quarter or part thereof
4.	4th	2% per quarter or part thereof

It has been specifically provided that where such cars are exported after the expiry of the period of two years, the drawback would be allowed only if the Central Board of Excise and Customs, on sufficient cause being shown, extends the period for expiry beyond two years. It is further provided that no drawback shall be allowed if such motor car or goods have been used for more than four years.

11.4 Re-Export of Imported Goods (Drawback of Customs Duties) Rules, 1995

(promulgated under ***Notification No.36/95 Cus (NT) dated 26.05.1995***, as amended)

In exercise of the powers conferred by section 74 of the Customs Act, 1962 (52 of 1962), the Central Government has notified the **Re-Export of Imported Goods (Drawback of Customs Duties) Rules, 1995** which provide as follows:-

11.4.1 Definitions: In these rules, unless the context otherwise requires, -

(a) "drawback", in relation to any goods exported out of India, means the refund of duty paid on importation of such goods in terms of section 74 of the Customs Act.

(b) "export", with its grammatical variations and cognate expressions means taking out of India to a place outside India and includes loading of provisions or store or equipment for use on board a vessel or aircraft proceeding to a foreign port or airport.

11.4.2 Procedure for claiming drawback on goods exported by post [Rule 3]

(a) Goods exported by post

Where goods are to be exported by post under a claim for drawback,-

(a) the outer packing shall carry the words "DRAWBACK EXPORT".

(b) the exporter shall deliver to the competent Postal Authority a claim in the prescribed form.

(b) Date of filing of drawback claim for the purpose of section 75A: In case of export by post, the date of filing of drawback claim for the purpose of section 75A would be the date on which the aforesaid claim form is received by the proper officer of customs from the postal authorities.

(c) Deficiencies in the claim: In case the aforesaid claim form is not complete in all respects, the exporter shall be informed of the deficiencies therein within 15 days by a deficiency memo and such claim shall be deemed not to have been received.

When the exporter complies with the requirements specified in deficiency memo within 30 days, he shall be issued an acknowledgement.

The date of such acknowledgement shall be deemed to be date of filing the claim for the purpose of section 75A.

11.4.3 Statements/Declarations to be made on exports other than by post [Rule 4]: In the case of exports other than by post, the exporter shall at the time of export of the goods:-

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback under section 74 and make a declaration on the relevant shipping bill or bill of export that-

(i) the export is being made under a claim for drawback under section 74 of the Customs Act;

(ii) that the duties of customs were paid on the goods imported;

(iii) that the goods imported were not taken into use after importation;

or

(iii) that the goods were taken in use :

However, the Principal Commissioner/Commissioner of Customs may exempt the exporter or his authorized agent from the provisions of this clause if he is satisfied that failure to comply with the said provisions is due to the reasons beyond his (exporter/authorized agent) control.

(b) furnish to the proper officer of customs, copy of the Bill of Entry or any other prescribed document against which goods were cleared on importation, import invoice, documentary evidence of payment of duty, export invoice and packing list and permission from Reserve Bank of India to re-export the goods, wherever necessary.

11.4.4 Manner and time of claiming drawback on goods exported other than by post [Rule 5]

(a) Time-limit for filing drawback claim

A claim for drawback under these rules shall be filed:-

- in the prescribed form
- within **three months** (extendable by another three months)

from the date on which an order permitting clearance and loading of goods for exportation under section 51 is made by proper officer of customs.

Extension of the aforesaid time-limit

Authority	Period of extension	Application fee	Grant / refuse of extension
Assistant/Deputy Commissioner of Customs	three months	(i) 1% of the FOB value of exports or (ii) ₹1000/- whichever is less	The concerned authority may, on an application and after making such enquiry as he thinks fit, grant

Principal Commissioner/ Commissioner of Customs or Principal Commissioner/ Commissioner of Customs and Central Excise, as the case may be	further extension of six months	(i) 2% of the FOB value of exports or (ii) ₹2000/- whichever is less	extension or refuse to grant extension after recording in writing the reasons for such refusal

(b) Documents to be filed alongwith drawback claim: The claim shall be filed alongwith the following documents, namely:-

(a) Triplicate copy of the Shipping Bill bearing examination report recorded by the proper officer of the customs at the time of export.

(b) Copy of Bill of Entry or any other prescribed document against which goods were cleared on importation.

(c) Import invoice.

(d) Evidence of payment of duty paid at the time of importation of the goods.

(e) Permission from Reserve Bank of India for re-export of goods, wherever necessary.

(f) Export invoice and packing list.

(g) Copy of Bill of lading or Airway bill.

(h) Any other documents as may be specified in the deficiency memo.

(c) Date of filing of the claim for the purpose of section 75A: The date of filing of the claim for the purpose of section 75A shall be the date of affixing the Dated Receipt Stamp on the claims.

(d) Deficiencies in the claim: In case of incomplete claim/claim without the specified documents, such claim shall be returned to the claimant with the deficiency memo within 15 days of submission and shall be deemed not to have been filed.

Where exporter complies with requirements specified in deficiency memo within thirty days from the date of receipt of deficiency memo, the same will be treated as a claim filed under sub-rule (1).

11.5 Drawback on imported materials used in the manufacture of export goods [Section 75]

The drawback under section 75 is on a totally different footing. The following important aspects should be remembered in this regard:

(i) The goods exported are entirely different from the inputs.

(ii) The input could be either imported goods on which duty of customs has been paid or indigenous goods on which central excise duty has been paid.

(iii) The existence of the imported/indigenous excise duty paid goods in the final product is not capable of easy verification at the point of export.

(iv) The goods, namely the inputs might have undergone changes in physical shape, property etc.

(v) The quantity of inputs per piece of final product may not be uniform and may not also be capable of verification at the time of exportation.

The underlying principle of the drawback under section 75 is that, the Government fixes a rate per unit of final article to be exported out of the country as the amount of drawback payable on such goods. This amount is dependent upon prior verification of the mode of manufacture, the quantum of raw material required, the average content of duty paid articles in the final product and lastly, the standardization of the final product conforming to these norms.

11.5.1 Statutory Provisions: Sub-section (1) of section 75 provides that where it appears to the Central Government that in respect of good of any class or description manufactured, processed or on which any operation has been carried out in India, being

(1) the goods have been entered for export and an order permitting the clearance and holding thereof for exploration has been made under section 51 by the proper officer, or

(2) the goods have been entered for export by post under section 82 and an order permitting clearance for exportation has been made by the proper officer,

a drawback should be allowed of the duties of customs chargeable under this Act or any imported materials class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may by notification in the Official Gazette, direct that drawback shall be allowed.

Explanation: In this case, the rate of duty is not determined by the officer granting the drawback. Nor is it related to the actual import duty or excise duty paid on the raw materials or the components used in the manufacture of the final product exported. It is, therefore, an average amount determined by the Government having regard to all the circumstances and the facts of the manufacturing industry.

As a corollary to this proposition, it would follow that the rate fixed by the Government would be applicable for a prescribed period only. If there is (a) any variation in the rate of duty paid on the input whether customs or excise duty; (b) variation in the composition of the final product and (c) change in the process of manufacture, the rate of duty already fixed by the Government would not be applicable. It would require to be revised. The fixation of a rate of drawback is, therefore a continuous process and the industry availing of such facility of drawback is required to furnish continuously its costing and production data to the organisation entrusted with the responsibility of fixation of rates of drawback.

11.5.2 Drawback not to be allowed in certain cases [proviso to section 75(1)]: It will be noticed that in the case of drawback under section 74 the amount of drawback was related to the actual duty paid on the goods. It did not have any correlation to either the valuation of the goods at the time of exportation or the prevailing rates of duty on the goods at the time of export. However, in the case of section 75 drawback, since the identity of the inputs which have suffered customs or excise duty as the case may be, is extinguished in the final product, there has been a necessity to correlate the grant of drawback with the value of the goods

exported. It has therefore been prescribed under proviso to section 75(1) of the Customs Act that no drawback of duty shall be allowed under this section if:

(a) the export value of the finished goods or the class of goods is less than the value of the imported material used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods; or

(b) the export value is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as may be notified by the Central Government; or

(c) any drawback has been allowed on any goods and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act (FEMA). In such a case, the drawback shall be deemed never to have been allowed and the Central Government, may, by rules made under sub-section (2) specify the procedure for the recovery or adjustment of the amount of such drawback. In this regard, Central Government is empowered to prescribe the circumstances under which duty drawback would not be disallowed even though the export remittances are not received within the period allowed under FEMA.

Section 75(1A): Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured, processed or on which any operation has been carried out in India and exported outside India, then the Central Government, may, by notification in the Official Gazette declare that so much of the material as is contained in the goods exported shall for the purpose of sub-section (1) be deemed to be imported material.

11.5.3 Power of Central Government to frame rules [Section 75(2)]: Sub-section (2) of section 75, empowers the Central Government to make rules, providing for, *inter alia*

(a) the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation on the goods or as is specified in the Rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying out any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest if any payable thereon.

(b) Specifying the goods in respect of which no drawback shall be allowed and

(c) Specifying the procedure for recovery or adjustment of the drawback in case where there is variation in the basic material on which the drawback rate or the interest chargeable has been prescribed

(d) Prescribing the details of certificates, documents and other evidence necessary for determining the drawback amount and

(e) Requiring the manufacturer or the person carrying on any processor other operation to give access to every part of his manufacturing factory or the place where any

manufacture process or other operations are carried out to any officer of customs to enable such officer to make necessary examination of and study the process of manufacture, and to verify the data furnished about use of duty paid inputs etc.

(f) The manner and the time within which the claim for payment of drawback may be filed.

Sub-section (3) extends the rule-making power to include the power to make rules to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in the export of goods.

11.6 Customs and Central Excise Duties and Service Tax Drawback Rules, 1995

In exercise of the powers conferred upon it by section 75(2), the Central Government has made the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 *vide Notification No.37/95 dated 26.05.1995*.

11.6.1 Definitions [Rule 2]

(a) **Drawback** in relation to any goods manufactured in India and exported, **means** the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such excisable goods. These are subject to the Customs Act, 1962, the Central Excise Act, 1944 and these rules.

(b) **Export** with its grammatical variations and cognate expressions means

(i) taking out of India to a place outside India or

(ii) taking out from a place in Domestic Tariff Area (DTA) to a special economic zone and

includes loading of provisions or store or equipment for use on board a vessel or aircraft proceeding to a foreign port.

The export is complete when goods cross territorial waters of India and property passes to purchases. If export is not complete, duty drawback is not payable.

[UOI v. Rajindra Dyeing and Printing Mills 2005 (180) ELT 433 (SC)]

11.6.2 Drawback [Rule 3]: Drawback may be allowed at such amounts and such rates determined by Government and reduced by any amount of exemption availed on the export of goods (reduced rate of duty or tax paid/Cenvat Credit availed).

No drawback in certain cases: No drawback is allowed in the case of the following:

(i) Packing materials for export of tea, except teachests.

(ii) Goods manufactured out of duty free materials.

(iii) Jute batching oil used in manufacture jute yarn, twine etc.

(iv) Packing material used for jute yarn, fabrics etc.

(v) Wheat falling under heading 1001 of Customs Tariff.

Factors considered while determining amount/rate of drawback: In determining the amount or rate of drawback under this rule, the Central Government shall have regard to -

(a) the average quantity or value of each class or description of the materials from which a particular class of goods is ordinarily produced or manufactured in India;

(b) the average quantity or value of the imported materials or excisable materials used for production or manufacture in India of a particular class of goods;

(c) the average amount of duties paid on imported materials or excisable materials used in the manufacture of semis, components and intermediate products which are used in the manufacture of goods;

(d) the average amount of duties paid on materials wasted in the process of manufacture and catalytic agents:

However, if any such waste or catalytic agent is re-used in any process of manufacture or is sold, the average amount of duties on the waste or catalytic agent re-used or sold shall also be deducted;

(e) the average amount of duties paid on imported materials or excisable materials used for containing or, packing the export goods;

(f) any other information which the Central Government may consider relevant or useful for the purpose.

11.6.3 Revision of rates/amount [Rule 4]: The rates/amount of drawback may be revised by the Central Government.

11.6.4 Determination of date from which the amount or rate of drawback is to come into force and the effective date for application of amount or rate of drawback [Rule 5]

(i) The Central Government will specify the period of validity for the drawback.

(ii) Retrospective effect – from the date of notification.

(iii) The rate must be determined under section 16 or under section 83(2).

Government annually notifies ALL INDUSTRY RATES in the form of a Drawback Schedule, after the announcement of the Union Budget.

11.6.5 Cases where amount or rate of drawback has not been determined [Rule 6]: Where no drawback is determined, the manufacturer/exporter has to apply for drawback within 3 months seeking a brand rate from the Government giving all date and information about use of inputs, manufacture etc.

11.6.6 Cases where amount or rate of drawback determined is low [Rule 7]: When the drawback rate is low, a SPECIAL BRAND RATE will be applicable.

Where the rate is lower than 4/5th of the duty/taxes paid, revised rate may be applied for within 3 months. Proper rate will be fixed by the Government brand rate letter will be issued accordingly and provisional payment will be allowed subject to adjustment.

However, application for Special Brand Rate cannot be made where a claim for drawback under rule 3 or rule 4 has been made. In other words, where the exporter has

already filed a duty drawback claim under All Industry Rates (AIR) Schedule, he cannot request for fixation of Special Brand Rate of drawback. Thus, the exporter should determine prior to export of goods, whether to claim drawback under AIR or Special Brand Rate.

Extension of the time-limits prescribed under rule 6 & 7:

Authority	Period of extension	Application fee	Grant / refuse of extension
(i) Assistant / Deputy Commissioner of Central Excise or (ii) Assistant / Deputy Commissioner of Customs and Central Excise, as the case may be	three months	(i) 1% of the FOB value of exports or (ii) ₹1000/- whichever is less	The concerned authority may, on an application and after making such enquiry as he thinks fit, grant extension or refuse to grant extension after recording in writing the reasons for such refusal.
Principal Commissioner / Commissioner of Central Excise or Principal Commissioner / Commissioner of Customs and Central Excise, as the case may be	further extension of six months	(i) 2% of the FOB value of exports or (ii) ₹2000/- whichever is less	

11.6.7 Cases where no amount or rate of drawback is to be determined [Rule 8]: No drawback will be determined if-

(i) it is less than 1% of FOB value, except where the amount of drawback per shipment exceeds ₹ 500/-; or

(ii) if the export value is less than the value of imported materials used in such export goods or is not more than such percentage of the value of the imported materials used in the manufacture of such goods or class of goods notified by the Central Government in this behalf.

11.6.8 Upper Limit of Drawback money or rate [Rule 8A]: The upper limit of drawback money or rate determined under rule 3 should not exceed one third of the market price of the export product.

11.6.9 Power to require submission of information and documents [Rule 9]: Any officer of Government authorized by Assistant Commissioner/Deputy Commissioner of Central Excise/Customs has power to require submission of information and documents to determine the rate of drawback.

11.6.10 Access to manufactory [Rule 10]: Access to manufactory has to be provided to Assistant/Deputy Commissioner Customs of Central Excise to verify the facts.

11.6.11 Procedure for claiming drawback for goods exported by post [Rule 11]: (a) Outer packing containing the address of the consignee shall carry the words "Draw back Export**".**

(b) Exporter to furnish Annexure I to the postal authorities containing all details.

(c) The date of claim of drawback will be the date of filing of Annexure I to customs by the postal authorities.

11.6.12 Procedure for export other than by post [Rule 12]

(1) Declaration is to be given in shipping bill stating that drawback is being claimed and all duties have been paid.

(2) The exporter shall furnish to the proper officer copy of shipping invoices and any other document.

(3) In respect of brand rates (rules 6 & 7) additional declaration is to be given that:

  (a) materials or components; and

  (b) The materials continue to be imported and not being obtained from indigenous sources there has been no change in manufacturing formula or quantum per unit of imported materials or components if any, utilised in the manufacture of export goods.

(4) In respect of duties of customs and central excise paid on the containers, packing materials and materials and service tax paid on input services used in the manufacture of the export goods on which drawback is being claimed, no separate claim for rebate of duty or service tax under the Central Excise Rules, 2002 or any other law has been or will be made to the Central Excise authorities.

The Principal Commissioner/Commissioner is empowered to exempt any importer or his agent from the provisions of this clause for reasons for to be recorded in the order.

11.6.13 Manner and time of claiming [Rule 13]: Triplicate copy of the shipping bill is the document for the claim. Documents are to be enclosed to application Form Annexure II are the following:

(a) Copy of export contract or letter of credit

(b) Copy of packing list

(c) Copy of ARE-1

(d) Insurance certificate

(e) Copy of drawback brand rate letter.

After giving acknowledgement, a deficiency meno will be issued calling for wanting details within 10 days. Compliance and re-submission by the exporter is to be done within the time frame.

In case of *Terai Overseas Ltd. v. CC 2003 (156) ELT 841 (Cal HC)*, it was held that requirements of rule 13 are directory in nature. It is procedural in nature and claim cannot be rejected for procedural lapses.

11.6.14 Payment of drawback and interest [Rule 14]: One or more claims can be combined and adjustments of all dues can be made and cheque issued or amount credited to exporter or his Custom House account.

11.6.15 Supplementary claim [Rule 15]: Supplementary claims can be made in Form Annexure III within 3 months from

(a) Date of publication of such rate in case of revised rate granted

(b) Date of communication of the said rate in case of brand rate (rule 6 & 7)

(c) Date of payment of original drawback in other cases.

Extension of the time-limit

Authority	Period of extension	Application fee	Grant / refuse of extension
Assistant/Deputy Commissioner of Customs	Nine months	(i) 1% of the FOB value of exports or (ii) ₹ 1000/- whichever is less	The concerned authority may, on an application and after making such enquiry as he thinks fit, grant extension or refuse to grant extension after recording in writing the reasons for such refusal
Principal Commissioner/Commissioner of Customs or Principal Commissioner/Commissioner of Customs and Central Excise, as the case may be	further extension of six months	(i) 2% of the FOB value of exports or (ii) ₹ 2000/- whichever is less	

11.6.16 Repayment of erroneous or excess payment of drawback and interest [Rule 16]

Erroneous payments are to be repaid on demand or otherwise recovered u/s 142 of Customs Act with interest.

Adjudication of cases under rule 16 of the Customs, Central Excise and Service Tax Drawback Rules, 1995

Level of Adjudication Officer	Amount of Drawback
(i) Simple demand of erroneously paid drawback	
Assistant/Deputy Commissioner of Customs	Without any limit
(ii) Cases involving collusion, wilful misstatement or suppression of facts etc.	
Additional/Joint Commissioner of Customs	Without any limit
Deputy/Assistant Commissioner of Customs	Upto ₹ 5 lakhs

11.6.17 Recovery of amount of drawback where export proceeds not realised [Rule 16A]: If the exporter fails to produce evidence in respect of realisation of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Deputy/Assistant Commissioner of Customs shall issue a notice to the exporter to produce evidence of

realisation of export proceeds within 30 days. Where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within thirty days of the receipt of the said order. Recovery of drawback will be effected in case of non – receipt of payment from the consignee, based on R.E.I. or bank certificate.

However, such recovery shall not be made in case the non-realisation of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. under an insurance cover and the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits and the exporter produces a certificate from the concerned Foreign Mission of India about the fact of non-recovery of sale proceeds from the buyer. [*M L Balaram v. UOI (2006) SCL 8 (Kar HC)].*

If export proceeds are not realized, duty drawback allowed can be recovered even if proceedings under FEMA are dropped.

11.6.18 Power to relax [Rule 17]: Any relaxation in procedure may be made by the Government after recording the reasons in writing.

Significant points to be noted with regard to aforesaid rules:-

(1) In regard to the definition of the term "manufacture" the term has been defined in the rules. Accordingly "manufacture" includes processing or any other operation carried out of goods and the term manufacturer has to be construed accordingly.

(2) In terms of the new rules the amount or rate of drawback determined by the Central Government under rule 3 or revised under rule 4 can now be allowed with retrospective effect from a date to be specified by notification. However this date should not be earlier than the date of changes in the rates of duty on inputs used in the export product. Thus whereas normal announcement of rate or amount of drawback under rule 3 or rule 4 shall continue to be made by public notice as hitherto, any retrospective effect to a rate would have to be necessarily by a notification.

(3) Specific procedure has been provided for claiming drawback on goods exported by post as well as on goods exported other than by post

(4) Provision has been made for excluding the time taken for testing of sample. Accordingly time taken in testing of the sample in excess of one month is required to be excluded for computing the period of three months specified for filing of a claim by the exporter

(5) Provisional payment of drawback has been provided both under rule 6 and rule 7.

11.7 Interest on drawback [Section 75A]

Section 75A provides for payment of interest on delayed payment of drawback.

(a) Accordingly, where any drawback payable to a claimant under section 74 or 75 is not paid within a period of one month from the date of filing a claim for payment of such drawback, there shall be paid to the claimant, in addition to the amount of drawback, interest at the rate fixed under section 27A from the date after the expiry of the said period of one month till the date of payment of such drawback.

(b) Where any drawback has been paid to the claimant erroneously or it becomes otherwise recoverable under this Act or the Rules, the claimant shall within a period of 2 months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under section 28AA and the amount of interest shall be calculated for the period beginning from the date of payment of such drawback to the claimant till the date of recovery of such drawback.

11.8 Prohibition and regulation of drawback [Section 76]

(a) Notwithstanding anything herein before contained, no drawback shall be allowed

(i) in respect of any goods, the market price of which is less than the amount of drawback due thereon,

(ii) where the amount of drawback in respect of any goods is less than fifty rupees.

(b) Without prejudice to the provision of sub- section (I) if the Central Government is of the opinion that goods of any specified description in respect of which drawback is claimed under this chapter are likely to be smuggled back into India, it may by notification in the Official Gazette, direct that drawback shall no be allowed in respect of such goods or may be allowed subject to such restrictions and conditions as may be specified in the notification.

In case of *Sarala Enterprises v. CC 2001 (128) ELT 113 (CEGAT)*, it was held that if the market price of goods which is less than the amount of drawback due thereon, the claim can be rejected and penalty can be imposed.

The market price is as prevailing in India and not the price which exporter expects to receive from the foreign customer *[Om prakash Bhatia v. CC 2003 ELT 423 (SC)].*

RELEVANT CASE LAWS

In order to appreciate the importance of the basic principles underlying the law relating to grant of drawback, we have discussed below two important cases:

1. ***ABC India v. Union of India 1992 (61) E.L.T. 205 (Del.)*** [maintained by Supreme Court]

There is distinction between section 74 and 75 of the Customs Act- section 74 of the Customs Act comes into operation when articles are imported and therupon exported, such articles being easily identifiable; and section 75 comes into operation when imported materials are used in the manufacture of goods which are exported.

Facts: The Government of Andhra Pradesh floated an international tender for the transportation of Monolithic Buddha statue. The statue was required to be transported from Raigir, Nalgonda District, where the statue was rough – dressed and trasported to the foreshore of Hussain Sagar Lake, Hyderabad, where it was to be installed. The transportation of this Monolithic statue was a highly technical work and a special equipment for transportation as well as special lifting and erection equipment called Hydra – jack was required. This Hydra – jack was imported from a firm in Holland on hire. The equipment was imported on a customs clearance permit on an undertaking to export the equipment within a specified period. However, the job of installation of statue in the rock at the centre of the lake could not be completed as during transportation of the

statue from the shore to the central rock, the statue sank in the lake. The Hydra – jack was therefore shipped back to the suppliers from whom it was hired. A claim for drawback under section 74 of Customs Act was made claiming drawback of 98% of the total duty paid in respect of the goods. The Assistant Commissioner, however allowed drawback only at the rate of 85% of the total import duty paid.

Issue: The question that needed to be determined is whether the drawback is to be granted at 98% or 85% as has been allowed by the department.

Decision: The Delhi High Court held that the reduction in the rate of drawback was applicable in case where the goods had been used after importation and this reduction was sanctified in accordance with a notification issued under section 74 prescribing the rates of drawback admissible in case of goods used in India before their re- export.

In deciding the matter, the Court took a clear view that whether the jack in question was used or not is a question of fact. Since the statue did not reach the central rock (Gibraltar) where the statue had to be hoisted for installation, it is clear that the Hydra – jack could not be used in India.

The Court held that in these circumstances, the drawback was admissible under section 74.

2. *Commissioner of Customs v. India Steel Industries 1993 (67) E.L.T. 760 (G.O.I.)*

Rule of interpretation in tariff need not be extended to interpretation of classification under the Drawback Rules.

Facts: In the schedule II to Customs and Central Excise Drawback Rules, two entries occurred namely:

3606	All type of bright steel bars and shaftings	₹ 395/- PMT
3803	Articles made of stainless steel including stainless steel castings, not otherwise specified, made of austenitic variety of stainless steel	₹ 890/- PMT

The issue was whether the words "all types" occurring in the entry against 3606 referred to "steel bars" alone or qualified the next nomenclature "shaftings". In the Customs Tariff, a clear distinction is made between bars and shaftings. The department argued that in the commercial parlance bars were not known to be made up of stainless steel and shaftings did not come under the same category as bars. It was therefore, argued by the department that shafting would appropriately fall under the description articles made of stainless steel including stainless steel castings.

Decision: The Government of India held that the words "all types" did not refer to dimensional distinction alone but referred to the nature of the material used such as mild steel, carbon austenitic steel etc. It was further held that the rules of the interpretation of a tariff would not apply to rules of interpretation of the entries to the Schedule II to drawback, but they would have persuasive value. It was further held when two different descriptions or words are used, it would be necessary to give them the natural and separate meaning to make them meaningful.

12

Provisions Relating to Illegal Import, Illegal Export, Confiscation, Penalty & Allied Provisions

12.1 Introduction

Chapters IV, IV A, IV B and IV C of the Customs Act deals with the provisions relating to prohibition on importation and exportation of goods and detection of illegal imports and exports. The relevant sections are sections 11, 11A to 11N. Before we understand these provisions, we should understand the meaning of "prohibited goods".

12.2 Prohibited goods

The term **"prohibited goods"** has been defined under **section 2(33)** meaning "any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with".

This definition can be split as follows:

- any goods imports/exports of which is subject to any prohibition
- under this Act or any other law for the time being in force
- but **does not include** any such goods which complies with the conditions imposed.

Hence, this definition is of a wider scope which covers goods not only subject to prohibition under this Act but also under any other law in force. One exception is those goods which complies or fulfills the condition imposed on it.

The prohibition provided under the Customs Act is in four parts:

Provisions	Sections	Chapter
General power to prohibit importation and exportation of goods	11	IV
Special prohibition relating to detection of illegally imported goods and prevention/disposal thereof	11A to 11G	IV A
Prevention or detection of illegal export of goods	11H to 11 M	IV B
Power to exempt from the provisions of Chapters IVA and IVB	11N	IV C

12.2.1 Prohibition on illegal importation/exportation of goods

(1) Power to prohibit importation and exportation of goods [Section 11]

If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.

(2) Purposes for which import/export can be prohibited: The purposes referred to in sub-section (1) are the following:-

(a) the maintenance of the security of India;

(b) the maintenance of public order and standards of decency or morality;

(c) the prevention of smuggling;

(d) the prevention of shortage of goods of any description;

(e) the conservation of foreign exchange and the safeguarding of balance of payments;

(f) the prevention of injury to the economy of the country by the uncontrolled import or export of gold or silver;

(g) the prevention of surplus of any agricultural product or the product of fisheries;

(h) the maintenance of standards for the classification, grading or marketing of goods in international trade;

(j) the prevention of serious injury to domestic production of goods of any description;

(k) the protection of human, animal or plant life or health;

(l) the protection of national treasures of artistic, historic or archaeological value;

(m) the conservation of exhaustible natural resources;

(n) the protection of patents, trade marks, copyrights designs and geographical indications;

(o) the prevention of deceptive practices;

(p) the carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India;

(q) the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security;

(r) the implementation of any treaty, agreement or convention with any country;

(s) the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India;

(t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige;

(u) the prevention of the contravention of any law for the time being in force; and

(v) any other purpose conducive to the interests of the general public.

The Central Government has issued a large number of notifications under section 11, prohibiting, restricting or conditionally permitting import or export of various goods.

12.3 Detection of illegally imported goods and prevention of the disposal thereof [Chapter IVA]

12.3.1 Reasons for insertion of this Chapter: With an idea to keep a check over the large scale smuggling of silver out of the country and various consumer articles smuggled into the country, this chapter was inserted in the Customs Act, in 1969. This Chapter is for detection of those goods which have been imported illegally into India.

12.3.2 Important terms [Section 11A]

(a) "Illegal import" means "the import of any goods in contravention of provisions of this Act or any other law for the time being in force".

(b) "Notified date", in relation to goods of any description, means the date on which the notification in relation to such goods is issued under section 11B.

(c) "Notified goods" means goods specified in the notification issued under section 11B.

(d) "Intimated place" means a place intimated under sub-section (1)/(2)/(3) of section 11C.

12.3.3 Power of Central Government to notify goods [Section 11B]: If the Central Government is satisfied that it is expedient in the public interest to take special measures for the purpose of

- checking the illegal import,
- checking circulation or disposal of such goods, or
- facilitating the detection of such goods,

it may, by notification in the Official Gazette, specify goods of such class or description. Such notification shall be issued having regard to the magnitude of the illegal import of goods of any class or description.

However, it may be noted that at present, **no goods are specified as "notified goods"**.

12.3.4 Persons possessing notified goods to intimate the place of storage, etc. [Section 11C]

1. Intimation of possessing notified goods: Every person who owns, possesses or controls, on the notified date, any notified goods, shall, within seven days from that date, deliver to the proper officer a statement in such form and manner and containing such particulars as specified by rules made in this behalf in relation to the notified goods owned, possessed or controlled by him and the place where such goods are kept or stored.

Every person who acquires any notified goods, after the notified date, before making such acquisition,

- shall deliver to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored after such acquisition and
- shall, immediately on such acquisition, deliver to the proper officer a statement in relation to the notified goods acquired by him.

However, a person who has delivered a statement, in relation to any notified goods, owned, possessed, controlled or acquired by him, shall not be required to deliver any further statement in relation to any notified goods acquired by him, after the date of delivery of the said statement, so long as the notified goods so acquired are kept or stored at the intimated place.

2. Intimation of shifting of any notified goods: If any person intends to shift any notified goods to any place other than the intimated place, he shall, before taking out such goods from the intimated place, deliver to the proper officer an intimation containing the particulars of the place to which such goods are proposed to be shifted. No person shall, after the expiry of seven days from the notified date, keep or store any notified goods at any place other than the intimated place.

3. Sale or transfer of notified goods: Where any notified goods have been sold or transferred, such goods shall not be taken from one place to another unless they are accompanied by the voucher referred to in section 11F.

No notified goods (other than those which have been sold or transferred) shall be taken from one place to another unless they are accompanied by a transport voucher prepared by the persons owning, possessing or controlling such goods.

12.3.5 Precautions to be taken by persons acquiring notified goods [Section 11D]: No person shall acquire (except by gift or succession, from any other individual in India), after the notified date, any notified goods -

(i) unless such goods are accompanied by, -

  (a) the voucher referred to in section 11F or the memorandum referred to in sub-section (2) of section 11G, as the case may be, or

  (b) in the case of a person who has himself imported any goods, any evidence showing clearance of such goods by the Customs Authorities; and

(ii) unless he has taken, before acquiring such goods from a person other than a dealer having a fixed place of business, such reasonable steps as may be specified by rules made in this behalf, to ensure that the goods so acquired by him are not goods which have been illegally imported.

12.3.6 Persons possessing notified goods to maintain accounts [Section 11E]: Every person who, on or after the notified date, owns, possesses, controls or acquires any notified goods shall maintain (in such form and in such manner as may be specified by rules made in this behalf) a true and complete account of such goods and shall, as often as he acquires or parts with any notified goods, make an entry in the said account in relation to such acquisition or parting with, and shall also state therein the particulars of the person from whom such goods have been acquired or in whose favour such goods have been parted with, as the case

may be, and such account shall be kept, along with the goods, at the place of storage of the notified goods to which such accounts relate.

However, it shall not be necessary to maintain separately accounts in the form and manner specified by rules made in this behalf in the case of a person who is already maintaining accounts which contain the particulars specified by the said rules.

Every person who owns, possesses or controls any notified goods and who uses any such goods for the manufacture of any other goods, shall maintain (in such form, in such manner and containing such particulars as may be specified by rules made in this behalf) a true and complete account of the notified goods so used by him and shall keep such account at the intimated place.

12.3.7 Sale, etc., of notified goods to be evidenced by vouchers [Section 11F]: On and from the notified date, no person shall sell or otherwise transfer any notified goods, unless every transaction in relation to the sale or transfer of such goods is evidenced by a voucher in such form and containing such particulars as may be specified by rules made in this behalf.

12.3.8 Sections 11C, 11E and 11F not to apply to Goods in Personal Use [Section 11G]: Nothing in sections 11C, 11E and 11F shall apply to any notified goods which are -

(a) in personal use of the person by whom they are owned, possessed or controlled, or

(b) kept in the residential premises of a person for his personal use.

If any person, who is in possession of any notified goods referred to in sub-section (1), sells, or otherwise transfers for a valuable consideration, any such goods, he shall issue to the purchaser or transferee, as the case may be, a memorandum containing such particulars as may be specified by rules made in this behalf and no such goods shall be taken from one place to another unless they are accompanied by the said memorandum.

12.4 Prevention or detection of illegal export of goods [Chapter IV B]

12.4.1 Reason for insertion of this Chapter: Chapter IV B was introduced in the Customs Act to prevent or detect the export of goods illegally out of India.

12.4.2 Definitions [Section 11H]: Definitions of some of the terms relevant for this Chapter are given below:

(a) "Illegal export" means the export of any goods in contravention of the provisions of this Act or any other law for the time being in force;

(b) "Intimated place" means a place intimated under sub-section (1), sub-section (2) or sub-section (3), as the case may be, of section 11J;

(c) "Specified area"

includes the Indian customs waters, and

such inland area, not exceeding 100 kms in width from any coast or other border of India, as the Central Government may, having regard to the vulnerability of that area to smuggling, by notification in the Official Gazette, specify in this behalf.

However, where a part of any village, town or city falls within a specified area, the whole of such village, town or city shall, notwithstanding that the whole of it is not within one hundred kms from any coast or other border of India, be deemed to be included in such specified area.

(d) "Specified date", in relation to specified goods, means the date on which any notification is issued under section 11-I in relation to those goods in any specified area;

(e) "Specified goods" means goods of any description specified in the notification issued under section 11-I in relation to a specified area.

12.4.3 Power of Central Government to specify goods [Section 11I]: Central Government is empowered to specify goods by notification in the Official Gazette, having regard to the magnitude of the illegal export of goods of any class or description for the purpose of checking the illegal export or facilitating the detection of goods which are likely to be illegally exported.

At present, acetic anhydride, drug formulations containing codeine or its salts and ephedrine and pseudo-ephedrine have been so notified.

12.4.4 Persons possessing specified goods to intimate the place of storage, etc. [Section 11J]

1. Every person who owns, possesses or controls any specified goods on the specified date, the market price of which exceeds ₹15,000 shall, within seven days from that date, deliver to the proper officer an intimation containing the particulars of the place where such goods are kept or stored within the specified area.
2. Every person who acquires (within the specified area), after the specified date, any specified goods, -
   (i) the market price of which, or
   (ii) the market price of which together with the market price of any specified goods of the same class or description, if any, owned, possessed or controlled by him on the date of such acquisition,

   exceeds ₹15,000 shall, before making such acquisition, deliver to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored after such acquisition.
3. If any person intends to shift any specified goods, to any place other than the intimated place, he shall, before taking out such goods from the intimated place, deliver to the proper officer an intimation containing the particulars of the place to which such goods are proposed to be shifted.

12.4.5 Transport of specified goods to be covered by vouchers [Section 11K]: Transport of specified goods has to be covered by vouchers, in such form and containing such particulars as may be specified by rules made in this behalf.

12.4.6 Persons possessing specified goods to maintain accounts [Section 11L]: Every possessor of specified goods is required to maintain accounts in the prescribed form, inter alia, showing details of receipts and disposal.

12.4.7 Steps to be taken by persons selling or transferring any specified goods [Section 11M]: Except where he receives payment by cheque drawn by the purchaser, every person who sells or otherwise transfers within any specified area, any specified goods, shall obtain, on his copy of the sale or transfer voucher, the signature and full postal address of the person to whom such sale or transfer is made and shall also take such other reasonable steps as may be specified by rules made in this behalf to satisfy himself as to the identity of the purchaser or the transferee, as the case may be, and if after an inquiry made by a proper officer, it is found that the purchaser or the transferee, as the case may be, is not either readily traceable or is a fictitious person, it shall be presumed, unless the contrary is proved, that such goods have been illegally exported and the person who had sold or otherwise transferred such goods had been concerned in such illegal export.

However, nothing in this section shall apply to petty sales of any specified goods if the aggregate market price obtained by such petty sales, made in the course of a day, does not exceed two thousand and five hundred rupees.

Meaning of "petty sale"

In this section **"petty sale"** means a sale at a price which does not exceed ₹1,000.

12.5 Exemptions from the operation of Chapters IV A & IV B [Chapter-IVC]

Section 11N empowers the Central Government to exempt generally, either absolutely or subject to such conditions as may be specified in the notification, goods of any class or description from all or any of the provisions of Chapter IVA or Chapter IVB.

12.6 Confiscation of goods and conveyances and imposition of penalties [Chapter XIV]

Confiscation means seizure of private property by the Government without compensation to the owner, often as a consequence of conviction for crime, or because possession or use of the property was contrary to law.

This chapter deals with confiscation of goods and conveyances and imposing penalties. The provisions are contained in sections 111 to 127.

12.6.1 Confiscation of improperly imported goods, etc. [Section 111]: The following goods brought from a place outside India shall be liable to confiscation. They are improperly imported goods:

(a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any

place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;

(c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) any goods which do not correspond :-

- in respect of value or in any other particular with the entry made under this Act or
- in the case of baggage with the declaration made under section 77 in respect thereof, or
- in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;

(n) any dutiable or prohibited goods transitted with or without transhipment or attempted to be so transitted in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

Relevant case laws:

1. The word "prohibition" used in clause (d) not only takes within its fold total prohibition, but also restrictions or controls of all imports and exports.

   [*Sheikh Mohd. Omer v. CC 1983 (13) ELT 1439 (SC)*]

2. If the goods are imported from countries other than those permitted in the license, such import would be without license, conferring jurisdiction on the customs authorities to confiscate the goods under section 111 (d).

   [*CC & CE vs. Hindustan Motors Ltd 1979 ELT J313 (Cal)*].

3. Prior to 1973, clause (m) provided for confiscation of goods that did not correspond with the bill of entry in any material particular. By Act 36 of 1973, this was amended to include "value" and "any other particular". Therefore, prior to amendment, any difference in value between the bill of entry and value as found by the department cannot be said to be variation in material particular within the meaning of this clause.

   [*Rib Tapes (India) Pvt. Ltd & Anr v. UOI and Others 1986 (26) E.L.T. 193 (S.C.)]*

4. In *Jacsons Thevara v. CC & CE 1992 (61) ELT 343 (SC),* the importer had cleared goods under project imports regulations and concessional assessment under heading no. 84.66 of the Customs Tariff. Subsequently, these goods were diverted to a new unit and were not used for substantial expansion of capacity at the existing unit. Since the post importation conditions of exemption had not been complied with, the goods were confiscated after due process of law. This was upheld by the Supreme Court rejecting the contention of the appellant that the provisions of the clause (o) would apply only to exempt goods and not to goods which were liable to duty.

12.6.2 Confiscation of goods attempted to be improperly exported, etc. [Section 113]:
The following export goods shall be liable to confiscation. They are goods attempted to be improperly exported:

(a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

(b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;

(c) any goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

(f) any goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;

(g) any goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;

(h) any goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof;

(ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;

(j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;

(k) any goods cleared for exportation which are not loaded for exportation on account of any wilful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;

(l) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

12.6.3 Confiscation of conveyances [Section 115]

A. Conveyances liable to confiscation: The following conveyances shall be liable to confiscation:

(a) any vessel which is or has been within the Indian customs waters, any aircraft which is or has been in India, or any vehicle which is or has been in a customs area, while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods;

(b) any conveyance from which the whole or any part of the goods is thrown overboard, staved or destroyed so as to prevent seizure by an officer of customs;

(c) any conveyance which having been required to stop or land under section 106 fails to do so, except for good and sufficient cause;

(d) any conveyance from which any warehoused goods cleared for exportation, or any other

goods cleared for exportation under a claim for drawback, are unloaded, without the permission of the proper officer;

(e) any conveyance carrying imported goods which has entered India and is afterwards found with the whole or substantial portion of such goods missing, unless the master of the vessel or aircraft is able to account for the loss of, or deficiency in, the goods.

B. Confiscation of conveyance/animal used for smuggling: Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal.

C. Option to pay fine in lieu of confiscation of conveyance: Where any such conveyance is used for the carriage of goods or passengers for hire, the owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine.

Maximum amount of fine : The amount of such fine shall not exceed the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be.

Meaning of market price

In this section, **"market price"** means market price at the date when the goods are seized.

12.6.4 Confiscation of packages and their contents [Section 118]

(a) Confiscation of goods IMPORTED in a package: Where any goods imported in a package are liable to confiscation, the package and any other goods imported in that package shall also be liable to confiscation [Clause (a)].

(b) Confiscation of goods ATTEMPTED TO BE EXPORTED in package: Where any goods are brought in a package within the limits of a customs area for the purpose of exportation and are liable to confiscation, the package and any other goods contained therein shall also be liable to confiscation [Clause (b)].

12.6.5 Confiscation of goods used for concealing smuggled goods [Section 119]: As per this section, any goods* used for concealing smuggled goods shall also be liable to confiscation.

*In this section, **"goods" does not include** a conveyance used as a means of transport.

12.6.6 Confiscation of smuggled goods and their sale proceeds [Section 120-121]: These two provisions specifically relate to smuggled goods like gold etc. where there is a change in their physical form or characteristics.

(a) Change in the physical form or characteristics of smuggled goods: Smuggled goods are liable to confiscation even if after smuggling there is a **change in their physical form or characteristics**.

For example, if smuggled gold idols are later on made into gold ornaments, they shall still be liable to confiscation.

(b) Smuggled goods mixed with other goods in inseparable manner: Where smuggled goods are mixed with other goods in such manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable to confiscation.

However, where the owner of such goods proves that he had no knowledge or reason to believe that they included any smuggled goods, only such part of the goods the value of which is equal to the value of the smuggled goods shall be liable to confiscation.

(c) Confiscation of sale-proceeds of smuggled goods: Where any smuggled goods are sold by a person having knowledge/reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation.

12.7 Penalties on persons

The personal penalty is a heavy punishment. The entire Customs Act being in the nature of an indirect tax, no person can be penalised unless he is known to have personally committed the offence with full knowledge of the illegality of his action. However, this element of *mens rea* would defeat the very objective of deterrent action against persons involved in smuggling. Therefore, the persons involved in smuggling have been categorised into two, namely,

1. those directly involved in doing any act or omission which legally constitutes smuggling and
2. others, who wittingly or unwittingly get themselves involved in the various stages of smuggling.

12.8 Penal provisions under the Customs Act

The word 'penalty' means punishment under the law, i.e., such punishment as is provided in penal laws. It also means the sum payable as a punishment for a default.

12.8.1 Penalties in respect of improper importation of goods, etc. [Section 112]: (1) Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act,

OR

(2) Any person who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable to penalty in the following manner:

S.No	Goods	Maximum Penalty
1.	In the case of prohibited goods	(a) Value of the goods or (b) ₹ 5,000, whichever is greater

2.	In the case of dutiable goods other than prohibited goods	***(a) 10% of the duty sought to be evaded on such goods*** ***or*** ***(b) ₹ 5,000,*** ***whichever is greater.*** ***Further, such penalty will be subject to the provisions of section 114A.*** ***However, where such duty as determined under section 28(8) and the interest payable thereon under section 28AA is paid within 30 days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be 25% of the penalty so determined.***
3.	In the case of goods in respect of which:- (i) Value stated in Bill of entry or (ii) in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof.	(a) Difference between the declared value and the value thereof or (b) ₹ 5,000, whichever is greater
4.	In case the goods are prohibited and value is mis-declared	(a) Value of the goods or (b) Difference between the declared value and the value thereof or (c) ₹ 5,000, whichever is highest.
5.	In case the goods are dutiable (other than prohibited goods), and the value is mis-declared	(a) Duty sought to be evaded on such goods or (b) Difference between the declared value and the value thereof or (c) ₹ 5,000, whichever is highest.

12.8.2 Penalties in respect of attempt of improper exportation of goods, etc. [Section 114]: Improper exportation of goods, which would render such goods liable to confiscation under section 113 of the Customs Act, is liable to penalty under section 114 of the Act as under:

S.No	Goods	Maximum Penalty
1.	In case of prohibited goods	(a) Three times the value of the goods declared by the exporter or (b) Value as determined under the Customs Act, whichever is greater
2.	In case of dutiable goods, other than prohibited goods	***(a) 10% of the duty sought to be evaded on such goods*** ***or*** ***(b) ₹ 5,000,*** ***whichever is greater*** ***Further, such penalty will be subject to the provisions of section 114A.*** ***However, where such duty as determined under section 28(8) and the interest payable thereon under section 28AA is paid within 30 days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be 25% of the penalty so determined.***
3.	In case of any other goods	(a) Value of the goods declared by the exporter or (b) Value as determined under the Customs Act, whichever is greater

Thus, under section 112, in each case, the minimum penalty is ₹ 5,000.

12.8.3 Mandatory Penalty for short-levy or non-levy of duty in certain cases [Section 114A]

(a) Penalty for non-levy/short levy of duty/where the interest has not been charged/ paid/has been part paid or duty/interest has been erroneously refunded: In cases of non-levy or short levy of duty or where the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of:-

(i) collusion or

(ii) any wilful mis-statement or

(iii) suppression of facts

person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty.

(b) Amount of penalty: Amount of penalty shall be equal to the duty or interest so determined.

(c) Benefit of reduced penalty available if duty/interest and interest on delayed payment of duty paid within thirty days: Where such duty or interest, as the case may be, and the interest on delayed payment of duty, is paid within thirty days from the date of the communication of the order, the amount of penalty to be paid shall be reduced to 25% of the duty or interest.

However, aforementioned benefit of reduced penalty is available only if the amount of penalty so determined has also been paid within the said period of thirty days.

(d) Increase/decrease in the amount of duty/interest payable determined: If the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the duty or interest as reduced or increased, as the case may be, shall be taken into account.

(e) Benefit of reduced penalty available if increased duty/interest and interest on delayed payment of duty and 25% of consequentially increased penalty paid within thirty days: In a case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the benefit of reduced penalty shall be available if the amount of the duty or the interest so increased, along with the interest on delayed payment of duty, and 25% of the consequential increase in penalty have also been paid within thirty days of the communication of the order.

(f) Section 112/114 not to apply: Where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

12.8.4 Use of false and incorrect material to be penalized [Section 114AA]: Section 114AA lays down that if a person knowingly or intentionally:-

- makes,
- signs or uses, or
- causes to be made,
- signed or used,

any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of the Customs Act, shall be liable to a penalty.

Maximum penalty: Penalty shall not exceed 5 times the value of goods.

12.8.5 Penalty for not accounting for goods [Section 116]: If:-

(i) any goods loaded in a conveyance for importation into India, or

(ii) any goods transshipped under the provisions of this Act or

(iii) coastal goods carried in a conveyance

are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and

if the failure to unload or the deficiency is not accounted for to the satisfaction of the Assistant/Deputy Commissioner of Customs, the person-in-charge of the conveyance shall be liable to penalty as follows:-

S.No.	In case of	Amount of penalty shall not exceed
1.	goods loaded in a conveyance for importation into India or goods transhipped under the provisions of this Act	twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported
2.	coastal goods	amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported

12.8.6 Penalties for contravention, etc., not expressly mentioned – Residual penalty [Section 117] : Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding ₹1,00,000.

12.9 Adjudication of confiscations and penalties

12.9.1 Adjudication of confiscation and penalties [Section 122]: Where anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged as under -

S.No	Particulars	Adjudicating officer
1.	Value of goods liable to confiscation ≤ ₹ 50,000	Gazetted Officer of Customs lower in rank than an Assistant/Deputy Commissioner of Customs
2.	Value of goods liable to confiscation ≤ ₹ 5,00,000	Assistant/Deputy Commissioner of Customs
3.	Without limit	Principal Commissioner/ Commissioner/ Joint Commissioner of Customs

Mens rea: Generally, ***'mens rea'*** is not required to be proved for the imposition of penalty under the provisions of the Customs Act. The amount of penalty depends on the gravity of the offence and is to act as the deterrent for future.

12.9.2 Adjudication procedure [Section 122A]

1. Section 122A provides that Adjudicating Authorities shall give an opportunity of being heard to a party in a proceeding if the party so desires.
2. The Adjudicating Authority may, if sufficient cause is shown, at any stage of proceeding,

grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing.

3. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

12.9.3 Burden of proof in certain cases [Section 123]: Where any goods to which this section applies* are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be

(a) in a case where such seizure is made from the possession of any person

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case

on the person, if any, who claims to be the owner.

*This section applies to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify. Central Government has specified the following classes of goods under this section:-

(a) Synthetic yarn and metallised yarn

(b) Fabrics made wholly or mainly of synthetic yarn

(c) Electronic calculators

(d) Watches, watch movements (including partly assembled movements), dials and cases for watches

(e) Zip fasteners

(f) Silver bullion

Under this section, the burden of proof is on the accused and not on the Department. It implies that where the goods notified under section 123 are seized under reasonable belief that these are smuggled goods, the owner has to prove that the same are not smuggled goods.

12.9.4 Issue of show cause notice (SCN) before confiscation of goods etc. [Section 124]: No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless following conditions are satisfied-

(a) Issue of SCN: The owner of the goods or such person is given a notice in writing with the prior approval of the officer of customs not below the rank of Assistant Commissioner of Customs informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty.

(b) Opportunity of making presentation: The owner of the goods or such person is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) Opportunity of being heard: The owner of the goods or such person is given a reasonable opportunity of being heard in the matter.

Waiver of show cause notice and representation: The notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.

12.9.5 Option to pay fine in lieu of confiscation [Section 125]: Whenever confiscation of any goods is authorised by this Act, the officer adjudging it

MAY in the case of any goods, the importation or exportation whereof is **prohibited** under this Act or under any other law for the time being in force, and

SHALL in the case of any other goods give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit.

Analysis

Section 125(1) deals with two situations:-

(1) Importation or exportation of prohibited goods and

(2) Importation or exportation of any other goods

(1) Importation or exportation of prohibited goods: In case of importation or exportation of prohibited goods, where the goods were confiscated, the word used is "may". Hence, in case of prohibited goods, it is at the discretion of the officer to release the confiscated goods.

(2) Importation or exportation of any other goods: In the case of any other goods, which are confiscated, the word used is "shall". Thus, in case of other goods, the officer is bound to release the goods.

[CCus v. Alfred Menezes 2009 (242) E.L.T. 334 (Bom.)]

Meaning of redemption fine

On confiscation, goods are vested in the Central Government. Central Government can sell/auction the goods. However, the owner of the goods /the person from whom the goods are seized may be given an option to get the goods back by paying a fine. This fine is known as redemption fine

Maximum amount of fine: Without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

Maximum amount of redemption fine = MP of the goods confiscated – Duty chargeable

Liability to pay duty and charges payable on goods does not extinguish: Where any fine in lieu of confiscation of goods is imposed, the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

12.9.6 On confiscation, property to vest in Central Government [Section 126]: When any goods are confiscated under this Act, such goods shall thereupon vest in the Central

Government. The officer adjudging confiscation shall take and hold possession of the confiscated goods.

12.9.7 Award of confiscation or penalty by customs officers not to interfere with other punishments [Section 127]: The award of any confiscation or penalty under this Act by an officer of customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under the provisions of Chapter XVI of this Act or under any other law.

12.10 Powers of customs officers

12.10.1 Power to search suspected persons entering or leaving India, etc. [Section 100]: If the proper officer has reason to believe that any person to whom this section applies has secreted about his person, any goods liable to confiscation or any documents relating thereto, he may search that person [Sub-section (1)].

Persons who can be searched: This section applies to the following persons, namely : –

(a) any person who has landed from or is about to board, or is on board any vessel within the Indian customs waters;

(b) any person who has landed from or is about to board, or is on board a foreign-going aircraft;

(c) any person who has got out of, or is about to get into, or is in, a vehicle, which has arrived from, or is to proceed to any place outside India;

(d) any person not included in clauses (a), (b) or (c) who has entered or is about to leave India;

(e) any person in a customs area [Sub-section (2)].

12.10.2 Power to search suspected persons in certain other cases [Section 101]: Without prejudice to the provisions of section 100, if an officer of customs empowered in this behalf by general or special order of the Principal Commissioner/Commissioner of Customs, has reason to believe that any person has secreted about his person any goods* of the description specified in sub-section (2) which are liable to confiscation, or documents relating thereto, he may search that person [Sub-section (1)].

***Specified goods**

The goods referred to in sub-section (1) are the following: –

(a) gold

(b) diamonds

(c) manufactures of gold or diamonds

(d) watches

(e) any other class of goods which the Central Government may, by notification in the Official Gazette, specify [Sub-section (2)].

12.10.3 Distinction between the provisions of section 100 and section 101

S.No.	Section 100	Section 101
1.	A person can be searched if he has secreted **any** goods liable to confiscation/any documents relating thereto in his person.	A person can be searched if he has secreted **specified** goods liable to confiscation/documents relating thereto in his person.
2.	**Proper officer** is empowered to search the person.	**Officer of customs** can search the person only if he is empowered in this behalf by general or special order of the Principal Commissioner/Commissioner of Customs.

12.10.4 Persons to be searched may require to be taken before gazetted officer of customs or magistrate [Section 102]

(a) Person may require to be searched before Gazetted Officer/Magistrate: When any officer of customs is about to search any person under the provisions of section 100 or section 101, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate [Sub-section (1)].

If such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or the magistrate [Sub-section (2)].

(b) Gazetted Officer/Magistrate may discharge the person/direct the search to be made: The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made [Sub-section (3)].

(c) Two or more persons to attend and witness search : Before making a search under the provisions of section 100 or section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses [Sub-section (4)].

(d) Female to be searched only by a female: No female shall be searched by any one excepting a female [Sub-section (5)].

12.10.5 Power to screen or X-ray bodies of suspected persons for detecting secreted goods [Section 103]

(a) Detention of the person referred to in section 100(2): Where the proper officer has reason to believe that any person referred to in sub-section (2) of section 100 has any goods liable to confiscation **secreted INSIDE HIS BODY**, he may detain such person and produce him without unnecessary delay before the nearest magistrate [Sub-section (1)].

(b) Magistrate may discharge the person: A magistrate before whom any person is

brought under sub-section (1) shall, if he sees no reasonable ground for believing that such person has any such goods secreted inside his body, forthwith discharge such person [Sub-section (2)].

(c) Magistrate may order to X-ray the body of such person: Where any such magistrate has reasonable ground for believing that such person has any such goods secreted inside his body and the magistrate is satisfied that for the purpose of discovering such goods it is necessary to have the body of such person screened or X-rayed, he may make an order to that effect [Sub-section (3)].

Hence, a person [referred to in section 100(2)] can be screened/X-rayed only if he is suspected to have secreted any goods **INSIDE HIS BODY**. Otherwise, he can only be searched.

(d) Person to be X-rayed to be taken before radiologist: Where a magistrate has made any order under sub-section (3), in relation to any person, the proper officer shall, as soon as practicable, take such person before a radiologist possessing qualifications recognized by the Central Government for the purpose of this section, and such person shall allow the radiologist to screen or X-ray his body [Sub-section (4)].

(e) Radiologist shall forward report to magistrate: A radiologist before whom any person is brought under sub-section (4) shall, after screening or X-raying the body of such person, forward his report, together with any X-ray pictures taken by him, to the magistrate without unnecessary delay [Sub-section (5)].

(f) Magistrate may direct to bring out such goods: Where on receipt of a report from a radiologist under sub-section (5) or otherwise, the magistrate is satisfied that any person has any goods liable to confiscation secreted inside his body, he may direct that suitable action for bringing out such goods be taken on the advice and under the supervision of a registered medical practitioner and such person shall be bound to comply with such direction.

However, in the case of a female no such action shall be taken except on the advice and under the supervision of a female registered medical practitioner [Sub-section (6)].

Where any person is brought before a magistrate under this section, such magistrate may for the purpose of enforcing the provisions of this section order such person to be kept in such custody and for such period as he may direct [Sub-section (7)].

(g) No screening if person himself admits that goods are secreted in his body: Nothing in this section shall apply to any person referred to in sub-section (1), who admits that goods liable to confiscation are secreted inside his body, and who voluntarily submits himself for suitable action being taken for bringing out such goods [Sub-section (8)].

Meaning of registered medical practitioner

"Registered medical practitioner" means any person who holds a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act, 1916, or notified under section 3 of that Act, or by an authority specified in any of the Schedules to the Indian Medical Council Act, 1956.

12.10.6 Power to arrest [Section 104]: To tackle the menace of smuggling and other serious economic offences including commercial frauds effectively, apart from penal action in departmental adjudication, the Customs Act, also provides for criminal prosecution action. The persons involved can be arrested and prosecuted in a Court of Law. Prosecution action can also be taken for providing false documents/ declarations to Customs and for obstructing Customs officers working intentionally.

A customs officer duly authorised by the Principal Commissioner/Commissioner can arrest any person, in India or within the Indian customs waters, who is guilty of an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136 of the Customs Act [Section 104(1)].

Under the law, the person being arrested is entitled to be informed about the grounds for such arrest under the law. The said section also enjoins that provides that every person arrested under the Act has to be taken without unnecessary delay to the nearest Magistrate [Sub-section (2)].

Where an officer of customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1973 [Sub-section (3)].

12.10.7 Power to search premises [Section 105]: Section 105 provides that if the Assistant/Deputy Commissioner of Customs or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

The provisions of the Code of Criminal Procedure, 1898 relating to searches shall, so far as may be, apply to searches under this section.

12.10.8 Power to stop and search conveyances [Section 106]: Section 106 (1) provides that where the proper officer has reason to believe that any aircraft, vehicle or animal in India or any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any goods which have been smuggled, he may at any time stop any such vehicle, animal or vessel or, in the case of an aircraft, compel it to land, and -

(a) rummage and search any part of the aircraft, vehicle or vessel;

(b) examine and search any goods in the aircraft, vehicle or vessel or on the animal;

(c) break open the lock of any door or package for exercising the powers conferred by clauses (a) and (b), if the keys are withheld.

Sub-section (2) of section 106 provides that where for the purposes of sub-section (1)

(a) it becomes necessary to stop any vessel or compel any aircraft to land, it shall be lawful for any vessel or aircraft in the service of the Government while flying her proper flag and

any authority authorised in this behalf by the Central Government to summon such vessel to stop or the aircraft to land, by means of an international signal, code or other recognized means, and thereupon, such vessel shall forthwith stop or such aircraft shall forthwith land; and if it fails to do so, chase may be given thereto by any vessel or aircraft as aforesaid and if after a gun is fired as a signal the vessel fails to stop or the aircraft fails to land, it may be fired upon;

(b) it becomes necessary to stop any vehicle or animal, the proper officer may use all lawful means for stopping it, and where such means fail, the vehicle or animal may be fired upon.

12.10.9 Power to inspect [Section 106A]: Any proper officer authorised in this behalf by the Principal Commissioner/Commissioner of Customs may, for the purpose of ascertaining whether or not the requirements of this Act have been complied with, at any reasonable time, enter any place intimated under Chapter IVA or Chapter IVB, as the case may be, and inspect the goods kept or stored therein and require any person found therein, who is for the time being in charge thereof, to produce to him for his inspection the accounts maintained under the said Chapter IVA or Chapter IVB, as the case may be, and to furnish to him such other information as he may reasonably require for the purpose of ascertaining whether or not such goods have been illegally imported, exported or are likely to be illegally exported.]

12.10.10 Power to examine persons [Section 107]: Any officer of customs empowered in this behalf by general or special order of the Principal Commissioner/Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods, -

(a) require any person to produce or deliver any document or thing relevant to the enquiry ;

(b) examine any person acquainted with the facts and circumstances of the case.

12.10.11 Power to summon persons to give evidence and produce documents [Section 108]: Any Gazetted officer of Customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned. All persons so summoned shall be bound to attend either in person or by an authorised agent and state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required. Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860.

12.10.12 Power to require production of order permitting clearance of goods imported by land [Section 109]: Any officer of customs appointed for any area adjoining the land frontier of India and empowered in this behalf by general or special order of the Board, may require any person in possession of any goods which such officer has reason to believe to have been imported into India by land, to produce the order made under section 47 permitting

clearance of the goods :

However, this section shall not apply to any imported goods passing from a land frontier to a land customs station by a route appointed under clause (c) of section 7.

12.10.13 Seizure of goods documents and things [Section 110]: An officer of Customs can seize any goods, if he has reason to believe that the same are liable to confiscation, under the Customs Act. Where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer. The proper officer may also seize any document or things that may be relevant to any proceedings under the Custom Act. However, the person from whom these documents are seized is entitled to make copies of the same.

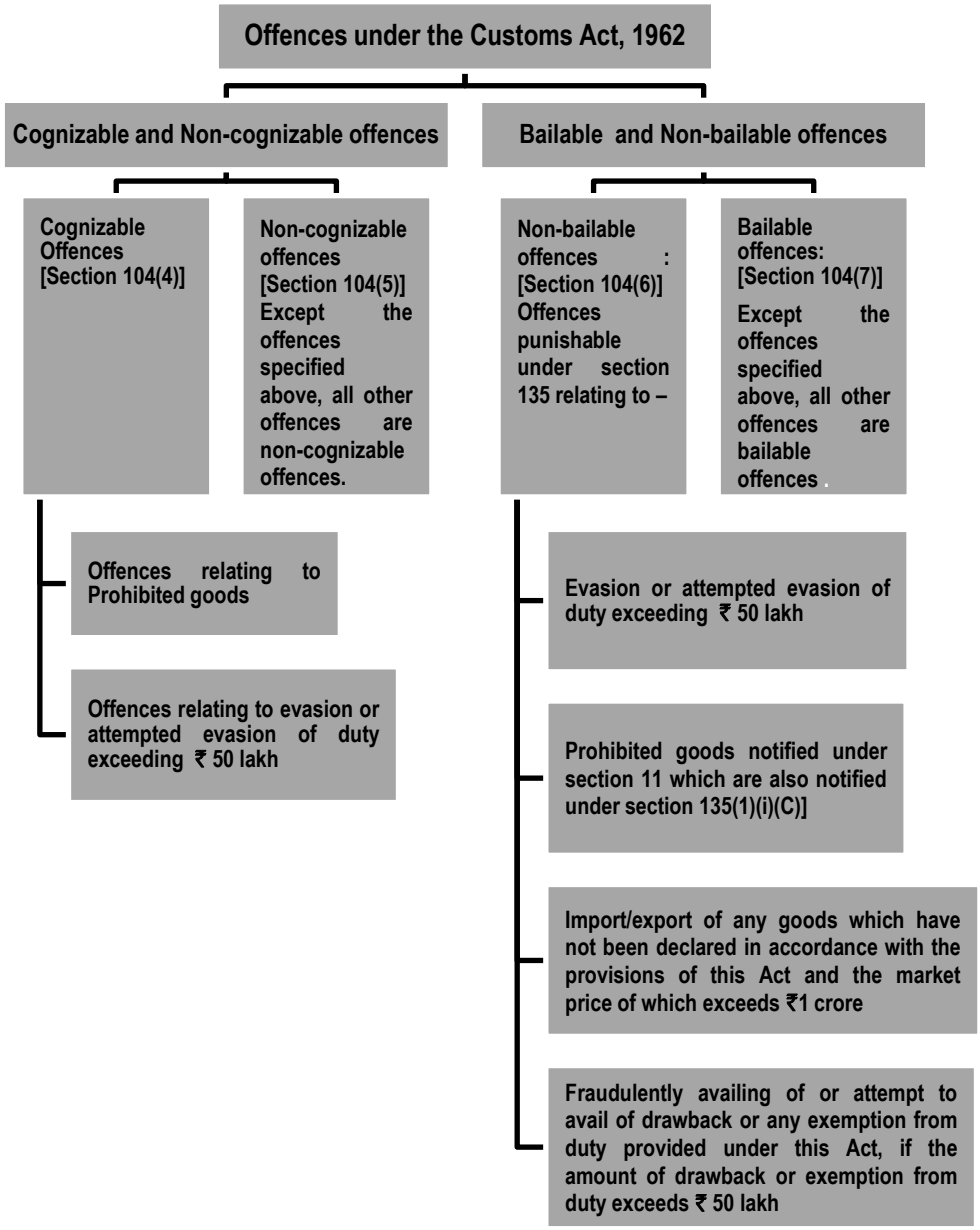
The person from whom the goods are seized is issued a show cause notice, usually within six months. However, the Principal Commissioner/Commissioner of Customs, on sufficient cause being shown, can extend the time period for issue of Show cause notice, by a further six months.

In case the seized goods are perishable or hazardous in nature or is prone to depreciate in value over time or for reasons of constraints in space, the government can notify these goods and these goods can be disposed off before the conclusion of the proceedings eg. All electronic goods, currency, liquors, P&P medicine, Gold, Silver etc. [Section 110]

12.10.14 Seized goods, documents and things pending adjudication to be released provisionally [Section 110A]: Any goods, documents or things seized under section 110, may, pending the order of the adjudicating authority, be released to the owner. Such release shall be made when the owner executes a bond in the proper form with such security and conditions as the adjudicating authority may require.

12.11 Offences and prosecution – Specific provisions

The scheme of offences under the Customs Act can be understood with the help of the following diagram:



Prosecution: No prosecution proceedings can be launched in a Court of Law against any person under Customs Act, and no cognizance of any offence under sections 132 to 135 of the Customs Act, 1962 can be taken by any Court, except with the previous sanction of concerned Principal Commissioner/Commissioner of Customs. Based upon the results of investigations and evidence brought on record, Principal Commissioner/Commissioners of Customs apply their mind before sanctioning prosecution- after being satisfied that there are sufficient reasons justifying prosecution. Criminal complaint is thereafter filed in appropriate Court of law and followed up with a view to get expeditious orders / conviction.

Specific provisions: Adjudication and appellate remedies are measures, which sometimes may not be adequate to contain smuggling and evasion of custom duty. As an exemplary measure it becomes necessary in certain situations to initiate criminal proceedings and impose stiffer actions against the offenders. Apart from prosecution in a court of law the Government had introduced the COFEPOS ACT in 1974 to preventively detain such smugglers and foreign exchange racketeers.

Sections 132 to 140 contain detailed provisions regarding the offences which are liable to prosecution in a criminal court of law, the cognisance of the offences, the procedure to try these offences and the presumption that can be had in such proceedings. These provisions are briefly discussed below:

12.11.1 False declaration, false documents, etc [Section 132]: Whoever makes, signs declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to 2 years, or with fine, or with both.

12.11.2 Obstruction of officer of Customs [Section 133]: If any person intentionally obstructs any officer of customs in the exercise of any powers conferred under this Act, such person shall be punishable with imprisonment for a term, which may extend to two years, or with fine, or with both.

12.11.3 Refusal to be X-rayed [Section 134]: If any person resists or refuses to allow a radiologist to screen or to take X-ray picture of his body in accordance with an order made by a Magistrate under section 103, or resists or refuses to allow suitable action being taken on the advice and under the supervision of a registered medical practitioner for bringing out goods liable to confiscation secreted inside his body, as provided in section 103, he shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

12.11.4 Evasion of duty or prohibitions [Section 135]: If any person—

(a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, arbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be; or

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113; or

(d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods,

then,

Particulars	Punishment
(A) in the case of an offence relating to	
(i) any goods the market price of which exceeds one crore of rupees	Imprisonment for a term which may extend to 7 years and with fine
(ii) the evasion or attempted evasion of duty exceeding ₹ 50 lakh	Imprisonment for a term which may extend to 7 years and with fine
(iii) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify	Imprisonment for a term which may extend to 7 years and with fine
(iv) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds ₹ 50 lakh	Imprisonment for a term which may extend to 7 years and with fine
(B) in any other case	Imprisonment for a term which may extend to 3 years, or with fine, or with both

However, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment (mentioned in point (i) above) shall not be for less than 1 year.

If any person is convicted for a second time, he shall be punishable for the second and subsequent offence with imprisonment for a term which may extend to seven years and with fine.

The following shall not be considered as special and adequate reasons for awarding sentence of imprisonment for less than one year:

1. the accused is convicted for the first time
2. the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act
3. the accused was not the principal offender and was a secondary party to the commission of the offence
4. the age of the accused.

12.11.5 Preparation [Section 135A]: If a person makes preparation to export any goods in contravention of the provisions of this Act, and from the circumstances of the case it may be reasonably inferred that if not prevented by circumstances independent of his will, he is determined to carry out his intention to commit the offence, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

12.11.6 Power of court to publish name, place of business, etc., of persons convicted under the Act [Section 135B]: Where any person is convicted under this Act for contravention of any of the provisions thereof, it shall be competent for the court convicting the person to cause the name and place of business or residence of such person, nature of the contravention, the fact that the person has been so convicted and such other particulars as the court may consider to be appropriate in the circumstances of the case, to be published at the expense of such person in such newspapers or in such manner as the court may direct.

No publication shall be made until the period for preferring an appeal against the orders of the court has expired without any appeal having been preferred, or such an appeal, having been preferred, has been disposed of. The expenses of any publication shall be recoverable from the convicted person as if it were a fine imposed by the court.

12.11.7 Offences by officers of customs [Section 136]: The officers of Customs also cannot escape serious action including prosecution action, if they are found abusing their powers or are shown to be colluding/conniving with tax evaders. In the following cases, prosecution proceeding against a customs officer may be initiated under section 136 of the Customs Act:-

S. No.	Offence by Customs Officers	Punishment
(i)	If a customs officer enters into or acquiesces in any agreement to do, abstains from doing, permits, conceals or connives at any act or thing whereby any fraudulent export is effected or any duty of customs leviable on goods [or any prohibition for the time being in force under this Act or any other law for the time being in force with respect to any goods] is or may be evaded [Sub-section 1].	Imprisonment up to three years, or with fine, or with both
(ii)	If a customs officer requires any person to be searched for goods liable to confiscation or any document relating thereto, without having reason to believe that he has such goods or document secreted about his person [Sub-section 2(a)].	Imprisonment upto six months, or with fine extendible upto ₹1,000, or with both
(iii)	If a customs officer arrests any person without having reason to believe that he has been guilty of an offence punishable under section 135, he may be punishable [sub-section 2(b)]	
(iv)	If a customs officer searches or authorises any other officer of customs to search any place without having reason to believe that any goods, documents or things of the nature referred to in section 105 are secreted in that place [Sub-section 2(c)]	

(v)	If any officer of customs, except in the discharge in good faith of his duty as such officer or in compliance with any requisition made under any law for the time being in force, discloses any particulars learnt by him in his official capacity in respect of any goods [Sub-section 2]	

12.11.8 Offences by companies [Section 140]: Every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Nothing shall render any such person liable to such punishment provided in this Chapter if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Explanation to sub-section (2) defines "company" as a body corporate and includes a firm or other association of individuals.

12.11.9 Cognizance of offences [Section 137]: No court shall take cognizance of:

(a) any offence under section 132, section 133, section 134 or section 135 or section 135A except with the previous sanction of the Principal Commissioner/Commissioner of Customs.

(b) any offence under section 136

- where the offence is alleged to have been committed by an officer not lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Central Government.
- where the offence is alleged to have been committed by an officer of lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Principal Commissioner/Commissioner of Customs.

Compounding of Offences: Sub-section (3) of section 137 provides for compounding of offences, either before or after the institution of prosecution, by Principal Chief Commissioner/Chief Commissioner of Customs on payment of the prescribed compounding amount in the prescribed manner. Such amount shall be paid to the Central Government by the person accused of the offence. Section 156 empowers Central Government to make rules for specifying the amount to be paid for compounding and the manner of compounding of offences under section 137.

However, in the case of following persons the provisions relating to compounding of offences will not apply: -

(a) a person who has been allowed to compound once in respect of any offence under sections 135 and 135A;

(b) a person who has been accused of committing an offence under this Act which is also an offence under any of the following Acts, namely:—

(i) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(ii) the Chemical Weapons Convention Act, 2000;

(iii) the Arms Act, 1959;

(iv) the Wild Life (Protection) Act, 1972;

(c) a person involved in smuggling of goods falling under any of the following, namely:—

(i) goods specified in the list of Special Chemicals, Organisms, Materials, Equipment and Technology in Appendix 3 to Schedule 2 (Export Policy) of ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy, as amended from time to time, issued under section 5 of the Foreign Trade (Development and Regulation) Act, 1992;

(ii) goods which are specified as prohibited items for import and export in the ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy, as amended from time to time, issued under section 5 of the Foreign Trade (Development and Regulation) Act, 1992;

(iii) any other goods or documents, which are likely to affect friendly relations with a foreign State or are derogatory to national honour;

(d) person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore;

(e) person who has been convicted under this Act on or after 30.12.2005.

12.11.10 Presumption of culpable mental state [Section 138A]: As per section 138A of the Customs Act, in prosecution proceedings under the said Act for an offence under the said Act, the culpable (guilty conscience or *mens rea*) on the part of the accused person shall be presumed and it will be for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. When the presumption of culpable mental state is drawn under this provision, it includes intention, motive, knowledge, belief as well as reason to belief. The presumption could be deemed as rebutted only if the proof is beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

12.11.11 Relevancy of statements under certain circumstances [Section 138B]: A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

12.11.12 Admissibility of micro films, etc as evidence [Section 138C]: The following are deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original:

1. a micro film of a document or the reproduction of the image; or
2. a facsimile copy of a document; or
3. computer printout.

12.11.13 Presumption as to documents in certain case [Section 139]: Where any document

- is produced by any person or has been seized from the custody, under this Act or any other law
- has been received from any place outside India in the course of investigation of any offence under this Act,

It is presumed, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested. The document can be admitted as evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence. Further the same shall be presumed, unless the contrary is proved, to be admissible.

12.11.14 Offences to be tried summarily [Section 138]: Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Chapter (ie., Chapter XVI) may be tried summarily by a Magistrate. However, the exceptions are:

1. Offence under clause (i) of sub-section (1) of section 135
2. Offence under sub-section (2) of section 135.

Customs Act is a special enactment. This section provides for summary trial of all offences under the Act. Therefore, the provisions of section 262 of Cr. P.C., which allows trial as warrant case of all offences punishable with imprisonment more than 2 years is inapplicable to the offences under this Act. *[Ruli Ram and Ors vs. ACCE, 1987 (30) ELT 657 (HP)].*

13

Settlement Commission

13.1 Introduction

Settlement Commission was set up to evolve a mechanism for speedy settlement of cases involving high revenue stakes. This is an alternative channel for resolution of dispute for assessees without going into the prolonged litigation in adjudication/appeals/revisions etc.

Customs, Central Excise and Service Tax Settlement Commission is constituted by Central Government. Section 127A to 127N contained in Chapter XIV A of the Customs Act deals with the provisions relating to settlement of cases. Presently, four Benches in the Settlement Commission have been constituted and are functioning at Delhi, Mumbai, Kolkata and Chennai.

13.2 Definitions [Section 127A]

In this Chapter, unless the context otherwise requires, -

(a) **"Bench"** means a Bench of the Settlement Commission;

(b) **"Case"** means any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 127B is made.

However, when any proceeding is referred back by any Court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause.

(c) **"Chairman"** means the Chairman of the Settlement Commission.

(d) **"Commissioner (Investigation)"** means an officer of the customs or a Central Excise Officer appointed as such Commissioner to conduct inquiry or investigation for the purposes of this Chapter.

(e) **"Member"** means a Member of the Settlement Commission and includes the Chairman and the Vice-Chairman.

(f) **"Settlement Commission"** means the Customs, Central Excise and Service Tax Settlement Commission constituted under section 32 of the Central Excise Act, 1944.

13.3 Application for settlement of cases [Section 127B]

Any importer, exporter or any other person may make an application for settlement in respect of a case, relating to him, before adjudication to the Settlement Commission. Such application shall be made in such form and in such manner as may be specified.

(a) Disclosures required in application: The application shall contain a full and true disclosure of:

- his duty liability which has not been disclosed before the proper officer,
- the manner in which such liability has been incurred,
- the additional amount of customs duty accepted to be payable by him and
- such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, undervaluation or inapplicability of exemption notification.

(b) Conditions for filing the application: Following conditions are to be fulfilled for filing an application for settlement of a case. The application shall not be made unless –

(i) the applicant has filed a bill of entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported/exported through post or courier, as the case may be, and in relation to such document(s), a show cause notice has been issued to him by the proper officer;

(ii) the additional amount of duty accepted by the applicant in his application exceeds ₹ 3,00,000.

(iii) the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AA.

(iv) No application shall be entertained by the Settlement Commission in cases which are pending in the Appellate Tribunal or any Court.

(v) No application under this sub-section shall be made:

- in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 has been committed:
- for the interpretation of the classification of the goods under the Customs Tariff Act, 1975.

(c) An application for settlement once made shall not be allowed to be withdrawn by the applicant.

(d) Every application shall be accompanied by such fees as may be specified by rules.

13.4 Procedure on receipt of application [Section 127C]

Following procedure is followed on receipt of application for settlement of cases:

(1) The Settlement Commission shall issue a notice to the applicant within 7 days from the date of receipt of the application to explain in writing as to why the application made by him should be allowed to be proceeded with. After taking into consideration the explanation provided by the applicant, the Settlement Commission shall, within a period of 14 days from the date of the notice, pass an order either allowing the application to be proceeded with, or rejecting the same. The proceedings before the Settlement Commission shall abate on the date of rejection.

However, where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

(2) A copy of every order under sub-section (1), shall be sent to the applicant and to the Principal Commissioner/Commissioner of Customs having jurisdiction.

(3) Where an application is allowed or deemed to have been allowed to be proceeded with under sub-section (1), the Settlement Commission shall, within 7 days from the date of order under sub-section (1), call for a report along with the relevant records from the Principal Commissioner/Commissioner of Customs having jurisdiction. The Principal Commissioner/Commissioner shall furnish the report within a period of 30 days from the date of the receipt of communication from the Settlement Commission.

However, where the Principal Commissioner/Commissioner does not furnish the report within the aforesaid period of 30 days, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner/Commissioner.

(4) After examination of the report of the Principal Commissioner/Commissioner submitted within time, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct, for reasons to be recorded in writing, the Commissioner (Investigation) within 15 days of the receipt of the report, to make such further enquiry or investigation on the matters covered by the application and any other matter relating to the case. The Commissioner (Investigation) should furnish the report of such enquiry within a period of 90 days from the date of the receipt of the communication from the Settlement Commission.

However, where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under sub-section (5) without such report.

(5) The Settlement Commission may pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Principal Commissioner/Commissioner of Customs and Commissioner (Investigation) after examination of the records, the report of the Principal Commissioner/Commissioner of Customs and the report, if any, of the Commissioner (Investigation) of the Settlement Commission. An opportunity of being heard either in person or through a representative duly authorised in this behalf shall be given to the applicant and to the Principal Commissioner/Commissioner of Customs having jurisdiction before passing of such order. The Commission shall also examine

any further evidence as may be placed before it or obtained by it before passing the order.

(6) Subject to the provisions of section 32A of the Central Excise Act, 1944 the materials brought on record before the Settlement Commission shall be considered by the Members of the concerned Bench before passing any order under sub-section (5). The provisions of section 32D of the Central Excise Act, 1944 shall apply in relation to the passing of such order.

(7) The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective. However, in case of rejection the order shall contain the reasons therefor. The order shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

The amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant under section 127B.

(8) The duty, interest, fine and penalty payable in pursuance of the order under sub-section (5) shall be paid by the applicant within 30 days of receipt of a copy of the order by him. If the applicant fails to do so, the amount which remains unpaid shall be recovered along with interest due thereon as the sums due to the Central Government by the proper Officer having jurisdiction over the applicant in accordance with the provisions of section 142.

(9) Where a settlement becomes void as provided under sub-section (8), the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission. The proper officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of 2 years from the date of the receipt of communication that the settlement became void.

13.5 Powers of Settlement Commission

(a) Power to order provisional attachment to protect revenue [Section 127D]: The Settlement Commission may, by order, attach provisionally any property belonging to the applicant in such manner as may be specified by rules. Such attachment can be made during the pendency of any proceeding before it, and for protecting the interests of the revenue.

Every provisional attachment made by the Settlement Commission under sub-section (1) shall cease to have effect from the date the sums due to the Central Government for which such attachment is made are discharged by the applicant and evidence to that effect is submitted to the Settlement Commission.

(b) Power to grant immunity from prosecution and penalty [Section 127H]: The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 127B has co-operated with the Settlement Commission in

the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act and also either wholly or in part from the imposition of any penalty and fine under this Act, with respect to the case covered by the settlement.

No such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section 127B.

An immunity granted to a person under sub-section (1) shall stand withdrawn if such person fails to pay any sum specified in the order of the settlement passed under sub-section (5) of section 127C within the time specified in such order or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted.

An immunity granted to a person under sub-section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person had, in the course of the settlement proceedings, concealed any particulars, material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had no such immunity been granted.

(c) Power to send a case back to the proper officer [Section 127-I]: The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 127B has not cooperated with the Settlement Commission in the proceedings before it, send the case back to the proper officer who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 127B had been made [Sub-section (1)].

For the purpose of sub-section (1), the proper officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such proper officer or held or recorded by him in the course of the proceedings before him.

For the purposes of the time limit under section 28 and for the purposes of interest under section 28AA, in a case referred to in sub-section (1), the period commencing on and from the date of the application to the Settlement Commission under section 127B and ending with the date of receipt by the officer of customs of the order of the Settlement Commission sending the case back to the officer of customs shall be excluded.

(d) Other powers and procedure of Settlement Commission [Section 127F]: In addition to the powers conferred on the Settlement Commission under Chapter V of the Central Excise Act, 1944, it shall have all the powers which are vested in an officer of the

customs under this Act or the rules made thereunder.

Where an application made under section 127B has been allowed to be proceeded with under section 127C, the Settlement Commission shall, until an order is passed under sub-section (5) of section 127C, have exclusive jurisdiction to exercise the powers and perform the functions of any officer of customs or Central Excise Officer as the case may be, under this Act or in the Central Excise Act, 1944, in relation to the case.

In the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matter other than those before the Settlement Commission.

The Settlement Commission shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings, subject to the provisions of Chapter V of the Central Excise Act, 1944 and this Chapter.

13.6 Inspection, etc., of reports [Section 127G]

No person shall be entitled to inspect, or obtain copies of, any report made by any officer of the Customs to the Settlement Commission; but the Settlement Commission may, in its discretion, furnish copies thereof to any such person on an application made to it in this behalf and on payment of such fee as may be specified by rules.

However, for the purpose of enabling any person whose case is under consideration to rebut any evidence brought on record against him in any such report, the Settlement Commission shall, on an application made in this behalf, and on payment by such person of such fee as may be specified by rules, furnish him with a certified copy of any such report or part thereof relevant for the purpose.

13.7 Order of settlement to be conclusive [Section 127J]

Every order of settlement passed under sub-section (5) of section 127C shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

13.8 Recovery of sums due under order of settlement [Section 127K]

Any sum specified in an order of settlement passed under sub-section (5) of section 127C may, subject to such conditions, if any, as may be specified therein, be recovered, and any penalty for default in making payment of such sum may be imposed and recovered as sums due to the Central Government in accordance with the provisions of section 142, by the proper officer having jurisdiction over the applicant.

13.9 Bar on subsequent application for settlement in certain cases [Section 127L]

As per section 127L, a person shall not be entitled to apply for settlement under section 127B in relation to any other matter in the following cases:-

(a) Where an order of Settlement has been passed which provides for the imposition of a penalty on applicant under section 127B for settlement, on the ground of concealment of particulars of his duty liability.

Here, concealment of particulars of duty liability relates to any such concealment made from the Central Excise officer.

(b) Where after the passing of an order of settlement, in relation to a case, such person is convicted of any offence in relation to that case; or

(c) Where the case of such person is sent back to the Central Excise Officer by the Settlement Commission under section 127-I.

13.10 Proceedings before Settlement Commission to be judicial proceedings [Section 127M]

Any proceedings under this Chapter before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code.

13.11 Applications of certain provisions of Central Excise Act [Section 127N]

The provisions of Chapter V of the Central Excise Act, 1944 in so far as it is not inconsistent with the provisions of this Chapter shall apply in relation to proceedings before the Settlement Commission under this Chapter.

13.12 Customs (Settlement of Cases) Rules, 2007

In exercise of the powers conferred by Section 156 of the Customs Act, the Central Government has notified Customs (Settlement of Cases) Rules, 2007.

14

Advance Ruling

Chapter VB was inserted in the Customs Act, 1962 by Finance Act, 1999. The Finance Act, 1999 decided to set up an Advance Ruling Authority to give rulings on classification and valuation issues in advance for the benefit of joint ventures with NRIs. The provisions relating to Advance Rulings are contained in sections 28E to 28M. The provisions are discussed below:

14.1 Definitions [Section 28E]

(a) **"Activity"** means import or export and includes any new business of import or export proposed to be undertaken by the existing importer or exporter, as the case may be.

(b) **"Advance ruling"** means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity which is proposed to be undertaken, by the applicant.

(c) **"Applicant"** means a -

(i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or

(b) a resident setting up a joint venture in India in collaboration with a non-resident; or

(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

who or which, as the case may be, proposes to undertake any business activity in India;

(ii) a joint venture in India; or

(iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf,

and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 28H.

For the said purpose, Central Government has specified the following:-

(a) a resident who proposes to import goods claiming for assessment under heading 9801 (items eligible for project import) of the First Schedule to the Customs Tariff Act, 1975

(b) a public sector company

(c) a resident public limited company

(d) a resident private limited company

(e) a resident firm

Resident: Resident shall have the same meaning as is assigned to it in section 2(42) of the Income Tax Act, 1961 so far it applies to a company.

Public sector company: A public sector company shall have the same meaning as is assigned to it in section 2(36A) of the Income-tax Act, 1961.

Public limited company: Public limited company shall have the same meaning as is assigned to "public company" in section 3(1)(iv) of the Companies Act, 1956[1] and shall include a private company that becomes a public company by virtue of section 43A of the said Companies Act, 1956.

Private limited company: shall have the same meaning as is assigned to "private company" in section 2(68) of Companies Act, 2013.

Firm: shall have the meaning assigned to it in section 4 of the Indian Partnership Act, 1932 and includes-

(i) the limited liability partnership as defined in section 2(1)(n) of the Limited Liability Partnership Act, 2008; or

(ii) limited liability partnership which has no company as its partner; or

(iii) the sole proprietorship; or

(iv) one person company.

Sole proprietorship: means an individual who engages himself in an activity as defined in section 23A(a) of the Central Excise Act, 1944.

One Person Company: means as defined in section 2(62) of the Companies Act, 2013.

Resident: shall have the meaning assigned to it in section 2(42) of the Income-tax Act, 1961 in so far as it applies to a resident firm.

Here, "joint venture in India" means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement.

Thus, now in case of joint venture an application for advance ruling can be made only when one of the partners is non-resident.

The collaboration would mean either technical or financial collaboration. Joint venture would mean participation by both persons. Residents in the country having joint venture

[1] Section 2(71) of the Companies Act, 2013

with other residents are not given the benefit.

(d) **"Application"** means an application made to the Authority under subsection (1) of section 28H.

(e) **"Authority"** means the Authority for Advance Rulings (Central Excise, Customs and Service Tax) constituted under section 28F.

(f) **"Non-resident" "Indian company"** and **"foreign company"** have the meanings respectively assigned to them in clauses (30), (26) and (23A) of section 2 of the Income-tax Act, 1961.

14.2 Authority for Advance Ruling (Central Excise, Customs and Service Tax) [Section 28F]

Sub-section (1) empowers the Central Government to constitute an Authority for giving advance rulings to be called "the Authority for Advance Rulings (Central Excise, Customs and Service Tax)", by notification in the Official Gazette.

The Authority shall consist of following Members appointed by the Central Government, namely:

(a) a Chairperson, who is a retired Judge of the Supreme Court;

(b) an officer of the Indian Customs and Central Excise Service who is qualified to be a Member of the Board;

(c) an officer of the Indian Legal Service who is, or is qualified to be, an Additional Secretary to the Government of India [sub-section (2)].

The Central Government may authorise an Authority constituted under section 245-O of the Income-tax Act, 1961, to act as an Authority under this Chapter by issuing a notification. The provisions of this sub-section override the provisions of sub-section (1) and sub-section (2) [sub-section (2A)]. On and from the date of publication of notification under sub-section (2A), the Authority constituted under sub-section (1) shall not exercise jurisdiction under Chapter V-B of the Act [sub-section (2B)]. For the purposes of sub-section (2A), the reference to "an officer of the Indian Revenue Service who is qualified to be a Member of Central Board of Direct Taxes" in clause (b) of sub-section (2) of section 245-O of the Income Tax Act, 1961 shall be construed as reference to "an officer of the Indian Customs and Central Excise Service who is qualified to be a Member of the Board" [sub-section (2C)].**)**

On and from the date of the authorization of Authority under sub-section (2A), every application and proceeding pending before the Authority constituted under sub-section (1) shall stand transferred to the Authority so authorised from the stage at which such proceedings stood before the date of such authorization [sub-section (2D)].

The salaries and allowances payable to, and the terms and conditions of service of, the Members shall be such as the Central Government may by rules determine.

The Central Government shall provide the Authority with such officers and staff as may be necessary for the efficient exercise of the powers of the Authority under this Act. The office of the Authority shall be located in Delhi.

14.3 Application for Advance Ruling [Section 28H]

The procedure involved in making an application for advance ruling is as follows:

(1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought.

(2) The question on which the advance ruling is sought shall be in respect of the following:

(a) classification of goods under the Customs Tariff Act, 1975;

(b) applicability of a notification issued under sub-section (1) of section 25, having a bearing on the rate of duty;

(c) the principles to be adopted for the purposes of determination of value of the goods under the provisions of this Act.

(d) the applicability of notifications issued in respect of duties under the Customs Act, 1962, the Customs Tariff Act, 1975 and any duty chargeable under any other law for the time being in force in the same manner as duty of customs leviable under the Customs Act.

(e) determination of origin of the goods in terms of the rules notified under the Customs Tariff Act, 1975.

(3) The application shall be made in quadruplicate and be accompanied by a fee of two thousand five hundred rupees.

(4) An applicant may withdraw his application within thirty days from the date of the application.

14.4 Procedure on receipt of application [Section 28-I]

The following procedure is to be followed by the Advance Ruling Authority on receipt of an application for Advance Ruling.

14.4.1 Calling for relevant records: On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Principal Commissioner/Commissioner of Customs and, if necessary, call upon him to furnish the relevant records. Where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the Principal Commissioner/Commissioner of Customs.

14.4.2 Allowing or rejecting the application The Authority may, after examining the application and the records called for, by order, either allow or reject the application. However, the Authority shall not allow the application where the question raised in the application is –

(a) already pending in the applicant's case before any officer of customs, the Appellate Tribunal or any Court;

(b) the same as in a matter already decided by the Appellate Tribunal or any Court:

Further, no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard. It is also provided that where the application is rejected, reasons for such rejection shall be given in the order [Sub-section (2)].

14.4.3 Copy of every order to be sent to Principal Commissioner/Commissioner of Customs: A copy of every order made under sub-section (2) shall be sent to the applicant and to the Principal Commissioner/Commissioner of Customs. [Sub-section (3)]

14.4.4 Pronouncement of Advance Ruling: Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application. [Sub-section (4)]

14.4.5 Opportunity to an applicant of being heard: On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative. [Sub-section (5)]

Any person who is entitled or required to appear before an officer of customs or the Appellate Tribunal in connection with any proceedings under this Act, otherwise than when required under section 108 to attend personally for examination on oath or affirmation, may, subject to the other provisions of this section, appear by an authorised representative.

For the purposes of this section, "authorised representative" means a person authorised by the person referred to in sub-section (1) of Section 146 to appear on his behalf, being -

(a) his relative or regular employee; or

(b) a custom house agent licensed under section 146; or

(c) any legal practitioner who is entitled to practise in any civil court in India; or

(d) any person who has acquired such qualifications as the Central Government may specify by rules made in this behalf.

14.4.6 Time limit for pronouncing advance ruling: The Authority shall pronounce its advance ruling in writing within ninety days of the receipt of application. [Sub-section (6)]

A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the Principal Commissioner/Commissioner of Customs, as soon as may be, after such pronouncement.

14.5 Applicability of Advance Ruling [Section 28J]

(1) The advance ruling pronounced by the Authority under section 28-I shall be binding only -

  (a) on the applicant who had sought it;

  (b) in respect of any matter referred to in sub-section (2) of section 28H;

  (c) on the Principal Commissioner/Commissioner of Customs, and the customs authorities subordinate to him, in respect of the applicant.

(2) The advance ruling shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.

14.6 Advance ruling to be void in certain circumstances [Section 28K]

Where the Authority finds, on a representation made to it by the Principal Commissioner/Commissioner of Customs or otherwise, that an advance ruling pronounced by it under sub-section (6) of section 28-I has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be void *ab initio* and thereupon all the provisions of this Act shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

A copy of the order made under sub-section (1) shall be sent to the applicant and the Principal Commissioner/Commissioner of Customs.

14.7 Powers of authority [Section 28L]

The Authority shall, for the purpose of exercising its powers regarding

- discovery and inspection,
- enforcing the attendance of any person and examining him on oath,
- issuing commissions and compelling production of books of account and other records,

have all the powers of a civil court under the Code of Civil Procedure, 1908.

The Authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973, and every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code.

The Authority shall, subject to the provisions of this Chapter, have power to regulate its own procedure in all matters arising out of the exercise of its powers under this Act.

15

Miscellaneous Provisions

Sections 141 to 161 are covered under this chapter.

15.1 Conveyance and goods in a customs area subject to control of officers of customs [Section 141]

As per sub-section (1), all the conveyances and goods in a customs area shall be subject to the control of officers of customs, for the purpose of enforcing the provisions of this Act.

As per sub-section (2), the imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

In *Oswal Spg & Wvg Mills ltd vs. CC, 1988 (SC)*, goods were confiscated u/s 111(d) and (m). Section 141 provides that goods in the customs area are subject to the control of the officers of Customs. Besides, upon confiscation, the goods are vested in the Central Government. Therefore, the customs authorities could not shirk from their liability.

15.2 Recovery of sums due to Government [Section 142]

The recovery procedures of any sums due under this Act, is covered under this section. The need to recover sums due to Government normally arises in two situations:

(a) on confirmation of demand for short levy of duty; and

(b) on imposition of fine or penalty in an adjudication proceedings.

Recovery by deducting the amount payable from the money owing to the defaulter or by detaining/selling goods of the defaulter: Two methods of recovery are provided for in this section. Either of the methods can be followed to recover the dues.

Sl No.	Recovery procedure	Power given to
01	To deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs [Section 142(1)(a)].	Proper officer himself or any other officer of customs
02	By detaining and selling any goods belonging to such person which are under the control of the Asst or Deputy	Assistant Commissioner of Customs or Deputy Commissioner of Customs;

	Commissioner of Customs or such other officer of customs [Section 142(1)(b)].	or The above authorities may require any other officer of customs to recover the amount due

Recovery as arrears of land revenue or by distraining and detaining movable/immovable property of the defaulter: If the amount cannot be recovered from such person in the manner provided in sl. nos 1 and 2 above, recovery is made in the manner given below. Here again, either of the procedures can be followed to recover the dues.

Sl No.	Recovery procedure	Power given to
01	Prepare a Certificate signed by Assistant or Deputy Commissioner of Customs, specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business. Thereon the said collector shall recover the dues as if it were an arrears of land revenue [Section 142(1)(c)(i)].	Assistant Commissioner of Customs or Deputy Commissioner of Customs
02	Distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid. In case, any part of the said amount or the cost of distress remains unpaid for 30 days next after such distress, may cause the said property to be sold and satisfy the amount payable and the costs including cost of sale remaining unpaid from the sale proceeds. The surplus if any, shall be paid back to such person [Section 142(1)(c)(ii)].	The proper officer on any authorisation by a Principal Commissioner/Commissioner of Customs and in accordance with the rules made in this behalf

The proviso to section 142(1) states that if a person from whom some recoveries are due, transfers his business in whole or in part to another person, then all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the possession of the transferee can be attached and sold for recovery. An officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Principal Commissioner/Commissioner of Customs, can make such recovery.

Recovery from a person other than from whom money is due - Garnishee Proceedings [Section 142(1)(d)]: If the amount cannot be recovered in any of the manner discussed above, the Proper the Officer can recover the monies due to the Government from any person

other than from whom money is due, if that other person holds money for/on account of the first person. The procedure for the same is as under:-

(i) Issue of notice: The Proper Officer may issue a written recovery notice to the following persons:

- any person from whom money is due to such person
- any person from whom money may become due to such person
- any person who holds money for or on account of such person
- any person who may subsequently hold money for or on account of such person.

The noticee would be required to pay to the credit of the Central Government so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount.

The money would be paid either forthwith upon the same becoming due or being held, or at or within the time specified in the notice. However, in no case the money would be required to be paid before the same becomes due or is held.

(ii) Noticee bound to comply with the notice: Every person to whom a notice is issued under this sub-section shall be bound to comply with such notice. In case any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.

(iii) Consequences of default in payment by noticee: In a case where the person to whom a notice under this sub-section has been issued, fails to make the payment, he shall be deemed to be a defaulter in respect of the amount specified in the notice. Therefore, all the consequences prescribed for assessee in default would apply for such other person as well.

Sub section (2) of section 142 provides that, where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provision of that sub-section.

Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 was notified vide *Notification No. 31/95-Cus.(N.T) dt 26-5-1995* amended by *Notification No. 67/97-Cus.(N.T) dt 11-12-1997*. These rules were framed by the Central Government in exercise of the powers conferred by section 156 read with section 142 of the Customs Act. The rules give procedure for attachment of property, for sale of property and also special provisions in respect of sale of immovable property.

15.3 Liability under the Customs Act, 1962 to be first charge [Section 142A]

Notwithstanding anything to the contrary contained in any Central Act or State Act, any

amount of duty, penalty, interest or any other sum payable by an assessee or any other person under this Act, shall, save as otherwise provided in section 529A of the Companies Act, 1956, the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002, be the first charge on the property of the assessee or the person, as the case may be.

15.4 Power to allow import or export on execution of bonds in certain cases [Section143]

If the importer or exporter is unable to fulfil the conditions for import/export, the Assistant or the Deputy Commissioner of Customs can permit clearance of imported goods/or export, subject to the following:

(a) The Assistant or Deputy Commissioner of Customs can grant leave for such import/or export or clearance of goods only if he is satisfied that having regard to the circumstances of the case the leave can be granted.

(b) A bond in such amount, with such surety or security and subject to such conditions as the Asst or Deputy Commissioner approves.

On fulfillment of conditions within the time specified in the bond, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall cancel the bond as discharged in full and shall, on demand, deliver it, so cancelled, to the person who has executed or who is entitled to receive it.

If the conditions are not fulfilled within the time specified in the bond, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall, without prejudice to any other action that may be taken under this Act or any other law for the time being in force, be entitled to proceed upon the bond in accordance with law.

15.5 Power to take samples [Section 144]

This section provides the necessary power to the customs authorities to draw adequate samples of such goods in the presence of the owner of the goods.

The proper officer of the customs can take the samples for:

- examination or testing, or
- ascertaining the value thereof, or
- any other purpose of this Act.

Samples may be taken on

- the entry; or
- clearance of any goods; or
- at any time while such goods are being passed through the customs area.

After the purpose for which a sample was taken is carried out, such sample shall, if practicable, be restored to the owner, but if the owner fails to take delivery of the sample within 3 months of the date on which the sample was taken, it may be disposed of in such manner as Principal Commissioner/Commissioner of Customs may direct [Sub-section (2)]. No duty shall be chargeable on any sample of goods taken under this section which is consumed or destroyed during the course of any test or examination thereof.

Amongst several samples drawn from export goods, if one of the samples is drawn behind the back of the exporter, and such report is unfavourable to the exporter, its results cannot be relied on in an adjudication proceeding.

15.6 Customs Brokers to be licensed [Section 146]

All importers/exporters cannot be expected to have detailed working knowledge of the procedures for clearance of imported or export goods. Further, it may not be possible for the importer/exporter to come to the custom house every time and attend to the clearance formalities personally, as it would involve time and expenditure. An institution of Customs Brokers (CB) has thus arisen out of necessity. At the same time, it is necessary to ensure that such agents are knowledgeable, efficient, loyal both to the parties and Government.

Section 146 stipulates that no person shall carry of the business as customs broker relating to the entry or departure of a conveyance or the import or export of goods at any customs station unless such person holds a licence granted in this behalf in accordance with the regulations.[Sub-section (1)]

Sub-section (2) empowers the Board to make regulations for the purpose of carrying out the provisions of this section and, in particular, such regulations may provide for –

(a) the authority by which a licence may be granted under this section and the period of validity of any such licence;

(b) the form of the licence and the fees payable therefor;

(c) the qualifications of persons who may apply for a licence and the qualifications of persons to be employed by a licensee to assist him in his work as a customs broker;

(d) the manner of conducting the examination;

(e) the restrictions and conditions (including the furnishing of security by the licensee) subject to which a licence may be granted;

(f) the circumstances in which a licence may be suspended or revoked; and

(g) the appeals, if any, against an order of suspension or revocation of a licence, and the period within which such appeals may be filed.

In exercise of the above powers, the Central Board of Excise & Customs made Customs Brokers Licensing Regulations, 2013 *vide Notification No. 65/2013 Cus(NT) dated 21.6.2013*.

15.7 Appearance by authorised representative [Section 146A]

1. Any person who is entitled or required to appear before an officer of customs or the

Appellate Tribunal in connection with any proceedings under this Act, otherwise than when required under section 108 to attend personally for examination on oath or affirmation, may, subject to the other provisions of this section, appear by an authorised representative. [Sub-section (1)]

2. For the purposes of this section, **"authorised representative"** means a person authorised by the person referred to in sub-section (1) to appear on his behalf, being -

(a) his relative or regular employee; or

(b) a customs broker licensed under section 146; or

(c) any legal practitioner who is entitled to practise in any civil court in India; or

(d) any person who has acquired such qualifications as the Central Government may specify by rules made in this behalf.[Sub-section (2)]

3. The following persons shall be disqualified to represent any person under sub-section (1)–

(a) who has been dismissed or removed from Government service; or

(b) who is convicted of an offence connected with any proceeding under this Act, the Central Excise Act ,1944, or the Gold (Control) Act, 1968; or the Finance Act, 1994; or

(c) who has become an insolvent,

for such time as the Principal Commissioner/Commissioner of Customs or the competent authority under the Central Excise Act, 1944, or the Gold (Control) Act, 1968, or the Finance Act, 1994, as the case maybe, may, by order, determine in the case of a person referred to in clause (b), and for the period during which the insolvency continues in the case of a person referred to in clause (c). [Sub-section (4)]

4. If any person, -

(a) who is a legal practitioner, is found guilty of misconduct in his professional capacity by any authority entitled to institute proceedings against him, an order passed by that authority shall have effect in relation to his right to appear before an officer of customs or the Appellate Tribunal as it has in relation to his right to practise as a legal practitioner;

(b) who is not a legal practitioner, is found guilty of misconduct in connection with any proceedings under this Act by such authority as may be specified by rules made in this behalf, that authority may direct that he shall thenceforth be disqualified to represent any person under sub-section (1).

5. Any order or direction under clause (b) of sub-section (4) or clause (b) of sub-section (5) shall be subject to the following conditions, namely:-

(a) no such order or direction shall be made in respect of any person unless he has been given a reasonable opportunity of being heard;

(b) any person against whom any such order or direction is made may, within one month of the making of the order or direction, appeal to the Board to have the order or direction cancelled; and

(c) no such order or direction shall take effect until the expiration of one month from the making thereof, or, where an appeal has been preferred, until the disposal of the appeal.[Sub-section (5)]

It would be worthwhile to note that Chartered Accountants are also authorised to appear by virtue of being notified by the Government as persons who have acquired the necessary qualifications.

15.8 Liability of principal and agent [Section 147]

Section 147 stipulates that anything required to be done by the owner/importer/exporter of any goods can be done by his agent [Sub-section 1]. However, the owner/importer/exporter shall be liable for all the acts of his agent [Sub-section 2].

Further, such authorized agent will, without prejudice to the liability of the owner/ importer/ exporter be deemed to be the owner/importer/exporter of such goods for such purposes including liability therefor under this Act [Sub-section 3].

However, where any duty is not/short levied or erroneously refunded on account of reasons not involving any wilful act, negligence or default of the agent, such duty will not be recovered from the agent unless the same cannot be recovered from the owner/importer/exporter.

15.9 Procedure for sale of goods and application of sale proceeds [Section 150]

There are two situations when the customs authorities can sell the goods of the importer or the exporter.

(1) When the goods are confiscated, in which case the goods become the absolute property of the Government. When such goods are sold, the entire sale proceeds accrue to the Government.

(2) Second, when the goods are not confiscated being the following circumstances:

- Imported goods, which are not cleared either for home consumption or for warehousing within the prescribed period of 30 days and such goods, are ordered to be sold under section 48 of the Act.
- Goods belonging to any defaulter of sums due to the Government under the control of an officer of customs ordered to be attached and thereafter sold under section142 (1)(b) of the Act for the satisfaction of the above dues.
- Where a Principal Commissioner/Commissioner of Customs order distraining any movable or immovable belonging to a defaulter of customs dues under the control of an officer of customs and if needed, authorising the sale of such property, if the dues are not paid within date of such distrainment for the satisfaction of the above dues. [Refer Section 142(1)(c)(ii)]

Section 150 covers a situation where the goods are not confiscated.(ie., circumstances which are stated in (2) above).

Where any goods not being confiscated goods are to be sold under any provisions of this Act, they shall, after notice to the owner thereof, be sold by public auction or by tender or with the consent of the owner in any other manner [Sub-section(1)].

The following conditions are to be fulfilled for selling the goods under this section:

1. The goods should not have been confiscated.
2. The provisions of the Act should allow sale of such goods.
3. Notice should be given to the owner before such sale.
4. Goods can be sold in the following manner:
   - by public auction; or
   - by tender; or
   - in any other manner with the consent of the owner.

Sub-section (2) deals with application of sale proceeds. Such sale proceeds can be applied as below:

1. First, to the payment of the expenses of the sale;
2. Next, to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods;
3. Next, to the payment of the duty, if any, on the goods sold;
4. Next, to the payment of the charges in respect of the goods sold due to the person having the custody of the goods;
5. Next, to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs.

The balance, if any, shall be paid to the owner of the goods.

Where it is not possible to pay the balance of sale proceeds, if any, to the owner of the goods within a period of 6 months from the date of sale of such goods (or such further period as the Principal Commissioner/Commissioner of Customs may allow), such balance of sale proceeds shall be paid to the Central Government [Proviso to section 150(1)].

An interesting feature of this section is that the legitimate dues of other persons such as auctioneer or carrier takes precedence over the duty payable under the Act.

The Board has issued instructions about the modalities of disposal of gold, which is seized or confiscated and ripe for disposal. The Board has nominated Branches of SBI at Mumbai, Delhi, Ahmedabad, Calcutta and Chennai. Under these instructions, the Customs department is responsible for delivery of gold of requisite purity along with assaying certificate, duly packed as per the trade practice. SBI is entitled to deduct its out of pocket expenses, sales tax and other taxes. But, no commission is to be paid to SBI for selling gold on behalf of Customs department. *[CBEC Circular No. 16/2001-Cus, dated 9.3.2001]*

Goods seized from applicant, in absence of a claim from any other person claiming to be owner, applicant was entitled to get the goods on redemption, if confiscation was ordered. The goods sold pending adjudication without giving a notice to the applicant. It was held that the applicant entitled for sales proceeds as laid down in Section 150 of Customs Act, 1962.

[IN RE : A. Mahesh Raj 2007 (214) E.L.T. 588 (Sett. Comm.)]

15.10 Certain Officers required to assist officers of customs [Section 151]

The following officers are empowered and required to assist officers of customs in the execution of the Act:

(a) officers of the Central Excise department;

(b) officers of the Navy;

(c) officers of Police;

(d) officers of the Central or State Governments employed at any port or airport;

(e) such other officers of the Central or State Governments or a local authority as are specified by the Central Government in this behalf by notification in the Official Gazette.

In exercise of the powers conferred on the Central Government, the following notifications are issued:

Sl No.	Notification Number	Notification date	Officers specified
01	77-Cus	23.05.1964	The following officers of Enforcement Directorate: - Deputy Directors; - Assistant Directors, - Chief Enforcement officers, - Enforcement officers, - Assistant Enforcement officers.
02	47-Cus	09.05.1970	Central Reserve Police Force
03	18-Cus	22.01.1972	Officers of Indian Railways and Railway Protection Force in the following places: - Within 50 KM width from the border separating India from Nepal; - at New Jalpaiguri, - Howrah R.S., - Barauni R.S., - Garhara Transhipment Yard; - Katihar R.S., - Luchnow R.S., and - Bareilly R.S.

15.11 Instructions to officers of customs [Section 151A]

In the exercise of their quasi-judicial functions, the adjudicating authorities under the Customs Act are required to act independently without any bias. In *Orient Paper Mills Ltd vs. UOI 1978 (2) ELT J345 (SC): AIR 1969 SC 48.,* it was held that the adjudicating authorities were totally independent and could not be directed or guided by any instructions from administrative superiors. But, over time, particularly, in the context of section 37B of the CE Act, the Supreme Court itself has changed its view.

In practice it has been found necessary to issue some guidelines to all adjudicating and assessing authorities to ensure uniformity in decisions and practice. It has been found difficult to maintain such instruction legally, and therefore, as specific provision has been inserted by Customs (Amendment) Act 1985, whereby the CBEC has been empowered to issue such orders, instructions and directions to officers of custom in order to ensure

- uniformity in the classification of goods; or
- with respect to the levy of duty thereon
- the implementation of any other provisions of the Customs Act or of any other law for the time being in force, in so far as they relate to any prohibition, restriction or procedure for import or export of goods.

Such orders, instructions and directions may be issued to officers of customs as the board may deem fit and such officers of customs and all other persons employed in the execution of the Act shall observe and follow such orders, instructions and directions of the Board.

No such orders, instructions or directions shall be issued

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions.

The relevant Case laws are given below:

(a) When the board has issued instruction regarding classification of goods in a particular manner such instructions are binding on them, even though the circular may not recite that it has been issued in exercise of power under section 37B. This case is *pari material* with Sec. 151A. [*Ranadey Micronutrients vs. CCE, 1996 (66) ECR 638 SC: 1996 (87) ELT 19 (SC)*]

(b) A public notice issued by one Custom House will bind all Customs authorities. If the department considers that a public notice is erroneous, it must be withdrawn.[*SAIL vs. CC,2000 (115) ELT 42 (SC)*]

(c) Also refer a leading decision under the Income Tax Act, 1961, *K.P. Varghese vs. ITO AIR 1980 SC 1922 : 1981 (131) ITR 597 (SC)*. In this case, binding nature of the circulars has been discussed far more elaborately than under case laws under the Central Excise or Customs Laws.

It is necessary to at least make an attempt to reconcile the apparent contradiction between the view expressed in *Orient Paper Mills* case and the view expressed in later decisions in the preceding paragraphs. It is submitted that the correct view would be to hold that the departmental instructions such as circulars and trade notices bind the departmental authorities under all circumstances. But, they do not bind them in such a manner that even if the departmental view is antithetical to the assessee's contentions, facts and evidence on record, the adjudicating authority has to blindly follow it. In such a situation, the adjudicating authority is entitled exercise his independent judgment as a quasi-judicial authority and arrive at an independent finding. However, if the adjudicating authority fails to do so, it is open to the assessee to challenge the correctness of the departmental instruction itself, or the mindless manner in which the adjudicating authority followed such instructions. This view finds support in *CCE vs. Usha Martin Industries*, *1997 (72) ECR 257 SC 1997 (94) ELT 460 (SC)* case.

Exercise of power under section 151A of the Customs Act, 1962 is restricted to matters pertaining to classification of goods or levy of duty thereof.

[Vinod Kumar Agarwal v. UOI 2008 (223) E.L.T. 19 (Bom.)]

15.12 Delegation of powers [Section 152]

It may not always be possible to have the particular level of officer who is empowered to exercise a particular function at a particular place. For example, the Principal Commissioner/Commissioner of Customs are stationed at the head quarters of Commissionnerate. The other subordinate officers may be stationed at other points. When necessity arises to exercise the power of Principal Commissioner/Commissioner at these other points, practical difficulties arise. Depending upon the volume of such problems, and the exigencies, it is desirable to empower the subordinate officer already available at the particular station to exercise the powers of his immediate superior officer. Section 152 envisages delegation of the powers to the next immediately subordinate authority.

The Central Government may, by notification in the Official Gazette, direct that subject to such conditions, if any, as may be specified in the notification -

(a) any power exercisable by the Board under this Act shall be exercisable also by a Principal Chief Commissioner/Chief Commissioner of Customs or a Principal Commissioner/Commissioner of Customs empowered in this behalf by the Central Government;

(b) any power exercisable by a Principal Commissioner/Commissioner of Customs under this Act may be exercisable also by a Joint Commissioner of Customs or an Assistant Commissioner of Customs or Deputy Commissioner of Customs empowered in this behalf by the Central Government;

(c) any power exercisable by a Joint Commissioner of Customs under this Act may be exercisable also by an Assistant Commissioner of Customs or Deputy Commissioner of Customs empowered in this behalf by the Central Government;

(d) any power exercisable by an Assistant Commissioner of Customs or Deputy Commissioner of Customs under this Act may be exercisable also by a Gazetted Officer

of Customs empowered in this behalf by the Board.

Some of the major notifications are given below:

1. The power of CBEC u/s 105(1) i.e. power to search premises, may be exercised by Principal Commissioner/Commissioner of Central Excise who are Principal Commissioners/Commissioners of Customs by virtue of Notification issued in this regard [*M.F. (D.R.) Notification No.22-Cus, dt 6-2-1965 as amended by Notification No.54-Cus. dt 24-5-1965*].
2. Board's powers under section 109 is delegated to certain Principal Commissioners/Commissioners in respect of goods imported by land [*M.F. (D.R.& I.) Notification No.121-Cus. dt 18-6-1966*]
3. Every Principal Commissioner/Commissioner of Customs authorised to exercise Board's powers under clause (ii) of the first proviso to section 61 subject to conditions laid out in the notification. [*M.F. (D.R. & I.) Notification No.100-Cus. dt 5-12-1975 as amended by Notification No.144-Cus. dt 24-7-1978*].

15.13 Service of order, decision, etc. [Section 153]

The date of service of an order or a communication containing a decision is of vital importance, in case the aggrieved party desires to file an appeal. The time limit allowed for appeal normally runs from the date of receipt of the communication containing the impugned decision by the aggrieved person. There are circumstances where it is not effectively possible to ensure that such communications are received by the concerned party. There are other circumstances where disputes arise about the actual date of the receipt of communication. These two problems have necessitated a uniform procedure for dispatch and service of orders, decisions, summons and other communications issued under the Customs Act. Section 153 provides the specific mode of service in this regard which is reproduced below.

Any order or decision passed or any summons or notice issued under this Act, shall be served–

(a) by tendering the order, decision, summons or notice or sending it by registered post or by such courier as may be approved by the Principal Commissioner/Commissioner of Customs; or

(b) if the order, decision, summons or notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house.

This provision is identical to section 37C of the Central Excise Act, but with an important difference. Clause (b) of that section provides for service of notice by affixture on the wall or door of the residence or office of the noticee. However, under section 153, affixture on the notice board of the custom house is the last method of service. It is neither clear nor does it stand to reason, why there is no provision similar to section 37C(b) of the Central Excise Act.

Section 153 indicates that in giving notice under the Act, receipt by the addressee is not relevant. What is relevant is issuing of notice in any one of the manners provided in this section. Therefore, it follows that the show cause notice issued within the period of six months

as stipulated under section 110 has been properly served [*Ambali Karthikeyan vs. CC & CE 2000 (125) ELT 517 (Mad)*]

15.14 Rounding off of duty, etc. [Section 154A]

This section provides for the rounding off of the duty or any other sum payable under this Act. This provision is invariably found in all tax laws. The section is reproduced below:

The amount of duty, interest, penalty, fine or any other sum payable, and the amount of refund, drawback or any other sum due, under the provisions of this Act shall be rounded off to the nearest rupee and, for this purpose, where such amount contains a part of a rupee consisting of paise then, if such part is fifty paise or more, it shall be increased to one rupee and if such part is less than fifty paise it shall be ignored.

15.15 Information in respect of persons in certain cases to be published [Section 154B]

(1) The Central Government may publish name of any person and any other particulars relating to any proceedings in respect of such person if it is of the opinion that it is necessary or expedient in the public interest to do so. The Government can do the publication in such manner as it thinks fit.

(2) The publication shall be made in relation to any penalty only after the time for presenting an appeal to the Commissioner (Appeals) or the Appellate Tribunal expires without an appeal being presented or the appeal, if presented, gets disposed of.

(3) In the case of a firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, may also be published if, in the opinion of the Central Government, circumstances of the case justify it.

15.16 General power to make rules [Section 156]

The Central Government is empowered to make rules consistent with this Act generally to carry out the purposes of this Act. In particular, such rules may provide for all or any of the following matters, namely:

(a) the manner of determining the transaction value of the imported goods and export goods under sub-section (1A) of section 14;

(b) the conditions subject to which accessories of, and spare parts and maintenance and repairing implements for, any article shall be chargeable at the same rate of duty as that article;

(c) the detention and confiscation of goods the importation of which is prohibited and the conditions, if any, to be fulfilled before such detention and confiscation and the

information, notices and security to be given and the evidence requisite for the purposes of such detention or confiscation and the mode of verification of such evidence;

(d) the reimbursement by an informant to any public officer of all expenses and damages incurred in respect of any detention of any goods made on his information and of any proceedings consequent on such detention;

(e) the information required in respect of any goods mentioned in a shipping bill or bill of export which are not exported or which are exported and are afterwards re-landed;

(f) the publication, subject to such conditions as may be specified therein, of names and other particulars of persons who have been found guilty of contravention of any of the provisions of this Act or the rules.

(g) the amount to be paid for compounding *and the manner of compounding* under sub-section (3) of section 137.

15.17 General power to make regulations [Section 157]

This section empowers the Board to make regulations consistent with this Act and the rules, generally to carry out the purposes of this Act. In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the form of a bill of entry, shipping bill, bill of export, import manifest, import report, export manifest, export report, bill of transhipment, declaration for transhipment, boat note and bill of coastal goods;

(ai) the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under section 26A(1)(d);

(aii) the form and manner of making application for refund of duty under sub-section (2) of section 26A.

(aa) the form and manner in which an application for refund shall be made under section 27;

(b) the conditions subject to which the transhipment of all or any goods under sub-section (3) of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;

(c) the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65.

(d) the manner of conducting audit of the assessment of duty of the imported or export goods at the office of the proper officer or the premises of the importer or exporter, as the case may be.

15.18 Provisions with respect to rules and regulations [Section 158]

All rules and regulations made under this Act shall be published in the Official Gazette.

Any rule or regulation which the Central Government or the Board is empowered to make under this Act may provide –

(i) for the levy of fees in respect of applications, amendment of documents, furnishing of duplicates of documents, issue of certificates, and supply of statistics, and for rendering of any services by officers of customs under this Act;

(ii) that any person who contravenes any provision of a rule or regulation or abets such contravention or who fails to comply with any provision of a rule or regulation with which it was his duty to comply, shall be liable to a penalty which may extend to ₹ 50,000.

16

FOREIGN TRADE POLICY

16.1 Introduction

Foreign Trade Policy is a set of guidelines or instructions issued by the Central Government in matters related to import and export of goods in India viz., **foreign trade**. In the era of globalization, foreign trade has become the lifeline of any economy. Its primary purpose is not merely to earn foreign exchange, but also to stimulate greater economic activity. International trade not only enables a nation to specialize in the goods which it can produce most cheaply and efficiently, but also to consume more than it would be able to produce with its own resources. International trade enlarges the potential markets for the goods of a particular economy.

Legislation governing foreign trade: In India, Ministry of Commerce and Industry governs the affairs relating to the promotion and regulation of foreign trade. The main legislation concerning foreign trade is the **Foreign Trade (Development and Regulation) Act, 1992 FT(D&R) Act**. The FT(D&R) Act provides for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto. As per the provisions of the Act, the Government:-

(i) may make provisions for facilitating and controlling foreign trade;

(ii) may prohibit, restrict and regulate exports and imports, in all or specified cases as well as subject them to exemptions;

(iii) is authorised to formulate and announce an export and import policy and also amend the same from time to time, by notification in the Official Gazette;

(iv) is also authorised to appoint a 'Director General of Foreign Trade' for the purpose of the Act, including formulation and implementation of the export-import policy.

Foreign Trade Policy: In exercise of the powers conferred by the FT(D&R) Act , the Union Ministry of Commerce and Industry, Government of India generally announces the integrated **Foreign Trade Policy (FTP)** every five years with certain underlined objectives. The Foreign Trade Policy was earlier called as Export Import policy i.e., EXIM Policy. However, export import policy is now referred to as Foreign Trade Policy (FTP) of the country as it covers areas much beyond export and import. This policy is updated every year, in addition to changes that are made throughout the year.

The FTP, in general, aims at developing export potential, improving export performance, encouraging foreign trade and creating favorable balance of payments position. The policies are driven by factors like export led growth, improving efficiency and competitiveness of the

Indian industries, ease of doing business etc.

Salient Features of an FTP: The following are some of the key attributes of the FTP:

- Export-Import of goods and services is generally free unless specifically regulated by the provisions of the Policy or any other law for the time being in force.
- Export and import goods are broadly categorized as – (a) Free (b) Restricted (c) Prohibited.
- Some goods are 'free' for import and export but can be imported/exported only through State Trading Enterprises (STE).
- There are restrictions on exports and imports for various strategic, health, defence, environment, and other reasons. If the goods are restricted for import/export but not prohibited, the Government can give a permission/license for specific reasons.
- Exports are promoted through various promotional schemes.
- Goods and services are to be exported and not taxes. Hence, the taxes on exports are either exempted or adjusted or refunded on both outputs and inputs, through schemes of Duty Exemption, Duty Refund (Drawbacks and Rebates).
- Capital goods can be imported at NIL duty for the purpose of exports under the scheme of EPCG.
- For units undertaking to export all their production, there are special schemes so that they can avoid taxes at every stage under the scheme of EOU/SEZ.
- In certain cases imports get duty exemption/concession for certain special purposes. In such cases, to enable domestic suppliers compete with the international suppliers, the supplies of domestic suppliers are treated as deemed exports.
- Duty credit scrips Schemes are designed to promote exports of some specified goods to specified markets and to promote export of specified services.

Foreign Trade Policy 2015-2020 - The present Foreign Trade Policy, which was announced on 01.04.2015, is an integrated policy for the period between 01.04.2015 and 31.03.2020.

Guiding principles: The guiding principles of FTP 2015-2020 are as follows –

- Generation of employment and increasing value addition in country, in keeping with 'Make in India' vision.
- Focus on improving 'ease of doing business' and 'trade facilitation' by simplifying procedures and extensive use of e-governance – move towards paperless working.
- Encouraging e-commerce exports of specified products.
- Steps to encourage manufacture and export by SEZ, EOU, STP, EHTP and BTP.
- Duty credit scrips to (a) encourage exports of specified products to specified markets (b) export of services.
- Special efforts to resolve quality complaints and trade disputes.

The various measures taken in said direction include:

- The number of mandatory documents required for exports and imports of goods from/into India have been reduced to 3 each (discussed in detail in subsequent pages).
- The facility of 24 X 7 Customs clearance for specified imports has been made available at the 18 specified sea ports. The facility of 24 X 7 Customs clearance for specified imports has also been made available at the 17 specified air cargo complexes.
- Single window scheme has been introduced to enable importer and exporter to lodge their clearance documents at a single point thereby providing a common platform to trade to meet requirements of all regulatory agencies involved in exim trade.
- To facilitate processing of shipping bills before actual shipment, prior online filing facility for shipping bills has been provided by the Customs - 7 days for air shipments & ICDs and 14 days for shipments by sea.
- DGFT under the EDI initiatives has provided the facility of on line filing of applications to obtain Importer Exporter Code and various authorizations /scrips.

Exports from and imports in India, need a lot of regulatory requirements to be complied with at various stages. Yet if properly planned, exports and imports can utilize a lot benefits that are available under various provisions of the FTP. The policy not only prescribes the guidelines as to which goods and services can be imported/exported and the relevant procedures thereto but also provides a lot of benefits if properly planned.

Schemes like Duty Exemption Schemes, EPCG Schemes, Deemed Exports, etc., benefit exporters, importers and even defined domestic businesses thereby assisting all businesses to reduce costs at every stage in the value chain. In addition, exporters can avail other benefits under promotional schemes.

Administration of the FTP: The FTP is formulated, controlled and supervised by the office of the Director General of Foreign Trade (DGFT), an attached office of the Ministry of Commerce & Industry, Government of India. DGFT has several offices in various parts of the country which work on the basis of the policy formed by the headquarters at Delhi.

DGFT issues **authorization** (earlier called as licence) for import/export. 'Authorization' means a permission in terms of the FT(D&R) Act to import or export. It also grants **Importer Exporter Code** (IEC) Number to importers and exporters. Import and Export without IEC number is not permitted, unless specifically exempted.

Decision of DGFT is final and binding in respect of interpretation of any provision of foreign trade policy, classification of any item in ITC(HS), content scope or issue of any authorization issued under the FTP.

Other authorities involved: Though the FTP is formulated by DGFT, it is administered in close coordination with other agencies. Other important authorities dealing with FTP are:

(1) Central Board of Excise and Customs (CBEC): CBEC comes under Ministry of Finance and its two Departments namely, Customs and Central Excise facilitate in implementing the provisions of the FTP.

Customs Department is responsible for clearance of export and import goods after their valuation and examination. Customs authorities follow the policy formed by the DGFT while clearing the goods. Since there is a central excise duty on almost all the manufactured products, Central Excise authorities need to be involved for all matters of exports, where goods have to be cleared without duty. Central Excise Department works as Customs Departments at various required places, and has a crucial role in the procedural aspects.

(2) Reserve Bank of India (RBI): RBI is the nodal bank in the country which formulates the policies related to management of money, including payments and receipts of foreign exchange. It also monitors the receipt and payments for exports and imports. RBI works under the Ministry of Finance.

(3) State VAT Departments: Since VAT is payable on domestic goods but not on export goods, formalities with State VAT departments assume importance in ensuring tax free exports.

Contents of Foreign Trade Policy:

The contents of the FTP 2015-2020 are as follows

(i) FTP 2015-2020: having 9 Chapters giving basic policy. This has been notified by the Central Government on 01.04.2015. The policy is amended normally in April every year and also during the year.

(ii) Handbook of Procedures 2015-2020: (HBP 2015-2020) containing 9 chapters, covering procedural aspects of policy. This has been notified by Director General of Foreign Trade on 01.04.2015. It is amended from time to time as per requirements.

(iii) Appendices and Aayat Niryat Forms (AANF): containing various appendices and forms relating to import and export.

(iv) Standard Input-Output Norms: Standard Input-Output Norms (SION) of various products are notified from time to time.. Based on SION, exporters are provided the facility to make duty-free import of inputs required for manufacture of export products under the Duty Exemption Schemes like Advance Authorisation and DFIA.

(v) ITC(HS) Classification of Exports and Import Items: The Export Import Policy regarding import or export of a specific item is given in the Indian Trade Classification Code based on Harmonized System of Coding [ITC(HS)]. ITC-HS Coding was adopted in India for import-export operations. Indian custom uses eight digit ITC-HS Codes to suit the national trade requirements.

ITC-HS codes are divided into two schedules. **ITC(HS) Import Schedule I** describe the rules and guidelines related to import policies where as **Schedule II** describe the rules and regulation related to export policies. Presently, most of the goods can be imported without any authorization. Schedule II contains very few products, where export is prohibited or restricted. Excluding those items, export of all other goods is free.

Any changes or formulation or addition of new codes in ITC-HS Codes are carried out by DGFT (Directorate General of Foreign Trade).

Foreign Trade Policy *vis a vis* tax laws: The Foreign Trade Policy is closely knit with the Customs and Excise laws of India. However, the policy provisions *per-se* do not override tax laws.

The exemptions extended by FTP are given effect to by issue of notifications under respective tax laws (e.g., Customs Tariff Act). Thus, actual benefit of the exemption depends on the language of exemption notifications issued by the CBEC. In most of the cases the exemption notifications refer to policy provisions for detailed conditions. Ministry of Finance/ Tax Authorities cannot question the decision of authorities under the Ministry of Commerce (so far as the issue of authorization etc. is concerned).

FTP, Handbook of procedures under FTP, Central Excise Act and Customs Act and notifications issued hereunder form an integrated scheme of indirect taxation. All these statues have to be read as a whole and not in isolation, since they are series of statues relating to same subject matter.

Scope of FTP: The FTP covers the policies and regulations with respect to the following matters:

(i) Legal framework and trade facilitation – Chapter 1

(ii) Policy for regulating import and export of goods and services – Chapter 2

(iii) Export Promotional Measures – Export from India Scheme – Chapter 3

(iv) Duty Remission and Duty Exemption Scheme for promotion of exports – AA and DFIA and duty drawback – Chapter 4

(v) Export promotion Capital Goods (EPCG) Scheme – Chapter 5

(vi) Export Oriented Undertakings (EOU) / Electronic Hardware Technology Park (EHTP) / Software Technology Park (STP) and Bio Technology Parks (BTU) Schemes – Chapter 6

(vii) Deemed Exports – Chapter 7

(viii) Quality Complaints and Trade Disputes – Chapter 8

(ix) Definitions – Chapter 9

Provisions relating to Special Economic Zone (SEZ) are contained in a separate Act and are not part of FTP. However, provisions of SEZ are closely related to Foreign Trade Policy.

Handbook of Procedures (HBP 2015-2020) has 9 corresponding chapters which mainly deal with procedural aspects of the foreign trade policy.

Special Focus Initiatives: The FTP provides certain special focus initiatives for Market Diversification, Technological Upgradation, Support to status holders, Agriculture, Handlooms, Handicraft, Gems & Jewellery, Leather, Marine, Electronics and IT Hardware Manufacturing Industries, Green products, Exports of products from North-East, Sports Goods and Toys sectors wherein the Government of India shall make concerted efforts to promote exports.

Board of Trade: Board of Trade (BOT) has been constituted to advise Government on Policy measures for increasing exports, review export performance, review policy and procedures for imports and exports and examine issues relevant for promotion of India's foreign trade. Commerce & Industry Minister will be the Chairman of the BOT. Government shall also nominate upto 25 persons, of whom at least 10 will be experts in trade policy. In addition, Chairmen of recognized Export Promotion Councils (EPCs) and President or Secretary-Generals of National Chambers of Commerce will be ex-officio members. BOT will meet at least once every quarter.

Trade facilitation through EDI initiatives: DGFT has put in place a robust EDI system for the purpose of export facilitation and good governance. DGFT has set up a secured EDI message exchange system for various documentation related activities including import and export authorizations established with other administrative departments, namely, Customs, Banks and EPCs. This has reduced the physical interface of exporters and importers with the Government Departments and is a significant measure in the direction of reduction of transaction cost. The endeavour of DGFT has been to enlarge the scope of EDI to achieve higher level of integration with partner departments. E-BRC (Electronic Bank Realisation Certificate) has enabled DGFT to capture details of realisation of export proceeds directly from the banks through secured electronic mode. Further, an online complaint registration and monitoring system allows users to register complaint and receive status/ reply online.

DGCI&S Commercial Trade Data: DGCI&S has put in place a Data Suppression Policy. Transaction level data would not be made publically available to protect privacy. DGCI&S trade data shall be made available at aggregate level with a minimum possible time lag in a query based structured format on commercial criteria.

16.2 Provisions regarding imports and exports

A. GENERAL PROVISIONS APPLICABLE TO IMPORT AND EXPORT OF GOODS

1. Exports and imports are free unless regulated: Exports and Imports shall be free, except where regulated by FTP or any other law in force. The item wise export and import policy shall be specified in ITC(HS) notified by DGFT from time to time. These are classified as – (a) Free (b) Restricted (c) Prohibited (d) Exclusive trading through State Trading Enterprise (STEs).

2. Compliance with laws: Every exporter or importer shall comply with the provisions of the FT (D&R) Act, the rules and orders made there-under, the FTP and terms and conditions of any authorization granted to him. All imported goods shall also be subject to domestic laws, rules, orders, regulations, technical specifications, environmental and safety norms as applicable to domestically produced goods unless specifically exempted.

3. Interpretation of policy: If any question or doubt arises in respect of interpretation of any provision, said question or doubt shall be referred to DGFT whose decision thereon shall be final and binding.

4. Procedure: DGFT may specify procedure to be followed by an exporter or importer or by any licencing or any other competent authority for the purpose of implementing provisions of Foreign Trade Act, the rules and the orders made there-under and FTP. Such procedures shall be published in Hand Book of Procedures by means of a Public Notice, and may, in like manner, be amended from time to time.

5. Exemption from Policy/Procedure: DGFT may pass such orders or grant such relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade. DGFT may, in public interest, exempt any person or class or category of persons from any provision of FTP or any procedure and may, while granting such exemption, impose such conditions as he may deem fit.

6. Principles of Restriction: DGFT may, through a notification, adopt and enforce any measure necessary for:

(a) **Protection** of:-

(i) public morals.

(ii) human, animal or plant life or health.

(iii) patents, trademarks and copyrights and the prevention of deceptive practices.

(iv) national treasures of artistic, historic or archaeological value

(v) trade of fissionable material or material from which they are derived

(b) **Prevention** of traffic in arms, ammunition and implements of war and use of prison labour.

(c) **Conservation** of exhaustible natural resources.

7. Export/import of restricted goods/services: Any goods/services, export or import of which is restricted under ITC(HS) may be exported or imported only in accordance with an Authorization or in terms of a public notice/notification issued in this regard.

8. Terms and Conditions of an authorization: Every Authorization shall be valid for prescribed period of validity and shall, *inter alia,* include the following terms and conditions (as applicable) in addition to such other conditions as may be specified:

(a) Quantity, description and value of goods;

(b) Actual User condition;

(c) Export obligation;

(d) Minimum Value Addition to be achieved;

(e) Minimum export/ import price; and

(f) Bank Guarantee/ Legal Undertaking/ Bond with Customs Authority/ RA.

9. Authorization not a right: No person may claim an Authorization as a right and DGFT or RA shall have power to refuse to grant or renew the same in accordance with provisions of FT(D&R) Act, rules made there under and FTP.

10. Penalty: If an authorization holder violates any condition of such authorization or fails to fulfill export obligation, he shall be liable for action in accordance with FT (D&R) Act, the Rules and Orders made there under, FTP and any other law for time being in force.

11. State Trading Enterprises (STEs): STEs are governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and/or import. Any goods, import or export of which is governed through exclusive or special privileges granted to State Trading Enterprises [STE(s)], may be imported or exported by STE(s) as per conditions specified in ITC(HS). DGFT may, however, grant an authorization to any other person to import or export any of these goods.

12. Importer-Exporter Code (IEC): It is a unique 10 digit code issued by DGFT to a person. IEC is mandatory to export any goods out of India or to import any goods into India unless specifically exempt. Permanent Account Number (PAN) is pre-requisite for grant of an IEC. Only one IEC can be issued against a single PAN.

An application for IEC is to be made manually to the nearest RA (Regional Authority) of DGFT or alternatively, it can be filed online, in Form ANF 2A and shall be accompanied by prescribed documents. In case of STPI/ EHTP/ BTP units, the Regional Offices of the DGFT having jurisdiction over the district in which the Registered/ Head Office of the STPI unit is located shall issue or amend the IECs.

13. Trade with neighbouring countries: DGFT may issue instructions or frame schemes as may be required to promote trade and strengthen economic ties with neighbouring countries.

14. Transit facility: Transit of goods through India from/ or to countries adjacent to India shall be regulated in accordance with bilateral treaties between India and those countries and will be subject to such restrictions as may be specified by DGFT in accordance with international conventions.

15. Mandatory documents for export/import of goods from/into India:

(a) Mandatory documents required for export of goods from India:

1. Bill of Lading/Airway Bill/Lorry Receipt/Railway Receipt/Postal Receipt
2. Commercial Invoice cum Packing List*
3. Shipping Bill/Bill of Export

(b) Mandatory documents required for import of goods into India

1. Bill of Lading/Airway Bill/Lorry Receipt/Railway Receipt/Postal Receipt
2. Commercial Invoice cum Packing List*
3. Bill of Entry

***Note:** As per CBEC *Circular No. 01/15-Customs dated 12/01/2015*, separate Commercial Invoice and Packing List would also be accepted.

B. PROVISIONS RELATING TO IMPORT OF GOODS

1. Actual user condition: Goods which are importable without any restriction, may be imported by any person. However, if such imports require an Authorization, actual user alone may import such goods unless actual user condition is specifically dispensed with by DGFT.

2. Second hand goods: Import of second hand capital goods, including refurbished/ re-conditioned spares shall be allowed freely. However, second hand personal computers/ laptops, photocopier machines, air conditioners, diesel generating sets will only be allowed against authorisation. Second hand (used) goods, [except second hand capital goods], shall be restricted for imports and may be imported only against Authorization.

3. Removal of scrap/ waste from SEZ: Any waste or scrap or remnant including any form of metallic waste & scrap generated during manufacturing or processing activities of an SEZ

Unit/ Developer/ Co-developer shall be allowed to be disposed in DTA (Domestic Tariff Area) freely, subject to payment of applicable customs duty.

4. Import of gifts and samples: Import of gifts shall be permitted where such goods are otherwise freely importable under ITC(HS). In other cases, a Customs Clearance Permit (CCP) shall be required from DGFT. Further, import of samples shall be governed by the prescribed procedures. Authorisation for import of samples is required only in case of vegetable seeds, bees and new drugs. Samples of tea upto ₹ 2,000 (CIF) per consignment will be allowed without authorization. Samples upto ₹ 3,00,000 can be imported by all exporters without duty.

5. Passenger Baggage:

(a) Bonafide household goods and personal effects may be imported as part of passenger baggage as per limits, terms and conditions thereof in the Baggage Rules, 1998.

(b) Samples of such items that are otherwise freely importable under FTP may also be imported as part of passenger baggage without an Authorization.

(c) Exporters coming from abroad are also allowed to import drawings, patterns, labels, price tags, buttons, belts, trimming and embellishments required for export, as part of their passenger baggage without an Authorization.

Note: Baggage provisions have been discussed in detail in Chapter-7- Importation, Exportation and Transportation of Goods.

6. Re-import of goods repaired abroad: Capital goods, equipments, components, parts and accessories, whether imported or indigenous, except those restricted under ITC(HS) may be sent abroad for repairs, testing, quality improvement or upgradation or standardization of technology and re-imported without an Authorization.

7. Import of goods used in projects abroad: After completion of projects abroad, project contractors may import, without an Authorization, goods including capital goods used in the project provided they have been used for at least one year.

8. Sale on high seas: Sale of goods on high seas for import into India may be made subject to FTP or any other law in force.

9. Import under lease financing: It is freely permitted. Permission of Regional Authority is not required for import of capital goods under lease financing. However, RBI approval is required in some cases.

10. Clearance of goods from customs: Goods already imported/ shipped/ arrived, in advance, but not cleared from customs may also be cleared against an Authorization issued subsequently. However, this facility will not be available to restricted items or items traded through STEs.

11. Execution of BG/ LUT: Whenever goods are imported duty free or otherwise specifically stated, importer shall execute prescribed LUT (Letter of Undertaking)/ BG (Bank Guarantee)/ Bond with Customs Authority before clearance of goods. In case of indigenous sourcing,

Authorization holder shall furnish LUT/ BG/ Bond to RA concerned before sourcing material from indigenous supplier/ nominated agency as per the prescribed procedures.

12. Private/ public bonded warehouses for imports: Private/ public bonded warehouses may be set up in DTA (Domestic Tariff Area) as per terms and conditions of notification issued by DoR. Any person may import goods, except prohibited items, arms and ammunition, hazardous waste and chemicals and warehouse them in such bonded warehouses. Such goods may be cleared for home consumption against authorisation, whenever required. Customs duty as applicable shall be paid at the time of clearance of such goods. If such goods are not cleared for home consumption within a period of one year or such extended period as the custom authorities may permit, importer of such goods shall re-export the goods.

C. PROVISIONS RELATING TO EXPORT OF GOODS

1. Free exports: All goods may be exported without any restriction except to the extent that such export is regulated by ITC(HS) or any other provision of FTP or any other law for the time being in force. DGFT may however, specify through a public notice such terms and conditions according to which any goods, not included in ITC(HS), may be exported without an Authorization.

2. Export of samples: Export of samples and free of charge goods shall be governed by prescribed procedures. Export of bona fide trade and technical samples of freely exportable item shall be allowed without any limit. In case of restricted items, application should be made to DGFT. Such samples can be exported as part of passenger baggage without an Authorisation.

3. Export of passenger baggage: Bonafide personal baggage may be exported either along with passenger or, if unaccompanied, within one year before or after passenger's departure from India. However, items mentioned as restricted in ITC(HS) shall require an Authorization. Government of India officials proceeding abroad on official postings shall, however, be permitted to carry alongwith their personal baggage, food items (free, restricted or prohibited) strictly for their personal consumption. Samples of such items that are otherwise freely exportable under FTP may also be exported as part of passenger baggage without an Authorisation.

4. Export of gifts: Goods, including edible items, of value not exceeding ₹ 5,00,000 in a licensing year, may be exported as a gift. However, items mentioned as restricted for exports in ITC(HS) shall not be exported as a gift, without an Authorization. For export of samples/gifts/ spares/ replacement goods (other than SCOMET items) in excess of ceiling/period, application can be made to DGFT in form ANF-2Q.

5. Export of spares: Warranty spares (whether indigenous or imported) of plant, equipment, machinery, automobiles or any other goods, [except those restricted under ITC(HS)] may be exported along with main equipment or subsequently, but within contracted warranty period of such goods subject to approval of RBI.

6. Third party exports: Third-party exports means exports made by an exporter or manufacturer on behalf of another exporter(s). In such cases, export documents such as shipping bills shall indicate name of both manufacturing exporter/manufacturer and third party

exporter(s). BRC, GR declaration, export order and invoice should be in the name of third party exporter. Such third party exports shall be allowed under FTP.

7. Export of imported goods: Goods imported, in accordance with FTP, may be exported in same or substantially the same form without an Authorization, provided that an item to be imported or exported is not restricted for import or export in ITC(HS).

Exports of such goods imported against payment in freely convertible currency would be permitted provided export proceeds are realized in freely convertible currency. However, export of such goods to notified countries will be permitted in Indian rupees subject to at least 15% value addition. Such exports shall not be eligible for any export incentives.

8. Export of replacement goods: Goods or parts thereof on being exported and found defective/ damaged may be replaced free of charge by the exporter and such goods shall be allowed clearance by customs authorities, provided that replacement goods are not mentioned as restricted items for exports in ITC(HS).

9. Export of repaired goods: Goods or parts exported and found defective, damaged or otherwise unfit for use may be imported for repair and subsequent re-export. Such goods shall be allowed clearance without an Authorization and in accordance with customs notification.

However, re-export of such defective parts/spares by the Companies/firms and Original Equipment Manufacturers shall not be mandatory if they are imported exclusively for undertaking root cause analysis, testing and evaluation purpose.

10. Private Bonded Warehouses for exports: Private bonded warehouses, which are set up exclusively for exports shall be entitled to procure goods from domestic manufacturers without payment of duty. Supplies made by a domestic supplier to such notified warehouses shall be treated as physical exports provided payments are made in free foreign exchange.

11. Denomination of export contracts: All export contracts and invoices shall be denominated either in freely convertible currency or Indian rupees but export proceeds shall be realised in freely convertible currency. However, export proceeds against specific exports may also be realized in rupees, provided it is through a freely convertible Vostro account of a non resident bank situated in any country other than a member country of Asian Clearing Union (ACU) or Nepal or Bhutan. Additionally, rupee payment through Vostro account must be against payment in free foreign currency by buyer in his non-resident bank account.

Free foreign exchange remitted by buyer to his non-resident bank (after deducting the bank service charges) on account of this transaction would be taken as export realization under export promotion schemes of FTP. Contracts for which payments are received through ACU shall be denominated in ACU Dollar. Central Government may relax provisions in this regard in appropriate cases. Export contracts and invoices can be denominated in Indian rupees against EXIM Bank/ Government of India line of credit.

12. Non-realisation of export proceeds: If an exporter fails to realise export proceeds within time specified by RBI, he shall, without prejudice to any liability or penalty under any law in force, be liable to action in accordance with provisions of FT(D&R) Act, rules and orders made thereunder and provisions of FTP.

13. Free movement of export goods: Consignments of items meant for exports shall not be withheld/ delayed for any reason by any agency of Central/ State Government. In case of any doubt, authorities concerned may ask for an undertaking from exporter and release such consignment.

14. No seizure of export related stock: No seizure of stock shall be made by any agency so as to disrupt manufacturing activity and delivery schedule of exports. In exceptional cases, concerned agency may seize the stock on basis of prima facie evidence of serious irregularity. However, such seizure should be lifted within 7 days unless the irregularities are substantiated.

D. Personal hearing by DGFT for Grievance Redressal:

Government is committed to easy and speedy redressal of grievances from Trade and Industry. As a last resort to redress grievances of Foreign Trade players, DGFT may provide an opportunity for Personal hearing before Policy Relaxation Committee (PRC) subject to fulfillment of certain conditions.

Export Promotion Councils: Basic objective of Export Promotion Councils (EPCs) is to promote and develop Indian exports. Each Council is responsible for promotion of a particular group of products, projects and services.

Registration-cum-Membership Certificate (RCMC): Any person, applying for an Authorization to import/ export, or any other benefit or concession under FTP shall be required to furnish on DGFT's website in the Importer Exporter profile, RCMC granted by competent authority. For instance, Certificate of Registration as Exporter of Spices (CRES) issued by Spices Board shall be treated as RCMC for the purposes under this Policy.

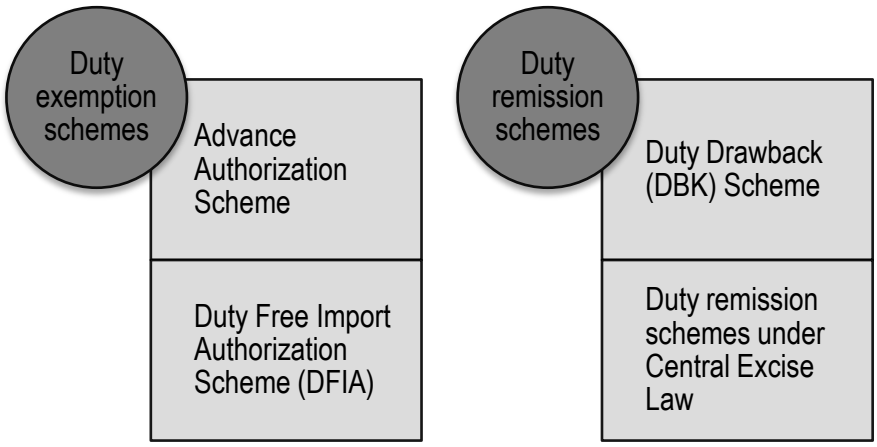
16.3 Export promotion schemes

Exports of a country play an important role in the economy. Government always endeavors to encourage exports by introducing various export promotion schemes. Consequently, there are various promotional measures under FTP and other schemes operated under Ministry of Commerce through various Export Promotion Councils.

As per WTO, export incentives cannot be given to the exporters as such otherwise there would be no free competition. Hence, all the export promotion schemes in India are directed towards ensuring that the inputs as well as final products are made tax-free.

(1) DUTY EXEMPTION & REMISSION SCHEMES

The Duty Exemption and Remission Schemes are the most important schemes in the Foreign Trade Policy, because they are most widely utilized and are largely compatible with the provisions of the Agreement on Subsidies and Countervailing Measures (ASCM) of the WTO.



(A) Duty exemption schemes: Under duty exemption schemes, exporter can import the inputs duty free for export production. The two duty exemption schemes are as follows:-

1. Advance Authorization Scheme
2. Duty Free Import Authorization Scheme (DFIA)

(B) Duty remission schemes: Under duty remission scheme, duty on inputs and input services used in the export product is either replenished or remitted. Duty Drawback (DBK) Scheme is designed for this purpose. Duty remission is also granted under central excise law, through CENVAT credit scheme and rules 18 and 19 of Central Excise Rules, 2002.

Duty exemption schemes

1. ADVANCE AUTHORIZATION SCHEME

- Under advance authorization scheme, **INPUTS** which are used in the export product can be imported without payment of customs duty.
- The goods imported are exempt from basic customs duty, additional customs duty, education cess, anti-dumping duty and safeguard duty, unless otherwise specified. The conditions for duty free imports against physical exports are provided in notification issued under the Customs law.
- Advance Authorisation shall be valid for 12 months from the date of issue of such Authorisation. Advance Authorisation for Deemed Export shall be co-terminus with contracted duration of project execution or 12 months from the date of issue of Authorisation, whichever is more.
- Period of fulfillment of export obligation under Advance Authorization is 18 months from the date of issue of Authorization or as notified by DGFT.
- Exports proceeds shall be realized in freely convertible currency except otherwise specified.

(i) Advance Authorisation on basis of SION: Advance Authorization is issued for inputs in relation to the resultant product on the basis of SION. If SION for a particular item is not fixed, Advance Authorisation can be issued by RA based on self declaration by applicant, except certain specified products.

> **Standard Input Output Norms (SION)** are standard norms which define the amount of input(s) required to manufacture unit of output for export purpose. SION is notified by DGFT on basis of recommendation of Norms Committee.

(ii) Items which can be imported duty free against advance authorization:

- Inputs, which are physically incorporated in export product (making normal allowance for wastage).
- Fuel, oil, catalysts which are consumed/utilised to obtain export product.
- Mandatory spares which are required to be exported/supplied with resultant product permitted upto 10% of CIF value of Authorization.
- Specified spices only when used for activities like crushing/ grinding /sterilization/ manufacture of oils or oleoresins and not for simply cleaning, grading, re-packing etc.

However, items reserved for imports by STEs cannot be imported against advance authorization.

(iii) Actual user condition for Advance Authorisation: Advance Authorization and/ or materials imported thereunder will be with actual user condition. It will not be transferable even after completion of export obligation. However, Authorization holder will have an option to dispose off product manufactured out of duty free inputs once export obligation is completed.

In case where CENVAT credit facility on inputs has been availed for the exported goods, even after completion of export obligation, the goods imported against Advance Authorization shall be utilized only in the manufacture of dutiable goods whether within the same factory or outside (by a supporting manufacturer).

Waste/scrap arising out of manufacturing process, as allowed, can be disposed off on payment of applicable duty even before fulfillment of export obligation.

(iv) Who are eligible for advance authorization: Advance Authorization can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer(s).

Such Authorization can also be issued for:

(1) Physical exports

(2) Intermediate supply

(3) Supplies made to specified categories of deemed exports

(4) Supply of 'stores' on board of foreign going vessel/aircraft provided there is specific

SION in respect of items supplied.

(v) Domestic sourcing of inputs: Holder of advance authorization has an option to procure the materials/ inputs from indigenous manufacturer/STE in lieu of direct import against Advance Release Order (ARO)/ Invalidation letter/ Back to Back Inland Letter of Credit. However, Advance Authorisation holder may obtain supplies from EOU/EHTP/BTP/STP/SEZ units, without obtaining ARO or Invalidation letter.

(vi) Conditions for redeeming authorisation: It is necessary to establish that inputs actually used in manufacture of the export product should only be imported under the authorization and inputs actually imported must be used in the export product, for redeeming the Authorisation. The name/description of the input in the Authorisation must match exactly with the name/description endorsed in the shipping bill.

Further, quantity of input to be allowed under Advance Authorisation shall be in proportion to the quantity of input actually used/ consumed in production. If goods are imported against advance authorization but export obligation is not fulfilled, duty and interest is payable.

Aforesaid provisions will also be applicable for supplies to SEZs and supplies made under deemed exports.

(vii) Annual Advance authorization: Advance Authorization can be issued for annual requirement also. Such authorization shall be issued for items specified in SION and is not available on self-declaration basis.

Exporters having past export performance (in at least preceding two financial years) shall be entitled for Advance Authorization for Annual Requirement.

Entitlement in terms of CIF value of imports shall be upto 300% of the FOB value of physical export and/ or FOR value of deemed export in preceding financial year or ₹ 1 crore, whichever is higher.

(viii) Value addition (VA): will be calculated as follows (except for gem and jewellery sector)–

VA = [(A-B) x 100]/B

A = FOB value of export realised/FOR value of supply received.

B = CIF value of inputs covered by authorisation plus any other imported materials used on which benefit of duty drawback (DBK) is claimed or intended to be claimed.

If some items are supplied free of cost by foreign buyer, its notional value will be added in the CIF value of import and FOB value of export for purpose of calculating value addition. Exports to SEZ Units/ supplies to Developers/ Co-developers, irrespective of currency of realization, would also be covered.

Minimum value addition required to be achieved under Advance Authorization is 15%, except for physical exports for which payments are not received in freely convertible currency and some other specified export products. For tea, minimum value addition required shall be 50%.

(ix) Admissibility of drawback: Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid inputs (both imported and indigenous) used in the export product.

2. DUTY FREE IMPORT AUTHORIZATION (DFIA) SCHEME

- Provisions applicable to Advanced Authorisation are broadly applicable in case of DFIA. However, these Authorizations shall be issued only for products for which Standard Input and Output Norms (SION) have been notified. Duty Free Import Authorisation (DFIA) is issued to allow duty free import of inputs. In addition, import of oil and catalyst which is consumed / utilised in the process of production of export product, may also be allowed.
- The goods imported are exempt ONLY from basic customs duty. Additional customs duty/excise duty, being not exempt, shall be adjusted as CENVAT credit as per DoR rules.
- DFIA shall be issued on post export basis for products for which SION have been notified. Separate DFIA shall be issued for each SION and each port.
- The applicant shall file an online application to RA concerned before starting exports under DFIA. Export shall be completed within 12 months from the date of online filing of application and generation of file number. While doing export/supply, applicant shall indicate file number on the export documents.
- After completion of exports and realization of export proceeds, request for issuance of transferable DFIA may be made to concerned RA within a period of:

  (a) 12 months from the date of export

  or

  (b) 6 months (or additional time allowed by RBI for realization) from the date of realization of export proceeds,

  whichever is later.
- RA shall issue transferable DFIA with a validity of 12 months from the date of issue.
- Exports proceeds shall be realized in freely convertible currency except otherwise specified.

(i) No DFIA for 'Actual Úser' condition inputs: No DFIA shall be issued for an export product where SION prescribes 'Actual User' condition for any input.

(ii) Domestic sourcing of inputs: Holder of DFIA has an option to procure the materials/ inputs from indigenous manufacturer/STE in lieu of direct import against Advance Release Order (ARO)/ Invalidation letter/ Back to Back Inland Letter of Credit. However, DFIA holder may obtain supplies from EOU/EHTP/BTP/STP/SEZ units, without obtaining ARO or Invalidation letter.

(iii) Conditions for redeeming authorisation: It is necessary to establish that inputs actually used in manufacture of the export product should only be imported under the authorization and inputs actually imported must be used in the export product, for

redeeming the DFIA. The name/description of the input in the DFIA must match exactly with the name/description endorsed in the shipping bill.

Further, quantity of input to be allowed under DFIA shall be in proportion to the quantity of input actually used/ consumed in production.

If goods are imported against advance authorization but export obligation is not fulfilled, duty and interest is payable.

Aforesaid provisions will also be applicable for supplies to SEZs and supplies made under deemed exports.

(iv) Value addition (VA): will be calculated as follows (except for gem and jewellery sector)–

VA = [(A-B) x 100]/B

A = FOB value of export realised/FOR value of supply received.

B = CIF value of inputs covered by authorisation plus any other imported materials used on which benefit of duty drawback (DBK) is claimed or intended to be claimed.

If some items are supplied free of cost by foreign buyer, its notional value will be added in the CIF value of import and FOB value of export for purpose of calculating value addition. Exports to SEZ Units/ supplies to Developers/ Co-developers, irrespective of currency of realization, would also be covered.

Minimum value addition required to be achieved under DFIA is 20%, except for physical exports for which payments are not received in freely convertible currency.

(v) Admissibility of drawback: Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid inputs, whether imported or indigenous, used in the export product.

Duty remission schemes

1. DUTY DRAWBACK (DBK) SCHEME

At present, this scheme is used to allow rebate of duties (central excise, customs and service tax) paid on inputs and input services used for exported final product. This scheme has been discussed in detail in Chapter-11-Duty Drawback.

2. DUTY REMISSION SCHEMES IN CENTRAL EXCISE LAW

Duty remission/exemption is also granted under central excise law, through CENVAT credit scheme and rules 18 and 19 of Central Excise Rules, 2002. These schemes are discussed in Section A: Central Excise.

(2) REWARD SCHEMES

Reward schemes are the schemes which entitle the exporters to duty credit scrips subject to various conditions. These scrips can be used for payment of customs duties on import of inputs/goods including notified capital goods, payment of excise duties on domestic procurement of inputs/goods including capital goods, payment of service tax on procurement of services.

These scrips are transferable, i.e. they can be sold in market, if the holder of duty credit scrip does not intend to import goods against the scrips. Goods imported under the scrip are also freely transferable.

Following are two schemes for exports of merchandise and services:

(i) Merchandise Exports from India Scheme (MEIS)

(ii) Service Exports from India Scheme (SEIS)

1. MERCHANDISE EXPORTS FROM INDIA SCHEME (MEIS)

The objective of MEIS scheme is to compensate infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially goods having high export intensity, employment potential and thereby enhancing India's export competitiveness.

(i) Reward under the scheme: Under MEIS, exports of notified goods/products to notified markets shall be eligible for reward at the specified rate(s). Unless otherwise specified, the basis of calculation of reward would be:

(i) on realised FOB value of exports in free foreign exchange,

or

(ii) on FOB value of exports as given in the Shipping Bills in free foreign exchange,

whichever is less.

(ii) Ineligible categories under MEIS: Some exports categories/sectors ineligible for Duty Credit Scrip entitlement under MEIS are listed below:

(1) EOUs / EHTPs / BTPs/ STPs who are availing direct tax benefits / exemption

(2) Supplies made from DTA units to SEZ units

(3) Exports through trans-shipment, i.e., exports that are originating in third country but trans-shipped through India

(4) Deemed Exports

(5) SEZ/EOU/EHTP/BPT/FTWZ products exported through DTA units

(6) Export products which are subject to Minimum export price or export duty

(7) Ores and concentrates of all types and in all formations

(8) Cereals of all types

(9) Sugar of all types and all forms unless specifically notified.

(10) Crude / petroleum oil and crude / primary and base products of all types and all formulations

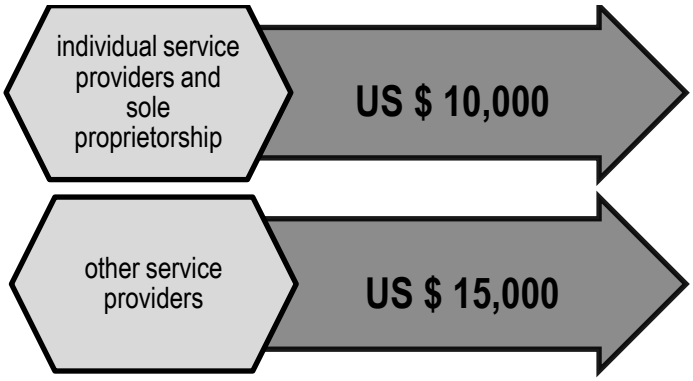
(11) Export of milk and milk products and meat and meat products unless specifically notified.

(iii) Export of goods through courier/foreign post offices using e-commerce: Exports of handicraft items, handloom products, books/periodicals, leather footwear, toys and tailor made fashion garments through courier or foreign post office using e-commerce of FOB value upto ₹ 25,000 per consignment shall be entitled for rewards under MEIS.

2. SERVICE EXPORTS FROM INDIA SCHEME (SEIS)

The objective of SEIS scheme is to encourage export of notified services from India. The scheme applies to export of services made on or after 01.04.2015.

(i) Eligible service providers: A service provider (with active IEC at the time of rendering services) located in India, providing notified services rendered in the specified manner* shall be eligible for reward at the notified rate(s) on net foreign exchange earned provided the minimum net free foreign exchange earnings of such service provider in preceding financial year is:



***Specified manner** is supply of a 'service' from India to any other country; (Mode 1-Cross border trade) and supply of a 'service' from India to service consumer(s) of any other country in India; (Mode 2-Consumption abroad).

Payment in Indian Rupees for service charges earned on specified services, shall be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India. The list of such services and the notified rates of rewards are as under:

Sl No	SECTORS	Admissible rate
1.	**BUSINESS SERVICES**	
A.	Professional services Legal services, Accounting, auditing and bookkeeping services, Taxation services, Architectural services, Engineering services, Integrated engineering services, Urban planning and landscape architectural services, Medical and dental services, Veterinary services, Services provided by midwives, nurses, physiotherapists and paramedical personnel	5%

B.	Research and development services R&D services on natural sciences, R&D services on social sciences and humanities, Interdisciplinary R&D services	5%
C.	Rental/Leasing services without operators Relating to ships, Relating to aircraft, Relating to other transport equipment, Relating to other machinery and equipment	5%
D.	Other business services Advertising services, Market research and public opinion polling services Management consulting service, Services related to management consulting, Technical testing and analysis services, Services incidental to agricultural, hunting and forestry, Services incidental to fishing, Services incidental to mining, Services incidental to manufacturing, Services incidental to energy distribution, Placement and supply services of personnel, Investigation and security, Related scientific and technical consulting services, Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment), Building- cleaning services, Photographic services, Packaging services, Printing, publishing and Convention services	3%
2.	**COMMUNICATION SERVICES** Audiovisual services Motion picture and video tape production and distribution service, Motion picture projection service, Radio and television services, Radio and television transmission services, Sound recording.	5%
3.	**CONSTRUCTION AND RELATED ENGINEERING SERVICES** General Construction work for building, General Construction work for Civil Engineering, Installation and assembly work, Building completion and finishing work	5%
4.	**EDUCATIONAL SERVICES** (Please refer Note 1) Primary education services, Secondary education services, Higher education services, Adult education	5%
5.	**ENVIRONMENTAL SERVICES** Sewage services, Refuse disposal services, Sanitation and similar services	5%

6.	**HEALTH-RELATED AND SOCIAL SERVICES** Hospital services	5%
7.	**TOURISM AND TRAVEL-RELATED SERVICES**	
A.	Hotels and Restaurants (including catering)	
	a. Hotel	3%
	b. Restaurants (including catering)	3%
B.	Travel agencies and tour operators services	5%
C.	Tourist guides services	5%
8.	**RECREATIONAL, CULTURAL AND SPORTING SERVICES** (other than audiovisual services) Entertainment services (including theatre, live bands and circus services), News agency services, Libraries, archives, museums and other cultural services, Sporting and other recreational services	5%
9.	**TRANSPORT SERVICES** (Please refer Note 2)	
A.	Maritime Transport Services Passenger transportation*, Freight transportation*, Rental of vessels with crew*, Maintenance and repair of vessels, Pushing and towing services, Supporting services for maritime transport	5%
B.	Air transport services Rental of aircraft with crew, Maintenance and repair of aircraft, Airport Operations and ground handling	5%
C.	Road Transport Services Passenger transportation, Freight transportation, Rental of Commercial vehicles with operator, Maintenance and repair of road transport equipment, Supporting services for road transport services	5%
D.	Services Auxiliary To All Modes of Transport. Cargo-handling services, Storage and warehouse services, Freight transport agency services	5%

Notes:

(1) Under education services, SEIS shall not be available on Capitation fee.

(2) *Operations from India by Indian Flag Carriers only is allowed under Maritime transport services.

1.	**Net Foreign exchange earnings** = Gross Earnings of Foreign Exchange **Minus** Total expenses/ payment/ remittances of Foreign Exchange by the IEC holder, relating to service sector in the financial year.
2.	**'Services'** include all tradable services covered under General Agreement on Trade in Services (GATS) and earning foreign exchange.
3.	**'Service Provider'** means a person providing: (i) Supply of a 'service' from India to any other country; *(Mode1- Cross border trade)* (ii) Supply of a 'service' from India to service consumer(s) of any other country in India; *(Mode 2- Consumption abroad)* (iii) Supply of a 'service' from India through commercial presence in any other country. *(Mode 3 – Commercial Presence)* (iv) Supply of a 'service' from India through the presence of natural persons in any other country *(Mode 4- Presence of natural persons)*.

(ii) Ineligible categories under SEIS:

(A) Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible.

(B) Following shall not be taken into account for calculation of entitlement under the scheme:

(1)	**Foreign Exchange remittances**
A.	Related to Financial Services Sector: ♦ Raising of all types of foreign currency Loans ♦ Export proceeds realization of clients ♦ Issuance of Foreign Equity through ADRs/ GDRs or other similar instruments ♦ Issuance of foreign currency Bonds ♦ Sale of securities and other financial instruments ♦ Other receivables not connected with services rendered by financial institutions.
B.	Earned through contract/ regular employment abroad (e.g. labour remittances)
(2)	Payments for services received from EEFC Account
(3)	Foreign exchange turnover by Healthcare Institutions like equity participation,

	donations etc.
(4)	Foreign exchange turnover by Educational Institutions like equity participation, donations etc.
(5)	Export turnover relating to services of units operating under EOU/ EHTP/ STPI/ BTP Schemes or supplies of services made to such units
(6)	Clubbing of turnover of services rendered by EOU/ EHTP/ STPI/ BTP units with turnover of DTA Service Providers
(7)	Exports of Goods
(8)	Foreign Exchange earnings for services provided by Airlines, Shipping lines service providers plying from any foreign country X to any foreign country Y routes not touching India at all
(9)	Service providers in Telecom Sector

Common Provisions for Exports from India Schemes (MEIS and SEIS)

(i) CENVAT/ Drawback:

- Additional Customs duty/excise duty/Service Tax paid in cash or through debit under Duty Credit scrip shall be adjusted as CENVAT Credit or Duty Drawback as per DoR rules or notifications.
- Basic Custom duty paid in cash or through debit under Duty Credit scrip shall be adjusted for Duty Drawback as per DoR rules or notifications.

Duty credit scrip shall be permitted to be utilized for payment of duty in case of import of capital goods under lease financing.

(ii) Transfer of export performance: Transfer of export performance from one IEC holder to another IEC holder shall not be permitted. Thus, a shipping bill containing name of applicant shall be counted in export performance / turnover of applicant only if export proceeds from overseas are realized in applicant's bank account and this shall be evidenced from e - BRC / FIRC.

However, MEIS rewards can be claimed either by the supporting manufacturer (along with disclaimer from the company / firm who has realized the foreign exchange directly from overseas) or by the company/ firm who has realized the foreign exchange directly from overseas.

(iii) Incentives of MEIS & SEIS are available to units located in SEZs also.

3. STATUS HOLDER

Status Holders are business leaders who have excelled in international trade and have successfully contributed to country's foreign trade. All exporters of goods, services and technology having an import-export code (IEC) number shall be eligible for recognition as a status holder. Status recognition depends upon export performance**.

An applicant shall be categorized as status holder upon achieving export performance during current and previous two financial years, as indicated below:

Status category	Export Performance [FOB/ FOR (as converted) Value (in US $ million)]
One Star Export House	3
Two Star Export House	25
Three Star Export House	100
Four Star Export House	500
Five Star Export House	2,000

****Points which merit consideration while computing export performance for grant of status:**

(a) Export performance will be counted on the basis of FOB value of export earnings in free foreign exchange.

(b) For deemed export, FOR value of exports in Indian Rupees shall be converted in US$ at the exchange rate notified by CBEC, as applicable on 1st April of each Financial Year.

(c) For granting status, export performance is necessary in at least 2 out of 3 years.

(d) For calculating export performance for grant of One Star Export House Status category, exports by IEC holders under the following categories shall be granted double weightage:

  (i) Micro, Small & Medium Enterprises (MSME)

  (ii) Manufacturing units having ISO/BIS

  (iii) Units located in North Eastern States and Jammu & Kashmir

  (iv) Units located in Agri Export Zones.

(e) Export performance of one IEC holder shall not be permitted to be transferred to another IEC holder. Hence, calculation of exports performance based on disclaimer shall not be allowed.

(f) Exports made on re-export basis shall not be counted for recognition.

(g) Export of items under authorization, including SCOMET items, would be included for calculation of export performance.

Privileges of Status Holders: Status holders are granted certain benefits like:

(a) Authorisation and custom clearances for both imports and exports on self-declaration basis.

(b) Fixation of Input Output Norms (SION) on priority i.e. within 60 days.

(c) Exemption from compulsory negotiation of documents through banks. The remittance receipts, however, would continue to be received through banking channels.

(d) Exemption from furnishing of Bank Guarantee in Schemes under FTP.

(e) Two Star Export Houses and above are permitted to establish export warehouses.

(f) Three Star and above Export House shall be entitled to get benefit of Accredited Clients Programme (ACP) as per the guidelines of CBEC.

(g) Status holders shall be entitled to export freely exportable items on free of cost basis for export promotion subject to an annual limit of ₹10 lakh or 2% of average annual export realization during preceding 3 licensing years, whichever is higher.

(3) EXPORT PROMOTION CAPITAL GOODS SCHEME (EPCG)

Export Promotion Capital Goods Scheme (EPCG) permits exporters to import capital goods for pre-production, production and post-production at zero customs duty or procure them indigenously without paying duty in the prescribed manner. In return, exporter is under an obligation to fulfill the export obligation.

Import under EPCG scheme shall be subject to an export obligation equivalent to 6 times of duty saved on capital goods to be fulfilled in 6 years reckoned from the date of issue of authorization. Authorisation shall be valid for 18 months from the date of issue of Authorisation. Import of capital goods shall be subject to 'Actual User' condition till export obligation is completed. After export obligation is completed, capital goods can be sold or transferred.

(i) Eligible exporters: Following are eligible for EPCG scheme:

- Manufacturer exporters with or without supporting manufacturer(s),
- Merchant exporters tied to supporting manufacturer(s), and
- Service providers including service providers designated as Common Service Provider (CSP) subject to prescribed conditions.

(ii) Eligible and ineligible capital goods:

Eligible capital goods include	Ineligible capital goods include
Capital Goods including capital goods in CKD/SKD condition	Second hand capital goods
Computer software systems	Any capital goods (including captive plants and Power Generator Sets of any kind) for: • Export of electrical energy (power) • Supply of electrical energy (power) under deemed exports • Use of power (energy) in their own unit, and • Supply/export of electricity transmission services
Spares, moulds, dies, jigs, fixtures, tools & refractories for initial lining and spare refractories	
Catalysts for initial charge plus one subsequent charge	
Capital goods for Project Imports notified by CBEC	

(iii) Export Obligation: Export obligation means obligation to export product(s) covered by Authorisation/permission in terms of quantity or value or both, as may be prescribed/specified by Regional or competent authority. Export obligation consists of average export obligation and specific export obligation.

Specific export obligation (Specific EO) under EPCG scheme is equivalent to 6 times of duty saved on capital goods imported under EPCG scheme, to be fulfilled in 6 years reckoned from Authorization issue-date. Specific EO is over and above the Average EO.

Note: In case countervailing duty (CVD) is paid in cash on imports under EPCG, incidence of CVD would not be taken for computation of net duty saved, provided CENVAT is not availed.

Average export obligation (Average EO) under EPCG scheme is the average level of exports made by the applicant in the preceding 3 licensing years for the same and similar products. It has to be achieved within the overall EO period (including extended period unless otherwise specified).

Conditions applicable to the fulfilment of the Export Obligation (EO):

(a) EO shall be fulfilled by the authorisation holder through export of goods which are manufactured by him or his supporting manufacturer / services rendered by him, for which the EPCG authorisation has been granted.

(b) In case of indigeneous sourcing of capital goods, specific EO shall be 25% less than the EO mentioned above, i.e. EO will be 4.5 times (75% of 6 times) of duty saved on such goods procured.

(c) Shipments under Advance Authorisation, DFIA, Drawback scheme, or reward schemes; would also be counted for fulfilment of EO under EPCG Scheme.

(d) EO can also be fulfilled by the supply of Information Technology Agreement (ITA-1) items to DTA, provided realization is in free foreign exchange.

(e) Both physical exports as well as specified deemed exports shall also be counted towards fulfilment of export obligation.

(iv) Incentives for early fulfillment of export obligation

In cases where Authorization holder has fulfilled 75% or more of specific export obligation and 100% of Average Export Obligation till date, if any, in half or less than half the original export obligation period specified, remaining export obligation shall be condoned and the Authorization redeemed.

(v) Post Export EPCG Duty Credit Scrip(s)

Under this scheme, capital goods are imported on full payment of applicable duties in cash. Later, basic customs duty paid on Capital Goods is remitted in the form of freely transferable duty credit scrip(s) [similar to the Reward schemes discussed earlier].

Salient features of the schemes are as follows:-

- Specific EO shall be 85% of the applicable specific EO stipulated under EPCG scheme. Average EO remains unchanged.
- Duty remission shall be in proportion to the EO fulfilled.

- These Duty Credit Scrip(s) can be utilized in the similar manner as the scrips issued under reward schemes can be utilised.

(4) EOU, EHTP, STP & BTP SCHEMES

Units under Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme export their entire production of goods and services (except permissible sales in DTA). They can import inputs and capital goods without payment of customs duty.

STP/EHTP/BTP schemes are similar to EOU schemes and provisions are more/ less identical. EOU scheme is administered by Ministry of Commerce and Industry, while STP/EHTP/BTP schemes are administered by their respective administrative ministries.

Software Technology Park (STP) is set up for development of software exports. Electronic Hardware Technology Park (EHTP) are for export of electronics hardware and software. STP/EHTP Scheme is administered by Ministry of Information Technology. Bio Technology Park (BTP) is established on the recommendation of Department of Biotechnology.

(I) ELIGIBILITY

- Such units may be set up for manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services, development of software, agriculture.
- Trading units are not covered under these schemes.
- Only projects having a minimum investment of ₹ 1 crore in plant & machinery shall be considered for establishment as EOUs. However, this shall not apply to units in EHTP/ STP/ BTP, Handicrafts/ Agriculture/ Floriculture/ Aquaculture/ Animal Husbandry/ Information Technology Services, Brass Hardware and Handmade jewellery sectors. Board of Approvals may also allow establishment of EOUs with a lower investment criteria.

(II) PROCEDURE FOR SETTING UP NEW EOU, EHTP, STP AND BTP

(a) Approval for setting up of units under EOU scheme shall be granted by the Units Approval Committee within 15 days as per prescribed criteria. In other cases, approval may be granted by Board of Approval set up for this purpose.

(b) On approval, concerned authority will issue a Letter of Permission (LoP)/ Letter of Intent (LoI) which will have initial validity of 2 years (extendable by 2 years and further extension, if necessary, by BoA), by which time unit should have commenced production.

(III) NET FOREIGN EXCHANGE EARNINGS

- EOU/ EHTP/ STP/ BTP unit must be a positive net foreign exchange earner. However, a higher value addition is specified for some sectors.
- **How to compute NFE earnings?:** NFE Earnings shall be calculated cumulatively in blocks of 5 years, starting from commencement of production.

  In case unit is not able to achieve NFE due to:

(i) prohibition/ restriction imposed on export of any product, 5 years block period may be extended suitably by BoA.

(ii) adverse market condition or any grounds of genuine hardship having adverse impact on functioning of the unit, 5 year block is extendable upto 1 year.

Who monitors NFE?: Performance of EOU/ EHTP/ STP/ BTP units shall be monitored by Units Approval Committee as per prescribed guidelines.

Which supplies to DTA can be counted for positive NFE?: Following supplies effected from EOU/ EHTP/ STP/ BTP units to DTA (Domestic Tariff Area) will be counted for fulfillment of positive NFE:

(a) Supplies in DTA to holders of Advance Authorisation/ Advance Authorisation for annual requirement/ DFIA under duty exemption/ remission scheme/ EPCG scheme subject to certain exceptions.

(b) Supplies affected in DTA against foreign exchange remittance received from overseas.

(c) Supplies to other EOU/ EHTP/ STP/ BTP/ SEZ units, provided that such goods are permissible for procurement in terms of relevant provisions of FTP.

(d) Supplies made to bonded warehouses set up under FTP and/ or under section 65 of Customs Act and free trade and warehousing zones, where payment is received in foreign exchange.

(e) Supplies of goods and services to such organizations which are entitled for duty free import of such items in terms of general exemption notification issued by MoF.

(f) Supplies of Information Technology Agreement (ITA-1) items and notified zero duty telecom/ electronics items.

(g) Supplies of items like tags, labels, printed bags, stickers, belts, buttons or hangers to DTA unit for export.

(IV) ENTITLEMENTS TO UNITS UNDER EOU, EHTP, STP AND BTP SCHEMES

(a) Entitlements for supplies from DTA

- Supplies from DTA to EOU/ EHTP/ STP/ BTP units will be regarded as "deemed exports" and DTA supplier shall be eligible for relevant entitlements for deemed exports, besides discharge of export obligation, if any, on the supplier.
- Notwithstanding the above, EOU/ EHTP/ STP/ BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements specified under the provisions relating to deemed exports in FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry Rates of Drawback are not available.

In addition, EOU / EHTP / STP / BTP units shall be entitled to following:-

- Reimbursement of Central Sales Tax (CST) on goods manufactured in India. Interest @ 6% p.a. will be payable on delay refund of CST, if the case is not settled within 30 days of receipt of complete application.

- ❖ Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.
- ❖ Reimbursement of duty paid on fuel procured from domestic oil companies/ Depots of domestic oil Public Sector Undertakings as per drawback rate notified by DGFT from time to time. Reimbursement of additional duty of excise levied on fuel under the Finance Acts would also be admissible.
- ❖ CENVAT credit on service tax paid.

(b) Other Entitlements

- ❖ Exemption from industrial licensing for manufacture of items reserved for SSI sector.
- ❖ Export proceeds will be realized within 9 months.
- ❖ Units will be allowed to retain 100% of its export earnings in the EEFC account.
- ❖ Unit will not be required to furnish bank guarantee at the time of import or going for job work in DTA, subject to fulfillment of required conditions.
- ❖ 100% FDI investment permitted through automatic route similar to SEZ units.
- ❖ Units shall pay duty on the goods produced or manufactured and cleared into DTA on monthly basis in the manner prescribed in the Central Excise Rules.

(V) EXPORT AND IMPORT OF GOODS

Export : Following exports are permitted:

- ✓ all kinds of goods and services except items that are prohibited in ITC(HS),
- ✓ Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) subject to fulfillment of the conditions indicated in ITC (HS).

Import : Following imports are permitted:

- * Export promotion material upto a maximum value limit of 1.5% of FOB value of previous years exports.
- * All types of goods, including capital goods, required for its activities, from DTA/ bonded warehouses in DTA/ International exhibition held in India, without payment of duty subject to 'Actual User' condition, provided such goods are not prohibited items of import.
- * Goods including capital goods (on a self certification basis) required for approved activity, free of cost or on loan/ lease from clients, subject to 'Actual User' condition.
- * Certain specified goods from DTA, without payment of duty, for creating a central facility.
- * Second hand capital goods, without any age limit, duty free.

Procurement and export of spares/ components, upto 5% of FOB value of exports, may be allowed to same consignee/ buyer of the export article, subject to the condition that it shall not count for NFE and direct tax benefits.

(VI) LEASING OF CAPITAL GOODS

An EOU/ EHTP/ STP/ BTP unit may:

- ✓ source capital goods from a domestic/ foreign leasing company without payment of excise/ customs duty, on the basis of a firm contract between parties.
- ✓ sell capital goods and lease back the same from a Non Banking Financial Company (NBFC) subject to fulfillment of specified conditions.

(VII) INTER UNIT TRANSFER

- ❖ Transfer of manufactured goods from one EOU/ EHTP/ STP/ BTP unit to another EOU/ EHTP/ STP/ BTP unit is allowed with prior intimation to concerned DC and Customs authorities, following procedure of in-bond movement of goods.
- ❖ Transfer of manufactured goods shall also be allowed from EOU/ EHTP/ STP/ BTP unit to a SEZ developer or unit following procedure prescribed in SEZ Rules, 2006.
- ❖ Capital goods may be transferred or given on loan to other EOU/ EHTP/ STP/ BTP/ SEZ units, with prior intimation to concerned DC and Customs authorities.

Note: Goods supplied by one unit of EOU/ EHTP/ STP/ BTP to another unit shall be treated as imported goods for second unit for payment of duty, on DTA sale by second unit.

(VIII) SALE OF UNUTILIZED MATERIAL

- ❖ In case an EOU/ EHTP/ STP/ BTP unit is unable to utilize goods (including capital goods) and services, imported or procured from DTA, it may be
  - ✓ transferred to another EOU/ EHTP/ STP/ BTP/ SEZ unit; or
  - ✓ disposed off in DTA with approval of Customs authorities on payment of applicable duties and submission of import authorization; or
  - ✓ exported.

  Such transfer from EOU/ EHTP/ STP/ BTP unit to another such unit would be treated as import for receiving unit.
- ❖ In case of capital goods, benefit of depreciation, as applicable, will be available in case of disposal in DTA only when the unit has achieved positive NFE taking into consideration the depreciation allowed.
- ❖ No duty shall be payable in case capital goods, raw material, consumables, spares, goods manufactured, processed or packaged, and scrap/ waste/ remnants/ rejects are destroyed within unit after intimation to Customs authorities or destroyed outside unit with permission of Customs authorities.
- ❖ Disposal of used packing material will be allowed on payment of duty on transaction value.

(IX) DTA SALE OF FINISHED PRODUCTS/ REJECTS/ WASTE/ SCRAP/ REMNANTS AND BY-PRODUCTS

Entire production of EOU/ EHTP/ STP/ BTP units must be exported. However, following DTA sales are permissible:

(1) Sale of goods in DTA: Units* may sell goods in DTA

- ✓ **upto 50% of FOB value of exports** (including sales made to SEZ unit from Foreign Exchange Account of such unit),
- ✓ subject to fulfilment of positive NFE,
- ✓ on payment of concessional duties.

*other than gems and jewellery units

However, sale at concessional duty is not permitted:

(i) in respect of motor cars, alcoholic liquors, books, tea (except instant tea), pepper & pepper products, marble and other notified items or

(ii) to units engaged in activities of packaging/ labeling/ segregation/ refrigeration/ compacting/ micronisation/ pulverization/ granulation/ conversion of monohydrate form of chemical to anhydrous form or vice-versa.

An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.

In case of units manufacturing and exporting more than one product, sale of any of these products into DTA, upto 90% of FOB value of export of the specific products is permitted, provided total DTA sales does not exceed the overall entitlement of 50% of FOB value of exports for the unit.

(2) Services provided in DTA: For services, sale in DTA shall also be permissible up to 50% of FOB value of exports and/ or 50% of foreign exchange earned, where payment of such services is received in foreign exchange.

(3) Sale of rejects in DTA: Rejects within an overall limit of 50% may be sold in DTA on payment of applicable duties (concessional or otherwise), on prior intimation to Customs authorities. Such sales shall be counted against DTA sale entitlement.

Sale of rejects upto 5% of FOB value of exports shall not be subject to achievement of NFE.

(4) Sale of scrap/ waste/ remnants, arising out of production, in DTA: Scrap/ waste/ remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under Duty Exemption Scheme, on payment of concessional duties as applicable, within overall ceiling of 50% of FOB value of exports. Such sales of scrap/ waste/ remnants shall not be subject to achievement of positive NFE. Sale of waste/scraps/remnants by units not entitled to DTA sale or sales beyond DTA sales entitlement, shall be on payment of full duties. Scrap/waste/remnants may also be exported.

In case scrap/ waste/ remnants are destroyed with permission of Customs authorities, no duties/ taxes payable on same.

(5) Sale of by-products in DTA: By-products may also be sold in DTA subject to achievement of positive NFE, on payment of applicable duties, within the overall entitlement of 50% of FOB value of exports. Sale of by-products by units not entitled to DTA sales, or beyond entitlements shall also be permissible on payment of full duties.

(6) Procurement of spares / components, up to 2% of the value of manufactured articles, cleared into DTA, during the preceding year, may be allowed for supply to the same consignee / buyer for the purpose of after-sale-service.

Notes:

1. In case of DTA sale of goods manufactured by EOU/ EHTP/ STP/ BTP, where basic duty and CVD is nil, such goods may be considered as non-excisable for payment of duty.
2. In case of new EOUs, advance DTA sale will be allowed not exceeding 50% of its estimated exports for first year (2 years for pharmaceutical units).

(X) EXPORT THROUGH OTHER EXPORTERS

An EOU/ EHTP/ STP/ BTP unit may export goods manufactured/ software developed by it through another exporter or any other EOU/ EHTP/ STP/ SEZ unit subject to specified conditions

(XI) EXIT FROM EOU SCHEME

With approval of DC, an EOU may opt out of scheme. Such exit shall be subject to payment of excise and customs duties and industrial policy in force. If unit has not achieved obligations, it shall also be liable to penalty at the time of exit.

(XII) CONVERSION

Existing DTA units may also apply for conversion into an EOU/ EHTP/ STP/ BTP unit. Existing EHTP/ STP units may also apply for conversion/ merger to EOU unit and vice-versa. In such cases, units will remain in bond and avail exemptions in duties and taxes as applicable.

(5) DEEMED EXPORTS

Deemed Exports refer to those transactions in which goods manufactured in India are supplied to specified projects or to specific categories of consumers. In deemed exports, goods supplied do not leave the country and payment for such supplies is received either in Indian rupees or in free foreign exchange by the recipient of the goods.

The objective of deemed exports is to ensure that the domestic suppliers are not in disadvantageous position *vis-à-vis* foreign suppliers in terms of the fiscal concessions. The underlying theory is that foreign exchange saved must be treated at par with foreign exchange earned by placing Indian manufacturers at par with foreign suppliers. Deemed exports broadly cover three areas.

a. Supplies to domestic entities who can import their requirements duty free or at reduced rates of duty.

b. Supplies to projects/ purposes that involve international competitive bidding.

c. Supplies to infrastructure projects of national importance.

(I) CATEGORIES OF SUPPLIES CONSIDERED AS 'DEEMED EXPORT'

Supply by manufacturer	Supply by main/sub-contractors(s)
Supply of goods against Advance Authorisation/ Advance Authorisation for Annual Requirement/ DFIA	Supply of goods to projects or turnkey contracts financed by multilateral or bilateral agencies/Funds notified by Department of Economic Affairs (DEA), under International Competitive Bidding.
Supply of goods to units located in EOU/ STP/BTP/EHTP	Supply of goods to any project where import is permitted at zero customs duty as per customs *Notification No. 12/2012-Cus dated 17.03.2012* and supply is made against International Competitive Bidding.
Supply of capital goods against EPCG authorisation	Supply of goods to mega power projects against International Competitive Bidding (even if customs duty on imports made by such project is not zero). The ICB procedures should be followed. Supplier is eligible for benefits as specified. International Competitive Bidding (ICB) is not mandatory for mega power projects if requisite quantum of power has been tied up through tariff based competitive bidding or if project has been awarded through tariff based competitive bidding.
Supply of marine freight containers by 100% EOU provided said containers are exported within 6 months	Supply to goods to UN or international organisations for their official use or supplied to projects financed by them.
	Supply of goods to nuclear projects through competitive bidding (need not be international competitive bidding).

(II) BENEFITS FOR DEEMED EXPORTS

Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods, qualifying as deemed exports, subject to specified terms and conditions:

a. Advance Authorisation/ Advance Authorisation for Annual requirement/ DFIA

b. Deemed Export Drawback

c. Refund of terminal excise duty if exemption is not available.

(III) ELIGIBILITY FOR REFUND OF TERMINAL EXCISE DUTY/ DEEMED EXPORT DRAWBACK

Refund of Terminal Excise duty or Central Excise duty paid on inputs/ components will be available only when CENVAT credit/ rebate of the same have not been availed by the recipient of such goods. Similarly, supplies will be eligible for deemed export drawback on Central Excise paid on inputs and service tax paid on input services, provided CENVAT credit facility/ rebate has not been availed by the applicant. However, in such cases, basic customs duty paid can be claimed as brand rate of duty drawback.

(IV) COMMON CONDITIONS FOR DEEMED EXPORT BENEFITS

(i) Supplies shall be made directly to entities listed in the point (I) above. Third party supply shall not be eligible for benefits/exemption.

(ii) In all cases, supplies shall be made directly to the designated Projects/Agencies/Units/ Advance Authorisation/ EPCG Authorisation holder. Sub-contractors may, however, make supplies to main contractor instead of supplying directly to designated Projects/ Agencies. Payments in such cases shall be made to sub-contractor by main-contractor and not by project Authority.

(iii) Supply of domestically manufactured goods by an Indian Sub-contractor to any Indian or foreign main contractor, directly at the designated project's/ Agency's site, shall also be eligible for deemed export benefit provided name of sub-contractor is indicated either originally or subsequently (but before the date of supply of such goods) in the main contract. In such cases payment shall be made directly to sub-contractor by the Project Authority.

16.4 Special Economic Zone (SEZ)

(a) Introduction

A Special Economic Zone (SEZ) is a geographically bound zone where the economic laws in matters related to export and import are more broadminded and liberal as compared to other parts of the country. **SEZ is considered to be a place outside India for all tax purposes.** It is like a separate island within the territory of India and is deemed to be outside the customs territory of India. SEZs are projected as duty free area for the purpose of trade, operations, duty, and tariffs.

SEZ units are self-contained and integrated having their own infrastructure and support services. Within SEZs, a unit may be set-up for the manufacture of goods and other activities including processing, assembling, trading, repairing, reconditioning, making of gold/ silver, platinum jewellery etc.

Goods supplied to SEZs from DTA are treated as exports from India and goods supplied from the SEZ to the DTA are treated as imports into India.

The provisions relating to SEZ are contained in Special Economic Zone Act, 2005 and SEZ Rules, 2006.

State Governments are expected to play a very active role in the establishment of SEZ unit. Any proposal for setting up of SEZ unit in the Private/ Joint/ State Sector is routed

through the concerned State government who in turn forwards the same to the Department of Commerce with its recommendations for consideration.

The main objectives of the SEZ Act are:

(a) Export of goods and services without taxes

(b) Generation of additional economic activity

(c) Promotion of exports of goods and services

(d) Promotion of investment from domestic and foreign sources

(e) Creation of employment opportunities

(f) Development of infrastructure facilities

(g) Providing exemption from duties and taxes on procurement

(h) Single window clearance: It is expected that this will trigger a large flow of foreign and domestic investment in SEZs, in infrastructure and productive capacity, leading to generation of additional economic activity and creation of employment opportunities.

The SEZ Rules provide for:

(a) Simplified procedures for development, operation, and maintenance of the Special Economic Zones and for setting up units and conducting business in SEZs

(b) Single window clearance for setting up of an SEZ

(c) Single window clearance for setting up a unit in a Special Economic Zone

(d) Single Window clearance on matters relating to Central as well as State Governments

(e) Simplified compliance procedures

(f) Maintenance of documents with self-certification

(g) Simplified compliance procedures and documentation with an emphasis on self certification

The incentives and facilities offered to the units in SEZs for attracting investments into the SEZs, including foreign investment are:

(a) Duty free import/ domestic procurement of goods for development, operation and maintenance of SEZ units.

(b) Exemption from Central Sales Tax.

(c) Exemption from Service Tax.

(d) Single window clearance for Central and State level approvals.

(e) Exemption from State sales tax and other levies as extended by the respective State Governments.

16.5 Penalties

In case any exporter or importer in the country violates any provision of the Foreign Trade Policy or for that matter any other law in force, like Central Excise or Customs or Foreign Exchange, his IEC number can be cancelled by the office of DGFT and thereupon that exporter or importer would not be able to transact any business in export or import. The premises where any violation of the provisions of FTP has taken place or is expected to take place can be searched and the suspicious material seized.

Violations would cover situations when import or export has been made by unauthorized persons who are not legally allowed to carry out import or export or when any person carries out or admits to carry out any import or export in contravention of the basic FTP.

16.6 Glossary (Acronyms)

Acronym	Explanation
AA	Advance Authorisation
ACC	Assistant Commissioner of Customs
ANF	Aayaat Niryaat Form
BG	Bank Guarantee
BIFR	Board of Industrial and Financial Reconstruction
BoA	Board of Approval
BRC	Bank Realisation Certificate
BTP	Biotechnology Park
CBEC	Central Board of Excise and Customs
CCP	Customs Clearance Permit
CEA	Central Excise Authority
CEC	Chartered Engineer Certificate
CIF	Cost, Insurance & Freight
CVD	Countervailing Duty
DC	Development Commissioner
DFIA	Duty Free Import Authorisation
DGCI&S	Director General, Commercial Intelligence & Statistics.
DGFT	Director General of Foreign Trade
DoR	Department of Revenue
DTA	Domestic Tariff Area
EDI	Electronic Data Interchange
EEFC	Exchange Earners' Foreign Currency
EFC	Exim Facilitation Committee

EFT	Electronic Fund Transfer
EH	Export House
EHTP	Electronic Hardware Technology Park
EIC	Export Inspection Council
EO	Export Obligation
EOP	Export Obligation Period
EOU	Export Oriented Unit
EPC	Export Promotion Council
EPCG	Export Promotion Capital Goods
FDI	Foreign Direct Investment
FIEO	Federation of Indian Export Organisation
FOB	Free On Board
FT (D&R) Act	Foreign Trade (Development & Regulation) Act, 1992
FTP	Foreign Trade Policy
GATS	General Agreement on Trade in Services
ICD	Inland Container Depot
IEC	Importer Exporter Code
ISO	International Standards Organisation
ITC(HS)	Indian Trade Classification (Harmonised System)

Classification for Export & Import Items

ITPO	India Trade Promotion Organisation
LoC	Line of Credit
LoI	Letter of Intent
LoP	Letter of Permit
LUT	Legal Undertaking
MEA	Ministry of External Affairs
MoD	Ministry of Defence
MoF	Ministry of Finance
NC	Norms Committee
NFE	Net Foreign Exchange
NOC	No Objection Certificate
PSU	Public Sector Undertaking
R&D	Research and Development

RA	Regional Authority
RBI	Reserve Bank of India
RCMC	Registration-cum-Membership Certificate
S/B	Shipping Bill
SEZ	Special Economic Zone
SION	Standard Input Output Norms
SSI	Small Scale Industry
STE	State Trading Enterprise
STP	Software Technology Park
TEE	Towns of Export Excellence
VA	Value Addition