PAPER - 8 : INDIRECT TAXES

QUESTIONS

EXCISE

Classification

1. Dagar Ltd. manufactures coconut oil and sells them in packings of 50 ml or 100 ml. The packing of the oil specifies it to be 'pure coconut oil'. Majority of the consumers use the said coconut oil as hair oil. Dagar Ltd. classifies the coconut oil as 'vegetable oil' under Chapter 15 of the Central Excise Tariff. However, the Department contends that coconut oil manufactured by Dagar Ltd. is meant for sale as 'hair oil'; therefore, it should be classified as 'hair oil' under Chapter 33.

   Explain whether the contention of the Department is correct in law?

Valuation of excisable goods

2. MB Motors manufactures motor vehicles. It gets complete motor vehicles manufactured by sending the chassis of the motor vehicles to BD Works, independent body builders (job-worker), for building the body as per the design/specification given by it. The practice followed is that the chassis is transferred to BD Works on payment of appropriate central excise duty on stock transfer basis and is not sold to them. BD Works avails the CENVAT credit of the duty paid on the chassis and clears the same on payment of duty to the Depot of MB Motors. The duty is discharged by BD Works on the assessable value comprising the value of chassis and the job charges. The Depot of MB Motors sells the vehicles at a higher price than the price on which duty had been paid.

   Discuss whether the practice followed is correct in terms of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

CENVAT Credit

3. What is the quantum of CENVAT credit that can be availed in respect of inputs and capital goods cleared on or after 07.09.2009 from an export-oriented undertaking or by a unit in electronic hardware technology park or in a software technology park?

4. Rokasa Ltd. was engaged in the manufacture of a pharmaceutical product, viz. Rovamox Pediatric Drops. Rokasa Ltd. contended that the plastic droppers supplied along with the bottle containing the drops were inputs used in or in relation to manufacture of the final product and hence, claimed CENVAT credit of the duty paid on the droppers. However, the Revenue argued that CENVAT credit was not admissible as these droppers were kept separately in the cartons along with the sealed bottle of the pediatric drops and were neither used in the manufacture of pediatric drop nor used in relation to its manufacture.

   Briefly discuss whether the stand taken by the Department is correct or not with the help of a decided case law.

Assessment

5. Explain the concept of provisional assessment under rule 7 of the Central Excise Rules, 2002.

Power of the Central Government to impose restrictions in certain type of cases

6. Rule 12CC of the Central Excise Rules, 2002 empowers the Central Government to withdraw facilities or impose restrictions on a manufacturer, first stage or second stage dealer, or an exporter in certain cases. State such cases.

Offences

7. List the persons in respect of whom the provisions relating to compounding of offences do not apply.

Penalty

8. A show cause notice was issued against 'P' on 12.08.2009 asking him to pay Rs.3,50,000 which was short paid by him with an intent to evade payment of excise duty. The adjudication order confirming the demand was communicated to 'P' on 15.11.2009. 'P' filed an appeal against the order with the Commissioner of Central Excise (Appeals). The appeal was decided in favour of the revenue. The order of the Commissioner of Central Excise (Appeals) asking 'P' to pay the duty, interest under section 11AB and penalty equal to duty demanded under section 11AC was communicated to 'P' on 02.01.2010. 'P' plans to pay the full duty and interest within 30 days from 02.01.2010 and avail the benefit of reduced penalty (25% of duty) under the first proviso to section 11AC. Can 'P' avail the benefit of reduced penalty? Discuss.

9. Discuss, with the help of a decided case law, the conditions and the circumstances that would attract the imposition of penalty under section 11AC of the Central Excise Act, 1944?

Remission of duty

10. Bharat Zinc Ltd. (BZ Ltd.) was engaged in the manufacture of lead and zinc concentrates. At the time of carrying out the physical stock taking, some difference was found between the physically verified stock and the stock as per the books. According to BZ Ltd., this difference was due to de-bagging, shifting of concentrates, seepage of rain water and storage and loading on trucks. BZ Ltd. applied for the remission of duty under rule 21 of the Central Excise Rules, 2002. Revenue claimed that the shortage could have been avoided or minimized by the assessee, as they were neither due to natural causes, nor due to unavoidable accident. Thus, the prayer for remission was declined.

    You are required to examine the veracity of the Revenue's claim with the help of a decided case law.

Appeal

11. With reference to section 35G of the Central Excise Act, 1944, discuss whether the High Court has power to condone the delay in filing an appeal?

Advance Ruling

12. Who can apply for an advance ruling under central excise provisions?

Audit

13. Does central excise law have any audit mechanism to cover a case where the value of the excisable goods has not been correctly declared or determined by a manufacturer? Discuss.

CUSTOMS

Additional duty of customs

14. For the purpose of computing additional duty under section 3(1) of the Customs Tariff Act, 1975, what will be the value of an article imported into India where a tariff value has been fixed under section 3(2) of the Central Excise Act, 1944 for the like article manufactured in India?

Appointment of customs port, airport etc.

15. Discuss the provisions of section 7 of the Customs Act, 1962 relating to appointment of customs port, airports etc.?

Restrictions on custody and removal of imported goods

16. Who takes the custody of the imported goods which have entered the customs area but have not been cleared for home consumption or warehousing? Discuss the responsibilities and liabilities of such person.

Refund

17. The Finance (No. 2) Act, 2009 has inserted section 26A in the Customs Act, 1962, which provides for refund of import duty in certain cases. With reference to the said section, state the cases where the import duty shall be refunded to the person who has paid such duty.

Warehousing

18. Priyanshi imported certain goods in March 2009. An "Into Bond" bill of entry was presented on 14th March, 2009 and goods were cleared from the port for warehousing. Assessable value was $10,00,000. The order permitting the deposit of the goods in warehouse for three months was issued on 21st March, 2009. Priyanshi did not clear the imported goods even after the warehousing period got over on 20th June, 2009. She did not obtain any extension of time as well.

    A notice was issued under section 72 demanding duty and other charges. Priyanshi cleared the goods on 28th July, 2009. Compute the amount of duty payable by Priyanshi while removing the goods on the basis of following information:

	14.03.2009	20.06.2009	28.07.2009
Rate of Exchange	Rs.48.20	Rs.48.40	Rs.48.50

per US $			
Basic customs duty	15%	10%	12%

Assume that no additional duty or special additional duty is payable.

Advance Rulings

19. Explain the amendments made by the Finance (No. 2) Act, 2009 in section 28F of the Customs Act, 1962.

Seizure of goods

20. Krishna Telecoms were engaged in the business of providing telecommunication services in various States in India. For their business Krishna Telecoms imported Optic Fibre Cables (OFC) and classified them under Heading 85.44 of the Customs Tariff. However, the Department claimed that the goods should be classified under Heading 90.01. The Commissioner of Customs (Appeals), when the matter was brought before him, held that the impugned goods were classifiable under Heading 85.44 of the Customs Tariff. The Department has filed an appeal before CESTAT against the said order which has yet not been decided.

    Meanwhile, the customs authorities (DRI officers) have seized the consignment of OFC imported and cleared by Krishna Telecom on payment of duty assessed under Heading 85.44 and forced Krishna Telecoms to pay the differential duty between Headings 85.44 and 90.01 by threat and coercion.

    Examine the validity of the action of the customs authorities, with the help of a decided case law.

Miscellaneous

21. Whether officers of the other Departments are required to assist officers of customs in the execution of the Customs act, 1962? If yes, then list such officers.

SERVICE TAX

Banking and other financial services

22. With reference to banking and other financial services, state whether service tax is applicable in the following cases:

    (i) Services provided by State Bank of India to the Central Board of Direct Taxes in relation to collection of advance income-tax.

    (ii) Discount charged by SB Ltd., a non-banking financial company, on the facility of bill discounting provided by it. Such discount is shown separately in the bill issued for this purpose.

    (iii) Rich Bank, a Scheduled Bank, purchases foreign currency from Generous Bank, another Scheduled Bank.

Construction services in respect of residential complexes

23. With reference to construction services in respect of residential complexes, answer the following questions:

    (i) What does a "residential complex" mean?

    (ii) Which activities are covered within "construction of complex"?

    (iii) Does the service tax law provide for any exemption for this service? Explain.

Business auxiliary services

24. With reference to business auxiliary services state whether service tax is applicable in following cases:

    (i) Manufacture of non-excisable goods on behalf of the client.

    (ii) Services provided by commission agents in relation to sale of jute.

    (iii) Commission received by distributors for distribution of mutual fund units.

Appeals

25. The Finance (No. 2) Act, 2009 has substituted section 84 of the Finance Act, 1994 with a new section 84. Explain the provisions of new section.

SUGGESTED ANSWERS/HINTS

1. The Department's contention is correct. *Circular No. 890/10/2009 CX dated 03.06.2009* has been issued in respect of classification of coconut oil sold in small packs say of 50 ml or 100 ml. When the coconut oil is sold in small containers, following indications are found on containers or labels:

A. 'hair oil'

B. 'edible oil'

C. 'pure coconut oil' or 'coconut oil'

When 'hair oil' is printed on the container/label, it is classified as 'hair oil' under chapter 33. Further, the coconut oil falling under the other two categories ('edible oil', 'pure coconut oil' or 'coconut oil') should also be classified as 'hair oil' under Chapter 33 as they are meant for sale as 'hair oil'.

The circular explains that Chapter Note 2 of Chapter 33 prescribes a condition that Heading No.3305 (which covers hair oil also) applies to products **put up in packing of a kind sold by retail for such use.** Thus, if a particular packing of coconut oil is generally sold in retail as hair oil, in that case, the said product would be classified under heading 3305.

Further, Section Note 2 to Section VI also provides that goods classifiable in Heading 3305 by reason of being put up for retail sales are to be classified in the said heading

and in no other heading of the schedule. This Section Note further supports the interpretation that though a product is capable of being classified under more than one heading, even then because of the nature of its retail packing, which is indicative of its use as hair oil, the classification under heading 3305 would get priority. However, if the same coconut oil is packed in say 1 litre or 2 litre packages, which are generally used by consumers for edible purposes (even though some customers may use it as hair oil), it would be classified under Chapter 15.

Hence, the classification of coconut oil would depend upon the fact as to how the majority of the customers use the said product. Therefore, if coconut oil is packed in packages which are generally meant for sale in retail as hair oil, in that case the said product would be classified as hair oil under Heading 3305, even though few consumers may use it as edible oil.

Thus, the circular settles that coconut oil packed in containers upto 200 ml may be considered as generally used as hair oil and shall be classified under Heading 3305.

2. As per rule 10A (ii) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 the assessable value for the purpose of charging central excise duty, in cases where the job-worker transfers the excisable goods to the Depot/Sale office/Distributor and/or any other sale point of the principal manufacturer, shall be the transaction value on which goods are sold by the principal manufacturer from such a place. Accordingly, after the insertion of Rule 10A, the practice of discharging the duty on cost construction method by BD Works is not legally correct.

Circular No. 902/22/2009 CX dated 20.10.2009 also clarifies that wherever goods are manufactured by a person on job work basis on behalf of a principal, then value for the purpose of payment of excise duty may be determined in terms of the provisions of Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 subject to fulfilment of the requirements of the said rule.

Thus, BD Works should pay the duty on the transaction value on which vehicles are sold by MB Motors from its depot.

3. Sub-rule (7) of the CENVAT Credit Rules, 2004 *inter alia* provides that credit in respect of inputs and capital goods cleared on or after 07.09.2009 from an export-oriented undertaking or by a unit in electronic hardware technology park or in a software technology park, as the case may be, on which such undertaking or unit has paid –

A. 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*; and

B. the education cess and the secondary and higher education cess on the excise duty referred to in (A),

shall be the aggregate of –

I. that portion of excise duty referred to in (A), as is equivalent to -

i. the additional duty leviable under section 3(1) of the Customs Tariff Act, which is equal to the duty of excise under section 3(1)(a) of the Excise Act;

ii. the additional duty leviable under section 3(5) of the Customs Tariff Act; and

II. the education cess and the secondary and higher education cess referred to in (B).

4. No, the stand taken by the Department is not correct. The facts of the given case are similar to the case of *CCEx., Mumbai v. Okasa Ltd. 2009 (241) E.L.T. 359 (Bom.)*. In the instant case, the High Court has observed that for the purpose of dispensation or administration of the drugs in proper quantity as per the medical prescription, dropper has to be supplied along with the bottle containing the drug. Further, since as per the directions given by the Controller of Drugs for India, such droppers were mandatory for sale of the drug, they would be considered as "packing material".

Therefore, the High Court held that the plastic dropper packed with the pediatric drops should be construed to be an input used in or in relation to the manufacture of the final product.

5. Rule 7 of the Central Excise Rules, 2002 contains the provisions in respect of provisional assessment. Provisional assessment can be requested by the assessee. Department itself cannot order provisional assessment.

An assessee can request for provisional assessment if he:

(i) is unable to determine the value of the excisable goods or

(ii) is unable to determine the applicable rate of duty.

In aforesaid cases, assessee may request Assistant/Deputy Commissioner in writing giving reasons for provisional assessment of duty. After such request, the Assistant/ Deputy Commissioner may by order allow payment of duty on provisional basis. The Assistant/Deputy Commissioner shall also specify the rate or value at which duty will be provisionally paid. Payment of duty on provisional basis will be allowed subject to execution of bond for payment of differential duty.

The Assistant/Deputy Commissioner should pass the order for final assessment within 6 months from the date of order of provisional assessment. If after final assessment, any differential amount becomes payable, interest shall be payable from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof. However, if a refund arises consequent to the order of final assessment, interest shall be payable on such refund from the first day of the month succeeding the month for which such refund is determined, till the date of refund. The refund shall be subject to the provisions of unjust enrichment.

6. *Notification No. 32/2006 CE(NT) dated 30.12.2006* issued under rule 12CC specifies that Member (Central Excise), Central Board of Excise and Customs may order for withdrawal of facilities or impose restrictions where a manufacturer, 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 following:

(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 sub-rule (5) of rule 3 of the CENVAT Credit Rules, 2004.

7. Finance (No. 2) Act, 2009 has inserted a proviso in section 9A(2) to provide that in the case of following persons the provisions relating to compounding of offences will 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.

8. No, 'P' cannot avail the benefit of reduced penalty. *Circular No. 898/18/09 CX dated 15.09.2009* has clarified that the benefit of reduced penalty under provisos to section 11AC is not available at appeal stage, i.e. the reduced penalty cannot be paid *within 30 days of the communication of the order in appeal*. The circular explains that in order to avail the benefit of 25% penalty, the duty, interest and penalty are required to be paid *within 30 days of communication of the order passed by the adjudicating authority*.

Further, the reading of proviso (4) would also support this interpretation because the said proviso stipulates that wherever duty amount is increased at any appellate stage, in that case in order to avail the benefit of 25% penalty, the assessee is required to pay differential amount within 30 days of the passing of the order by the appellate authority. A combined reading of all the four provisos would, therefore, make it clear that the benefit of 25% penalty is applicable only when the assessee has paid duty, interest and the reduced penalty within 30 days of communication of the order passed by the adjudicating authority. However, if the penalty amount is increased at the appellate stage, in that case

the 25% of differential amount of penalty can be paid within 30 days of communication of said appellate order.

9. The conditions and the circumstances that would attract the imposition of penalty under section 11AC of the Central Excise Act, 1944 have been laid down by the Apex Court in case of *UOI v. Rajasthan Spinning & Weaving Mills 2009 (238) ELT 3 (SC)*.

In the instant case, the Apex Court has observed that mandatory penalty under section 11AC of the Central Excise Act, 1944 is not applicable to every case of non-payment or short-payment of duty. In order to levy the penalty under section 11AC, conditions mentioned in the said section should exist. Supreme Court ruled that the penalty would not be waived on the ground that the assessee had deposited the balance amount of excise duty (that was short paid at the first instance) before the show cause notice was issued. The Apex Court elaborated that the payment of the differential duty whether before/after the show cause notice is issued cannot alter the liability for penalty. The conditions for penalty to be imposed are clearly spelt out in section 11AC of the Act.

Supreme Court clarified that both section 11AC as well as proviso to sub-section (1) of section 11A use the same expressions : *"....by reasons of fraud, collusion or any wilful mis-statement or 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,..."*. Hence, it drew the inference that the penalty provision of section 11AC would come into play only if the notice under section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under section 11A(2), there is a legally tenable finding to that effect.

10. No, Revenue's claim is not valid in law. The facts of the given case are similar to the case of *UOI v. Hindustan Zinc Limited 2009 (233) E.L.T. 61 (Raj.)* wherein the High Court has held that the expressions "natural causes" and "unavoidable accident" are required to be given, reasonable and liberal meaning, otherwise the provisions of rule 21, so far as they relate to admissibility of remission, on these two grounds, would be rendered altogether ineffective. The Court has observed that if the contention of Revenue is accepted, no loss or destruction would fall under these two categories as in either case, grounds may be projected, on the anvil of requirement of appropriate storage, or safety measures, and so on and so forth. Even in cases of "unavoidable accident", it could always be contended that the accident could have been avoided by taking recourse of one or more measures. Thus, a bit liberal rather more practical approach is required to be taken in the matter.

The High Court further elaborated that the aspect of satisfaction under rule 21 is essentially a subjective satisfaction of authority concerned and in the instant case; the Tribunal had independently recorded its satisfaction about the loss, or destruction having been sustained by the assessee under the circumstances as covered by rule 21.

11. Section 35G(2) of the Act provides that the 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 under this sub-section shall be filed within 180 days from the

date on which the order appealed against is received by the Commissioner of Central Excise or the other party.

With effect from 01.07.2003, the Finance (No. 2) Act, 2009 has inserted sub-section (2A) to provide that the High Court may 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.

12. An applicant as defined under section 23A(c) of the Central Excise Act, 1944 can apply for advance ruling. As per section 23A(c), the following can apply for advance ruling:

(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 (a public sector company has been notified for this purpose),

and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 23C.

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.

13. Section 14A of the Central Excise Act, 1944 provides for a special audit for valuation purposes. Section 14A lays down that 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 Chief Commissioner of Central Excise is necessary.

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 Chief Commissioner of Central Excise in this behalf.

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. 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.

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.

14. Section 3(1) of the Customs Tariff Act, 1975 levies on any article which is imported into India, an additional duty of customs, equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. Finance (No.2) Act, 2009 has inserted a second proviso after the first proviso in section 3(2). The new proviso lays down that in the 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 shall be deemed to be such tariff value.

15. Section 7 of the Customs Act, 1962 empowers the Board to appoint by notification in the Official Gazette:

(a) the ports and airports which alone shall be customs ports or customs airports for the unloading of imported goods and the loading of export goods or any class of such goods;

(b) the places which alone shall be inland container depots for the unloading of imported goods and the loading of export goods or any class of such goods;

(c) the places which alone shall be land customs stations for the clearance of goods imported or to be exported by land or inland water or any class of such goods;

(d) 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;

(e) the ports which alone shall be 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.

16. Section 45(1) of the Customs Act, 1962 provides that all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transshipped. This person is called the custodian.

Responsibility of custodian of goods [Section 45(2)]: During the time the goods are in the custody of the custodians, they have the following responsibilities:

(i) maintaining a proper record of goods received from the carriers and sending a copy of the same to the customs authorities;

(ii) not permitting such goods to be removed from the customs area or allowing them to be dealt with otherwise except under the specific permission of the Customs Authorities.

Liability of the custodian [Section 45(3)]: If any imported goods are pilfered after unloading in any customs area, while in the custody of the custodian, such custodian shall be liable to pay duty on such goods. The duty shall be paid at the rate prevailing on the day of delivery of the import manifest/import report to the proper officer under section 30 for the arrival of the conveyance in which such goods were carried.

17. Sub-section (1) of section 26A provides that in the following cases the import duty paid on clearance of imported goods for home consumption shall be refunded to the person who has paid such duty if on importation the goods are capable of being easily identified as such imported goods:

(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. Further, 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 Commissioner of Customs for a period not exceeding 3 months.

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.

18. Computation of customs duty

Applicable rate of duty (Note 1)	10%
Relevant rate of exchange (Note 2)	Rs.48.20
Assessable Value	US $ 10,00,000 × Rs.48.20
	= Rs.4,82,00,000
Customs duty @ 10%	Rs.48,20,000
Add: Education cess @ 2% and secondary and higher education cess @ 1% of customs duty	Rs.1,44,600
Total duty payable	Rs.49,64,600

Note 1: In *Kesoram Rayon v. CC 86 ELT 464 = (1996) 5 SCC 576*, it has been held that goods which are not removed from the warehouse within the permissible period are deemed to be improperly removed on the day they ought to have been removed. In other words, the last date on which goods should have been removed is taken as the 'deemed date of removal' and the relevant rate of duty is the rate prevalent on that date. Hence, the applicable rate of duty is 10%, the rate prevalent on 20.06.2009, the last date when warehousing period gets over.

Note 2: The relevant rate of exchange will be the rate as in force on the date on which bill of entry for warehousing is presented. Subsequent changes in foreign exchange rate are not relevant. Hence, relevant exchange rate is 1 US $ = Rs.48.20 prevalent on 14.03.2009, the date on which bill of entry for warehousing is presented .

19. Section 28F of the Customs Act, 1962 contains the provisions relating to constitution of Authority for Advance Rulings. Sub-section (1) of section 28F empowers the Central Government to constitute an Authority for giving advance rulings to be called as "the Authority for Advance Rulings (Central Excise, Customs and Service Tax)", by notification in the Official Gazette. Sub-section (2) provides that the Authority shall consist of certain Members appointed by the Central Government. With effect from such date as the Central Government may, by notification in the Official Gazette, specify, the Finance (No. 2) Act, 2009 has inserted sub-sections (2A), (2B), (2C) and (2D) after sub-section (2) in section 28F of the Customs Act. The said sub-sections are discussed as under:

Sub-section (2A)

Notwithstanding anything contained in sub-sections (1) and (2), or any other law for the time being in force, the Central Government may, by notification in the Official Gazette, authorise an Authority constituted under section 245-O of the Income-tax Act, 1961, to act as an Authority under this Chapter.

Sub-section (2B)

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 (2C)

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 (2D)

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.

20. The action of the customs authorities is not valid. The facts of the given case are similar to the case of *Vodafone Essar South Ltd. v. UOI 2009 (237) E.L.T. 35 (Bom.)*. In the instant case, the Bombay High Court has held that the action of the Directorate of Revenue Intelligence (D.R.I. officers) in seizing the goods and collecting money from the petitioners is wholly unjustified and uncalled for, because of the following five reasons:-

(i) When the Commissioner of Customs (Appeals) in petitioner's own case had held that OFC imported by them were classifiable under Heading 85.44 of the Customs Tariff, the petitioners were not wrong in classifying the goods imported after the said order under Heading 85.44 ibid.

(ii) Decision of Commissioner (Appeals) was neither stayed by CESTAT nor by any other competent authority. Hence, mere fact that appeal filed by Revenue against the decision of Commissioner (Appeals) was pending could not be a ground to hold the petitioner guilty of misclassification of goods.

(iii) D.R.I. officers were bound by the decision given by Commissioner of Customs (Appeals).

(iv) The OFCs were cleared on payment of duty assessed under Heading 85.44. Therefore, till the assessment was set aside, the customs authorities could not have seized the goods assessed and cleared under Heading 85.44, on the ground that the goods were liable to be assessed under Heading 90.01.

(v) In the absence of any reassessment order passed determining the duty liability, there would be no question of recovering differential duty.

21. Section 151 of the Customs Act, 1962 provides that the following officers are empowered and required to assist officers of customs in the execution of the Customs Act, 1962:

(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.

22. (i) Service tax will not be applicable in this case as *Notification No. 13/2004 ST dated 10.09.2004* exempts the taxable services provided by a banking company or a financial institution including a non-banking financial company, or any other body corporate or ay other person to the Government of India or a State Government in relation to collection of any duties or taxes levied by the Government of India or a State Government from the whole of service tax leviable thereon.

(ii) Service tax will not be applicable in this case as *Notification No. 29/2004 ST dated 22.09.2004* exempts the value of taxable service provided to a customer, by a banking company or a financial institution including a non-banking financial company, or any other body corporate or any other person, in relation to,-

(a) overdraft facility;

(b) cash credit facility; or

(c) discounting of bills, bills of exchange or cheques,

which is equivalent to the amount of interest on such overdraft, cash credit or, as the case may be, discount from the service tax subject to the condition that the said interest amount is shown separately in an invoice, a bill or, as the case may be, a challan issued for this purpose.

(iii) Service tax will not be applicable in this case as *Notification No 19/2009 ST dated 07.07.2009* exempts taxable services of the nature referred to in sub-clause (zm) or (zzk), as the case may be, of clause (105) of section 65 of the Finance Act, provided to a Scheduled bank, by any other Scheduled bank, in relation to inter-bank transactions of purchase and sale of foreign currency from the whole of the service tax leviable thereon.

23. (i) As per section 65(91a) of the Finance Act, 1994, a "residential complex" means any complex comprising of—

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing

or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Here,

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence.

(ii) As per section 65(30)(a) of the Finance Act, 1994, "construction of complex" means—

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex.

(iii) Yes. *Notification No. 1/2006 ST dated 01.03.2006* exempts 67% of the value of the taxable service provided to any person by any other person in relation to construction of complex from the service tax leviable thereon. This exemption shall not apply in cases where the taxable services provided in relation to a residential complex are only completion and finishing services. Further, this exemption is not available in cases where,

(i) the CENVAT credit of duty paid on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii) the service provider has availed the benefit under *Notification No. 12/2003 ST dated 20.06.2003*.

The "gross amount charged" shall include the value of goods and materials supplied or provided or used for providing the said taxable service by the service provider.

24. (i) The Finance (No. 2) Act, 2009 has amended the definition of business auxiliary service under section 65(19) of the Finance Act, 1994 so as to exclude any activity that amounts to manufacture of excisable goods. Therefore, manufacture of non-excisable goods for or on behalf of the client shall attract service tax.

(ii) *Notification No. 13/2003 ST dated 20.06.2003* exempts the business auxiliary services provided by commission agents in relation to sale or purchase of agricultural produce from service tax.

Agricultural produce means any produce resulting from cultivation or plantation, on which either no further processing is done or such processing is done by the cultivator like tending, pruning, cutting, harvesting, drying which does not alter its essential characteristics but makes it only marketable and includes all cereals, pulses, fruits, nuts and vegetables, spices, copra, sugar cane, jaggery, raw vegetable fibres such as cotton, flax, **jute**, indigo, unmanufactured tobacco, betel leaves, tendu leaves, rice, coffee and tea but does not include manufactured products such as sugar, edible oils, processed food and processed tobacco.

Therefore, services provided by commission agents in relation to sale of jute shall not attract service tax.

(iii) Distributors receive commission from mutual fund for providing services relating to purchase and sale of mutual fund units. Services provided by such distributors are in the nature of commission agent and are, thus, liable to service tax under business auxiliary service *[Circular No. 96/7/2007 ST dated 23.08.2007].*

25. The Finance (No. 2) Act, 2009 has amended section 84 of the Finance Act, 1994 to abolish the revision procedure prescribed therein and to prescribe the procedure of filing departmental appeals before the Commissioner (Appeals) in service tax cases similar to the central excise procedure. Accordingly, section 84 pertaining to revision by Commissioner has been substituted with a new section relating to appeals to Commissioner of Central Excise (Appeals). The provisions of new section 84 are:

(1) The Commissioner of Central Excise 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 or order under this Chapter for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner of Central Excise (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(2) Every order under sub-section (1) shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(3) Where in pursuance of an order under sub-section (1), the adjudicating authority or any other officer authorised in this behalf makes an application to the Commissioner of Central Excise (Appeals) within a period of one month from the date of communication of the order under sub-section (1) to the adjudicating authority, such application shall be heard by the Commissioner of Central Excise (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.

Explanation — For the removal of doubts, it is hereby declared that above mentioned provision would come into effect from 19.08.2009. All cases decided before this date would continue to be governed by the existing provisions only.

IMPORTANT AMENDMENTS MADE BETWEEN 01.05.2009 TO 31.10.2009

Students may note that the Study Material for Indirect Tax Laws contain all the relevant amendments made by the Finance (No. 2) Act, 2009. Further, circulars/notifications issued up to 30.04.2009 and Budget notifications have also been incorporated therein. The following are the amendments which have been made between 01.05.2009 to 31.10.2009. It may be carefully noted that for the students appearing in May 2010 exams, the amendments made by the notifications, circulars and other legislations up to 31.10.2009 are relevant.

A. EXCISE

1. ***Notification No. 14/2009 CE (NT) dated 10.06.2009*** has amended rule 6 of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 so as to cast a responsibility on the said Assistant or Deputy Commissioner of Central Excise of ensuring that the goods received are used by the manufacturer for the intended purpose. This has been done by substituting the words "The said Assistant Commissioner or Deputy Commissioner shall ensure that the goods received are used by the manufacturer for the intended purpose and where the subject goods are not used" for the words "Where the subject goods are not used".

2. ***Notification No. 15/2009 CE (NT) dated 10.06.2009*** has amended *Notification No. 32/2006 CE (NT) dated 30.12.2006,* which prescribes withdrawal of facilities or imposition of restrictions on a manufacturer, first stage or second stage dealer, or an exporter involved in any of the prescribed contraventions, in the following manner:

   (i) Facilities may be withdrawn or restrictions may be imposed on a manufacturer, first stage or second stage dealer, or an exporter involved in 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 sub-rule (5) of rule 3 of the CENVAT Credit Rules, 2004. This has been done by inserting clause (g) after clause (f) in paragraph 1 of the notification.

   (ii) Two more restrictions have been imposed if a manufacturer is prima facie found to be knowingly involved in committing the prescribed offences, namely:

      (a) 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.

      (b) the assessee may be required to intimate the Superintendent of Central Excise regarding the 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.

This has been done by inserting clause (iii) and clause (iv) after clause (ii) in paragraph 2, in sub paragraph (1).

(iii) After explanation II, Explanation III has been inserted, which provides that "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 products.

3. ***Notification No. 21/2009 CE (NT) dated 20.08.2009*** has notified a public sector company as class of persons for the purpose of the sub-clause (iii) of section 23A(c) of the Central Excise Act, 1944. A "public sector company" shall have the same meaning as is assigned to it in clause (36A) of section 2 of the Income-tax Act, 1961.

4. ***Notification No.22/2009 CE (NT) dated 07.09.2009*** has inserted a second proviso after the first proviso in rule 3(7)(a) of the CENVAT Credit Rules, 2004. The second proviso lays down that the CENVAT credit in respect of inputs and capital goods cleared on or after 07.09.2009 from an export-oriented undertaking or by a unit in electronic hardware technology park or in a software technology park, as the case may be, on which such undertaking or unit has paid –

A. 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*; and

B. the education cess and the secondary and higher education cess on the excise duty referred to in (A),

shall be the aggregate of –

I. that portion of excise duty referred to in (A), as is equivalent to -

i. the additional duty leviable under section 3(1) of the Customs Tariff Act, which is equal to the duty of excise under section 3(1)(a) of the Excise Act;

ii. the additional duty leviable under section 3(5) of the Customs Tariff Act; and

II. the education cess and the secondary and higher education cess referred to in (B).

5. **Circular No. 889/09/2009 CX dated 21.05.2009** provides that the judgements of Hon'ble Supreme Court in the case of U.O.I Vs. Rajasthan Spinning & Weaving Mills and Commissioner of Customs & Central Excise Vs. Lanco Industries Ltd. in Civil Appeal No.3525 of 2009 arising out of S.L.P (Civil) No.4078 of 2008 have clarified that when the conditions spelled out under section 11AC of the Central Excise Act, 1944 are fulfilled, there is no discretion to reduce the mandatory penalty equal to duty even though the duty is paid before the issue of show cause notice.

6. ***Circular No. 890/10/2009 CX dated 03.06.2009*** has been issued to settle the classification dispute relating to coconut oil sold in small packs say of 50 ml or 100 ml. The two contending classifications are: Chapter 15 covering various types of vegetable oil including coconut oil and Chapter 33 covering cosmetics including hair oil. When the coconut oil is sold in small containers, following indications have been found on containers or labels.

A. 'hair oil'

B. 'edible oil'

C. 'pure coconut oil' or 'coconut oil'

When 'hair oil' is printed on the container/label, there is no dispute and it is classified as 'hair oil' under chapter 33. Disputes arise in respect of other two categories ('edible oil', 'pure coconut oil' or 'coconut oil'). Department contends that coconut oil falling under these two categories are meant for sale as 'hair oil', therefore, it shall be classified as 'hair oil' underChapter 33. The manufacturers plead that as they are not printing the specific use of such oil as 'hair oil' it should be classified as 'vegetable oil' under Chapter 15, irrespective of the fact that consumer may use it as 'hair oil'.

The circular explains that the Chapter Note 2 of Chapter 33 prescribes a condition that Heading No.3305 (which covers hair oil also) applies to products **put up in packing of a kind sold by retail for such use.** Thus, if a particular packing of coconut oil is generally sold in retail as hair oil, in that case, the said product would be classified under heading 3305.

Further, the Section Note 2 to Section VI also provides that goods classifiable in Heading 3305 by reason of being put up for retail sales are to be classified in the said heading and in no other heading of the schedule. This Section Note further supports the interpretation that though a product is capable of being classified under more than one heading, even then because of the nature of its retail packing, which is indicative of its use as hair oil, the classification under heading 3305 would get priority.

However, if the same coconut oil is packed in say 1 litre or 2 litre packages, which are generally used by consumers for edible purposes (even though some customers may use it as hair oil), it would be classified under Chapter 15.

Hence, the classification of coconut oil would depend upon the fact as to how the majority of the customers use the said product. Therefore, if coconut oil is packed in packages which are generally meant for sale in retail as hair oil, in that case the said product would be classified as hair oil under Heading 3305, even though few consumers may use it as edible oil.

Thus, the circular settles that coconut oil packed in containers upto 200 ml may be considered as generally used as hair oil and shall be classified under Heading 3305.

7. ***Circular No. 898/18/09 CX dated 15.09.2009*** has clarified that the benefit of reduced penalty under provisos to section 11AC is not available at appeal stage, i.e. the reduced penalty cannot be paid *within 30 days of the communication of the order in Appeal*. The circular explains that in order to avail the benefit of 25% penalty, the duty, interest and penalty are required to be paid *within 30 days of communication of the order passed by the adjudicating authority*. Further, the reading of proviso (4) would also support this interpretation because the said proviso stipulates that wherever duty amount is increased at any appellate stage, in that case in order to avail the benefit of 25 % penalty, the assessee is required to pay differential amount within 30 days of the passing of the order

by the appellate authority. A combined reading of all the four provisos would, therefore, make it clear that the benefit of 25% penalty is applicable only when the assessee has paid duty, interest and the reduced penalty within 30 days of communication of the order passed by the adjudicating authority. However, if the penalty amount is increased at the appellate stage, in that case the 25% of differential amount of penalty can be paid within 30 days of communication of said appellate order.

8. ***Circular No. 900/20/2009 CX dated 06.10.2009*** has been issued to permit bringing of duty-paid packing materials into export warehouse under Rule 20 of Central Excise Rules. Para 7.2 of the Board's *Circular No. 581/18/2001-CX dated 29.06.01* provides that duty paid goods are not permitted to be brought into the warehouse. However, it is a fact that number of times packing material in small quantity is required at a short notice and the supplier may not be interested to follow the detailed procedure of removal of goods without payment of duty. Therefore, it has been decided that duty paid packing material can be brought into the export warehouse, but exporter would not be allowed to claim export benefit like rebate for the duty paid on the said packing material.

   In view of above, in the above referred Circular, after para 7.2, following is inserted,-

   "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."

9. ***Circular No. 902/22/2009 CX dated 20.10.2009*** has been issued with regard to assessable value in respect of goods manufactured on job work basis. 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. The practice followed was that the chassis was transferred to the body builder on payment of appropriate central excise duty on stock transfer basis and was not sold to them. The body builder avails the CENVAT credit of the duty paid on the chassis and cleared the same on payment of duty to the Depot/Sales Office/Distributer of the motor vehicle manufacturer. The duty was discharged by the body builder on the assessable value comprising the value of chassis and the job charges. The Depot/Sales office of the motor vehicle manufacturer sold the vehicles at a higher price than the price on which duty had been paid.

   As per rule 10A (ii) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 the assessable value for the purpose of charging central excise duty, in the cases where the job-worker transfer the excisable goods to the Depot/Sale office/Distributer and/or any other sale point of the principal manufacturer, shall be the transaction value on which goods are sold by the principal manufacturer from such a place. 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. Therefore, the circular clarifies that wherever goods are manufactured by a person on job work basis on behalf of a principal, then value for the purpose of payment of excise duty may be

determined in terms of the provisions of Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 subject to fulfilment of the requirements of the said rule.

10. ***Circular No. 903/23/2009 CX dated 20.10.2009*** has clarified that textile quilted products like quilts, quilted bed spreads, etc. will be classified under heading 9404 and not under heading 5811 as heading 5811 covers quilted textile products which are further used in the manufacture of quilts, quilted bedspreads, etc. while it is heading 9404 which covers the final finished products like quilts and other articles of bedding and furnishing.

The HSEN 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.

In this context, the term 'used in the manufacture' is important to note. It means that heading 5811 covers only materials which are further used in making of quilted final products like bedding or bedspreads. Further HSEN to this Chapter Heading also state 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.

The HS explanatory notes 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.

11. ***Circular No. 904/24/09 CX dated 28.10.2009*** has clarified that in view of the amendment made by the Finance Act, 2008 in the definition of excisable goods, bagasse, aluminium/zinc dross and other such products termed as waste, residue or refuse which arise during the course of manufacture and are capable of being sold for consideration would be excisable goods and chargeable to payment of excise duty.

It is further clarified that in case the rate of duty in respect of such products 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 CENVAT Credit Rules, 2004, the assessee is required to reverse the proportionate credit or pay 5% amount.

Excisability of bagasse and similar waste products arising during the course of manufacture has been under dispute for a long period of time. There are number of Tribunal's judgments that being waste, these are not excisable products. Departmental appeal in respect of excisability of bagasse in one such case i.e Balrampur Chinni Mills Ltd. is reportedly still pending in the Supreme Court. Generally, the courts have been taking a view that the waste or refuse or residue arising during the course of manufacture cannot be treated as excisable goods even if such waste fetches some price in the market. However, all these matters pertain to the period prior to 2008.

In the budget of 2008, the definition of "excisable goods" in clause (d) of Section 2 of the Central Excise Act, 1944 was amended by adding an explanation that for the purposes of this clause, "goods" include 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.

B. CUSTOMS

1. ***Notification No. 124/2009 Cus. (NT) dated 20.08.2009*** has notified

   (i) a public sector company

   (ii) 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

   as class of persons for the purpose of the sub-clause (*iii*) of section 28E(c) of the Customs Act,1962.

   "Public sector company" shall have the same meaning as is assigned to it in clause (36A) of section 2 of the Income-tax Act, 1961. "Resident" shall have the same meaning as is assigned to it in clause (42) of section 2 of the Income-tax Act, 1961.

C. SERVICE TAX

Notification No. 26/2009 ST dated 19.08.2009 has notified 01.09.2009 as the date on which the services introduced by the Finance (No. 2) Act, 2009 would become effective. Further, the

amendments made in the existing services vide the Finance (No. 2) Act, 2009 would also become effective from 01.09.2009.

Exemptions

1. ***Notification No. 31/2009 ST dated 01.09.2009*** has exempted the taxable service provided by a sub-broker, to a stock-broker as defined in clause (101) of Section 65 of the Finance Act,1994, in relation to sale or purchase of securities listed on a registered stock exchange from the whole of the service tax leviable thereon.

2. ***Notification No. 32/2009 ST dated 01.09.2009*** has exempted the taxable service provided by any person, to a client as defined under business auxiliary service in relation to the manufacture of pharmaceutical products, medicines, perfumery, cosmetics or toilet preparations containing alcohol, which are charged to excise duty under Medicinal and Toilet Preparations (Excise Duties) Act, 1955 from the whole of the service tax leviable thereon.

3. ***Notification No. 33/2009 ST dated 01.09.2009*** has exempted the taxable service provided to any person in relation to transport of goods by rail from the whole of the service tax leviable thereon provided, nothing contained in this notification shall apply to any service provided or to be provided, by any person other than government railway, in relation to transport of goods in containers by rail.

   In other words, the exemption has been granted to:

   (i) service provided or to be provided by government railway, in relation to transport of goods by rail, whether in container or otherwise;

   (ii) service provided or to be provided by any person, other than government railway, in relation to transport of goods otherwise than in containers, by rail.

   Thus, services provided by persons, other than government railways, in relation to transport of goods in containers by rail would alone be taxable. An abatement of 70% of the gross amount charged for providing such service is available vide *Notification No. 1/2006 ST dated 01.03.2006.*

4. ***Notification No. 39/2009 ST dated 23.09.2009*** exempts the taxable service under the category of business auxiliary service provided by a person (service provider) to any other person (service receiver) during the course of manufacture or processing of alcoholic beverages by the service provider, for or on behalf of the service receiver, from so much of value which is equivalent to the value of inputs, excluding capital goods, used for providing the same service, subject to the following conditions, namely:-

   (a) that no Cenvat credit has been taken under the provisions of the Cenvat Credit Rules, 2004;

   (b) that there is documentary proof specifically indicating the value of such inputs; and

   (c) where the service provider also manufactures or processes alcoholic beverages, on his or her own account or in a manner or under an arrangement other than as mentioned aforesaid, he or she shall maintain separate accounts of receipt,

production, inventory, despatches of goods as well as financial transactions relating thereto.

Here, 'input' and 'capital goods' shall have the meaning as is assigned to them under rule 2 of the CENVAT Credit Rules, 2004.

5. ***Notification No. 40/2009 ST dated 30.09.2009*** has amended *Notification No.17/2009 ST dated 07.07.2009* which exempts certain specified taxable services received by an exporter and used for export of goods. The following service (inserted at point no. 17 in the original notification) received by an exporter and used for export of goods has also been exempted vide this notification:

17.	(zzzzl)	Service provided for transport of export goods through national waterway, inland water and coastal shipping.	i. The exporter shall- 1. produce the Bill of Lading or a Consignment Note or a similar document by whatever name called, issued in his name; 2. produce evidence to the effect that the said transport is provided for export of relevant goods.

Other amendments

6. *Notification No. 9/2009 ST dated 03.03.2009* was issued to provide refund of service tax paid on taxable services specified in section 65(105) of the Finance Act, 1994 which are provided in relation to the authorised operations (as defined under SEZ Act, 2005) in a Special Economic Zone (SEZ), and received by a developer or units of a SEZ, whether or not the said taxable services are provided inside the SEZ.

Notification No. 15/2009 ST dated 20.05.2009 has been issued to amend the aforesaid *Notification 9/2009 ST dated 03.03.2009* to provide unconditional exemption to services consumed within the SEZ without following the refund route thus dispensing with the requirement of first paying the tax by the service provider and then claiming the refund thereof by developer/unit. The exemption by way of refund would be limited to situations only when taxable services provided to SEZ are consumed partially or wholly outside SEZ.

This has been done by making the following amendments in *Notification No. 9/2009 ST dated 03.03.2009*:

A. Conditions (a) to (f) mentioned in paragraph 1 for claiming the exemption have been amended in the following manner:

(i) The condition (c) for claiming the exemption has been substituted with the following condition:

"the exemption claimed by the developer or units of special economic zone shall be provided by way of refund of service tax paid on the specified services

used in relation to the authorised operations in the special economic zone except for services consumed wholly within the special economic zone;"

(ii) The condition (d) for claiming the exemption has been substituted with the following condition:

"the developer or units of special economic zone claiming the exemption, by way of refund in accordance with clause (c), has actually paid the service tax on the specified services;"

(iii) Another condition (g) has been added after condition (f) for claiming the said exemption. The new condition (g) reads as follows:

"(g) the developer or unit of a special economic zone shall maintain proper account of receipt and utilisation of the taxable services for which exemption is claimed."

B. The manner of giving exemption mentioned in paragraph 2 has been amended. In paragraph 2, for the words, "shall be subject to the following conditions", the words, ",except for services consumed wholly within the Special Economic Zone, shall be subject to the following conditions" shall be substituted.

7. ***Notification No. 27/2009 ST dated 20.08.2009*** has notified a public sector company as class of persons for the purpose of the sub-clause (iii) of section 96A(b) of the Finance Act, 1994. A "public sector company" shall have the same meaning as is assigned to it in clause (36A) of section 2 of the Income-tax Act, 1961.

8. ***Notification No. 25/2009 ST dated 19.08.2009*** has substituted the explanation in rule 3 of the Export of Services Rules, 2005 with the following explanation:

"For the purposes of this rule "India" includes the installations, structures and vessels in the continental shelf of India and the exclusive economic zone of India."

9. The Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 and the Export of Services Rules, 2005 have been amended vide ***Notification No. 37/2009 ST dated 23.09.2009*** and ***Notification No. 38/2009 ST dated 23.09.2009*** so as to categorise the new taxable services introduced vide the Finance (No. 2) Act, 2009 under Rule 3. Taxable services have been categorised as under:

Sl. No.	**Taxable service**	**Sub-clause of section 65(105)**	**Export of Services Rules, 2005**	**Taxation of Services (Provided from Outside India and Received in India) Rules, 2006**
1.	Cosmetic and plastic surgery service	zzzzk	*Category 2 [Rule 3(1)(ii)]	Category 2 [Rule 3(ii)]
2.	Service provided in relation to	zzzzl	*Category 2 [Rule 3(1)(ii)]	Category 2 [Rule 3(ii)]

	transport of coastal goods and goods transported through inland water including National Waterways			
3.	Legal consultancy service	zzzzm	*Category 1 [Rule 3(1)(i)] and Category 3 [Rule 3(1)(iii)]	Category 1 [Rule 3(i)] and Category 3 [Rule 3(iii)]

Note – (1) Category 1 [Rule 3(1)(i)] – For services under this category, criterion of services being in relation to an immovable property situated outside India is prescribed.

(2) Category 2 [Rule 3(1)(ii)] – For services under this category, criterion of services as are performed outside India is prescribed.

(3) Category 3 [Rule 3(1)(iii)] – For services under this category, criterion of location of recipient of service outside India is prescribed.

10. ***Notification No. 34/2009 ST dated 01.09.2009*** has amended *Notification No. 1/2006 ST dated 01.03.2006* granting abatement of 70% to the service provided or to be provided, by any person other than government railway, in relation to transport of goods in containers by rail so as to rename the service as transport of goods in containers by rail.

11. ***Circular No. 115/09/2009 ST dated 31.07.2009*** has clarified the following two issues:

Issue: Whether service tax is payable on commission paid to Managing Director/Directors (whole time, or Independent) by the company under business auxiliary service?

Clarification: Some Companies make payments to Managing Director/Directors (Whole-time or Independent), terming the same as 'commissions'. The said amount paid by a company to their Managing Director/Directors (Whole-time or Independent) even if termed as commission, is not the 'commission' that is within the scope of business auxiliary service and hence service tax would not be leviable on such amount.

Issue: Whether service tax is payable by Independent Directors who are part of the Board of Directors under management consultant's service?

Clarification: The Managing Director/Directors (Whole-time or Independent) being part of Board of Directors perform management function and they do not perform consultancy or advisory function. The definition of management consultant service makes it clear that what is envisaged from a consultant is advisory service and not the actual performance of the management function. The payments made by Companies, to Directors cannot be termed as payments for providing management consultancy service. Therefore, it is

clarified that the amount paid to Directors (Whole-time or Independent) is not chargeable to service tax under the category 'Management Consultancy service'. However, in case such directors provide any advice or consultancy to the company, for which they are being compensated separately, such service would become chargeable to service tax.

12. ***Circular No. 116/10/2009 ST dated 15.09.2009*** has clarified the following issue:

Issue: Whether service tax is leviable on construction of canals for Government projects?

Clarification: As per section 65(25b) of the Finance Act, 1994 "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

13. ***Circular No. 117/11/2009 ST dated 31.10.2009*** has clarified that service tax will not be leviable on services provided by a tour operator in connection with Haj & Umrah pilgrimage. The amount charged to the pilgrims in India undertaking Haj and Umrah pilgrimage, is for services provided by the Government of Saudi Arabia and the tour takes place outside India. As per Rule 3(1)(ii) of the Export of Services Rules, 2005, (*Circular No. 111/05/2009 ST dated 24.02.2009*), the service in respect of tour operator is export if such service is performed outside India. It is also provided therein that where such taxable service is partly performed outside India, it shall be treated as performed outside India.

Therefore, it is clarified that service tax is not chargeable on the services provided in respect of tour undertaken for carrying out Haj and Umrah Pilgrimage in Saudi Arabia by Indian pilgrims considering these as export of service, provided they fulfill the other conditions of export as provided in Export of Service Rules.

Note: The Budget Notifications issued on 07.07.2009 are given in the Supplementary Study Paper 2009. Further, they have also been incorporated in the Study Material of Indirect Tax Laws (Edition 2009). Therefore, the same have not been given here again.