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PAPER – 8 : INDIRECT TAX LAWS

QUESTIONS

EXCISE

Manufacture

1. Discuss, with the help of a decided case law, if any, whether production of mustard oil and oil cake from mustard seeds amounts to manufacture.

CENVAT credit

2. Rokasa Ltd. was engaged in the manufacture of pharmaceutical product-Rovamox pediatric drops. Rokasa Ltd. claimed the CENVAT credit of the duty paid on the plastic droppers supplied along with the bottle containing drops on the ground that the droppers were inputs used in or in relation to manufacture of such final product. However, the Revenue argued that CENVAT credit was not admissible because these droppers were separately kept in the cartons along with the sealed bottle of the pediatric drop. These droppers 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, with the help of a decided case law.

Penalty

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

Remission of duty

4. 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, storage and loading on trucks, accounting method adopted. The assessee applied for the remission of the duty under rule 21 of the Central Excise Rules, 2002. Revenue contended that the shortage could have been avoided or minimized by the assessee, as these 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, if any.

Compounding of offences

5. Briefly enumerate the persons not eligible for compounding under section 9A(2) of the Act.

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Valuation

6. Henna Export Corporation gets its product manufactured on job work basis from Meltex Ltd. - an independent processor. The details of the transaction are as follows:-

Particulars	*Amount(Rs.)*
Cost of material sent to job worker for processing	2,500
Processor charges (including Rs.700 as processing charges and Rs.500 as his profit)	1,200
Transport charges for receiving goods at the premises of the processor	100

After processing, goods are sold by Henna Export Corporation at Rs.5,800 from the premises of Meltex Ltd. You are required determine the assessable value of the goods under section 4 of the Central Excise Act.

Settlement Commission

7. Bawa Traders Pvt. Ltd. filed an application with the Settlement Commission under section 32E of the Central Excise Act, 1944. However, as the applicant was not willing to accept the duty liability settled by the Commission, it sent the case back to the adjudicating authority in terms of section 32L(1) of the Act. It directed the adjudicating officer to dispose the case in accordance with the provisions of the Act as if no application had been made to Settlement Commission.

When case came up before Revenue for adjudication, it decided that since as per section 32M, any order made by the Settlement Commission was conclusive; the figure of duty liability fixed by the Settlement Commission had attained finality. Hence, Bawa Traders Pvt. Ltd. was required to make payment of the said amount along with penalty and interest.

Do you think that, in the light of facts and circumstances of the instant case, Revenue was justified in considering the order passed by the Settlement Commission to be the final order of adjudication?

SSI

8. Briefly explain whether the following units are eligible for the benefits under *Notification No. 8/2003-CE, dated 1.3.2003* during the financial year 2009-10 as small scale industry:

(i) The turnover of Padam Infosystems for the purpose of aforesaid notification in the financial year 2008-09 was Rs. 4.2 crores. However, owing to recession in the IT industry, Padam Infosystems has anticipated a fall of 20% in the turnover in the financial year 2009-10 as compared to the turnover in the financial year 2008-09.

(ii) Solo Enterprises started its manufacturing operations in the year 2008-09 with an investment of Rs. 4.5 crores in plant and machinery and achieved a sales turnover of Rs. 2 crore in 2008-09.

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Valuation audit

9. Explain the amendment made by the Finance (No. 2) Act, 2009 in the provisions relating to valuation audit under section 14A of the Central Excise Act, 1944.

Excisabilty of waste products

10. Bawana Sugar Mills Ltd. is engaged in the manufacture of sugar. During the course of manufacture of sugar, bagasse emerges as a residue. The Department has demanded duty on the bagasse treating it as excisable goods on the ground that bagasse is capable of being sold for consideration. However, the assessee contends 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.

    You are required to examine the veracity of the demand raised by the Department in law.

SERVICE TAX & VAT

Penalty for failure to pay service tax

11. Examine, with the help of a decided case law, if any, whether the Tribunal could reduce the penalty imposable under section 76 of the Finance Act, 1994 as amended, below the minimum limit prescribed under that section?

Clearing and forwarding agent's services

12. Tulip Medicines entered into an agreement with M/s. Sipla for handling and distribution of their products and was entrusted with the job of receiving, storing and distributing Sipla products to their authorised stockists and distributing centres. For the services so rendered, the Tulip Medicines was entitled to commission based on agreed percentage of sales figures and also to reimbursement of recurring expenses. Revenue contended that the services provided by the assessee attracted service tax under the category "clearing & forwarding agent's services". On the other hand, the assessee pleaded that service tax could be levied under the said category only when clearing and forwarding agent would have carried out both clearing and forwarding operations and in the given case, the assessee had not rendered any clearing services.

    Examine, whether the contention of the Department is justified in law.

Appeals

13. Discuss the provisions relating to the filing of appeals to Commissioner of Central Excise (Appeals) under section 84 of the Finance Act, 1994 as amended by Finance (No. 2) Act, 2009.

Taxable services

14. Explain the validity of the following statements:-

    (a) Money changer services provided by one Scheduled bank to another Scheduled bank in relation to sale and purchase of foreign currency is liable to service tax.

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(b) Services provided by a clearing and forwarding agent in relation to clearing and forwarding operations to a goods transport agency for transportation of goods by road are exempt from whole of the service tax.

Banking and other financial services

15. Explain, with the help of a decided case law, if any, whether the chit fund activity falls within the expression "cash management" under "banking and other financial services"?

Stock transfer

16. Briefly explain whether the input tax credit of the VAT paid on the purchases of goods which are stock transferred, is available.

Computation of VAT

17. Compute the net VAT liability of Rishabh using the information given as follows:-

Particulars	Rupees
Raw material purchased from foreign market (including duty paid on imports @ 20%)	12,000
Raw material purchased from local market (including VAT charged on the material @ 4%)	20,800
Raw material purchased from neighbouring state (including CST paid on purchases @ 2%)	7,140
Storage, transportation cost and interest	2,500
Other manufacturing expenses incurred	600

Rishabh sold the goods to Rajul and earned profit @ 10% on the cost of production. VAT rate on sale of such goods is 12.5%.

Subtraction method

18. Briefly discuss, under what circumstances subtraction method of computing VAT is normally applied?

Demerits of VAT

19. Illustrate the demerits of VAT system.

Works Contract

20. Is a works contract liable to VAT? What are the points that should be borne in mind to ascertain whether a transaction is a works contract as contemplated in Article 366(29A)(b) of the Constitution?

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CUSTOMS

Refund of import duty

21. Discuss, in detail, the provisions relating to the refund of import duty under section 26A.

Compounding of offences

22. Briefly enumerate the list of persons not eligible for compounding under section 137(3) of the Act.

Valuation

23. Robotics Private Limited imported some goods from ABC Inc. of US. Compute the value of the goods for the purpose of levying the duty:-

Particulars	Dollars($)
CIF value	5,000
Freight paid	1,500
Insurance cost	500

The banker realized the payment from importer at the exchange rate of Rs.45 per US $. Central Board of Excise and Customs notified the exchange rate as Rs.44.50 per US $.

Restriction on custody of goods

24. Discuss, with the help of a decided case law, if any, is the Port Trust liable to pay duty on the goods pilfered while in their possession.

Seizure of goods

25. 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, if any.

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SUGGESTED ANSWERS/HINTS

1. The question as to whether the production of mustard oil and oil cake from mustard seeds amounts to manufacture has been decided by the Supreme Court in the case of *Jai Bhagwan Oil and Flour Mills v. UOI 2009 (239) E.L.T. 401 (S.C.)*. In the instant case, the Apex Court held that the true test to ascertain whether a process is a manufacturing process producing a new and distinct article is whether the article produced is regarded in the trade, by those who deal in it, as a marketable product distinct in identity from the commodity/raw material involved in the manufacture.

When mustard seeds were subjected to the process of extraction whereby mustard oil and oil cake were produced, the process involved manufacture of mustard oil as also the manufacture of oil cake. It was certainly not a mere process of cleaning, repairing, reconditioning, recycling or assembling. Oil cake had a distinct and different identity from mustard seeds and it had a separate name, character and use different from mustard seed. Oil cake was not a waste to be thrown away, but was a valuable product with a distinct name, character, use and marketability. Resultantly, it can be concluded that the said process amounts to manufacture.

2. 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 agreed with the contention of the assessee that for purpose of dispensation or administration of the drugs in proper quantity as per the medical prescription, dropper had to be affixed on the bottle containing the drug. Further, as the droppers were necessary packaging material for marketing of the drug (as per the directions given by the Controller of Drugs for India), they would be covered by the words "packing material" in the definition of inputs under explanation to rule 57A of the erstwhile Central Excise Rules, 1944 [now rule 2(k) of the CENVAT Credit Rules, 2004]. The Tribunal, while allowing the appeal in the instant case, had relied upon the decision taken in *Heal Well Pharmaceutical v. Collector 1994 (72) E.L.T. 446 (Tribunal)* wherein it was held that where dropper was provided in the carton along with bottle containing the drug, it amounted to manufacture and the manufacturer was entitled to credit of duty paid on such product being input of the firm product.

Considering the all the facts, circumstances and the legal position, the High Court, upholding the Tribunal's decision, held that the plastic dropper packed in the pediatric drops and marketed at the factory gate should be construed to be an input used in or in relation to the manufacture of the final product.

3. 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, overruling the decision of the Tribunal, held 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

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the Tribunal was not justified in striking down the levy of penalty against the assessee 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.

4. 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 held that the expressions "natural causes" and "unavoidable accident" were required to be given, reasonable and liberal meaning, lest 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 noted that if the contention of Revenue was accepted, no loss or destruction would fall in either of these clauses because in either case, grounds might 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 was required to be taken in the matter.

The aspect of satisfaction under rule 21 was essentially a subjective satisfaction of authority concerned and in the instant case; the Tribunal independently recorded its satisfaction about the loss, or destruction having been sustained by the assessee under the circumstances as covered by rule 21. Therefore, merely on the basis of method of accounting of physical stock, the remission of duty could not be denied.

5. Finance (No. 2) Act, 2009 provides that the following mentioned persons shall not be eligible for compounding under section 9A(2):-

1. Person who has been 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).
2. 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.
3. 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.
4. A person who has been convicted by the court under this Act on or after 30.12.2005.

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6. As per rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, where the excisable goods are produced or manufactured by a job-worker, on behalf of a person (hereinafter referred to as principal manufacturer) and 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. Hence, in the instant case, the assessable value of the goods shall be Rs.5,800.

7. No, in the light of facts and circumstances of the instant case, Revenue was not justified in considering the order passed by the Settlement Commission to be the final order of adjudication. The facts of the given case are similar to the case of *Vishwa Traders Pvt. Ltd. v. UOI 2009 (241) E.L.T. 164 (Guj.)* wherein the High Court held that under section 32L(1), once the Settlement Commission forms an opinion that any person who made an application for settlement under section 32E of the Act has not cooperated in the proceedings before the Commission, the Settlement Commission may send the case back to the adjudicating authority to dispose of the case in accordance with provisions of the Act, as if, no application under section 32E has been made. If there is no application before Settlement Commission, there can be no question of any final order of adjudication. Consequently, the order passed by the Settlement Commission under section 32L(1) cannot be considered to be the final order of adjudication.

The High Court, while interpreting section 32L(3), held that for working out the time limit prescribed under section 11A for recovery of duties, the period commencing from the date of application to the Settlement Commission to the date of receipt of the order under section 32L by the adjudicating authority, shall be excluded. Therefore, the balance period available from the date of making of application before Settlement Commission shall be available to the adjudicating authority for making an order assessing duty liability of an assessee.

Hence, the High Court pronounced that Revenue shall continue the adjudication proceedings from the stage at which the proceedings before Settlement Commission commenced.

8. (i) The units whose value of clearances computed in accordance with the notification is less than Rs. 4 crores in the previous financial year are eligible for the benefit of the *Notification No. 8/2003* in the current financial year. Thus, Padam Infosystems is not eligible to any SSI concession in 2009-10. They have to pay normal duty.

(ii) All industries, irrespective of their investment or number of employees, are eligible for concession. Concession is based on the value of turnover only. Since in the financial year 2008-09, the value of turnover is less than Rs. 4 crores, Solo Enterprises is eligible for SSI concession.

9. Prior to amendment, section 14A, inter alia, provided that only a cost accountant can be nominated by the Chief Commissioner of Central Excise to conduct the special audit in case where any Central Excise Officer not below the rank of an Assistant

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Commissioner/Deputy Commissioner of Central Excise is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person.

Finance (No.2) Act, 2009 has amended section 14A so as to provide that now; the Chartered Accountants may also be nominated for the aforementioned purpose.

For the purpose of this section, "Chartered Accountant" shall have the meaning assigned to it in section 2(1)(b) of the Chartered Accountants Act, 1949.

Note : Section 2(1)(b) of the Chartered Accountants Act, 1949 defines Chartered Accountant as a person who is a member of the Institute of Chartered Accountants of India.

10. The demand raised by the Department is valid in law. *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.

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.

In the light of above discussion, it could be inferred that bagasse is excisable and hence, Bawana Sugar Mills Ltd. is liable to pay excise duty.

11. The question as to whether the Tribunal could reduce the penalty imposable under section 76 of the Finance Act, 1994 as amended, below the minimum limit prescribed under that section was decided by the Rajasthan High Court in case of *UOI v. Aakar Advertising 2008 (11) S.T.R. 5 (Raj.).* The High Court held that if the assessee proves that there is reasonable cause for failure to pay service tax, the penalty shall not be imposed. However, if reasonable cause is not shown, and penalty is required to be levied, then, the minimum penalty prescribed cannot be further reduced, under the garb of any existing discretion, assumed to be vesting, with the authority, including the Tribunal. Where the two limits have been prescribed, being the minimum and maximum limit, then obviously the free play is available between the two limits only, and the discretion can be exercised, within those limits. However, that does not mean, that the authorities have any power to impose penalty less than the minimum prescribed by the section. Accordingly, the question was answered in favour of the Revenue, and against the assessee.

12. No, the contention of the Department is not justified in law. The facts of the given case are similar to the case of *CCEx., Panchkula v. Kulcip Medicines (P) Ltd. 2009 (14) S.T.R. 608 (P & H).* In this case, the Tribunal held that as per the facts of the case, there was no clearing activity being undertaken by the dealer. Therefore, the services rendered by him would not satisfy the requirement of clearing and forwarding agent and consequently, no service tax liability would arise. The High Court, affirming the decision taken by the

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Tribunal, held that since no clearing activity was directly undertaken by the agent from the manufacturer's (Principal) premises, he was not liable to pay the service tax under the category "clearing and forwarding agent's services". Service tax is leviable under the said category only if an agent renders both clearing and forwarding services.

The High Court further elaborated the question - whether word 'and' used after the word 'clearing' but before the word 'forwarding' in section 65(105)(j) can be considered in a conjunctive (combined) sense or disjunctive (separating) sense. The Court elucidated that if one person who has rendered service only as 'forwarding agent' without rendering any service as 'clearing agent' would be deemed to have rendered both services, it would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. Besides, the learned counsel for the Revenue failed to bring on record any material to show that the word 'and' should be construed as disjunctive. Further, Revenue had also not shown any 'trade practice' which might lead to a necessary inference that service of one kind rendered was invariably considered to comprise both. Therefore, the word 'and' should be understood in a conjunctive sense.

13. Section 84 of the Finance Act, 1994 as amended by Finance (No. 2) Act, 2009 provides as follows:-

(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 [Sub-section (1)].

(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 amendment would come into effect from 19.08.2009. All cases decided before this date would continue to be governed by the existing provisions only.

14. (a) No, the statement is incorrect. *Notification No. 19/2009 – ST dated 07.07.2009* has exempted the money changer services provided by one Scheduled bank to another Scheduled bank in relation to sale and purchase of foreign currency.

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(b) Yes, the statement is absolutely correct. *Notification No. 1/2009 ST dated 05.01.2009* provides that services provided by a clearing and forwarding agent in relation to clearing and forwarding operations to a goods transport agency for transportation of goods by road has been exempted from the whole of the service tax subject to the condition that the invoice issued by such service provider, providing services should mention the name and address of the goods transport agency and also the name and date of the consignment note, by whatever name called, issued in his behalf.

15. The High Court, in case of *A.P. Federation OF Chit Funds v. UOI 2009 (13) S.T.R. 350 (A.P.)*, has decided the issue as to whether the chit fund activity falls within the expression "cash management" under "banking and other financial services". In this case, the petitioner was engaged in the business of chit funds. The petitioner questioned the correctness of *CBEC Master Circular No. 96/7/2007-S.T. dated 23-8-2007.* Considering the definition of "chit fund" and Supreme Court decision in case of *M/s. Shriram Chits & Investment (P) Ltd. v. Union of India AIR 1993 SC 2063*, the High Court held that in the absence of a specific statutory definition of 'cash management' or even 'asset management', the question of its wider interpretation either by seeking to include or exclude any other transactions or business (chit fund activity in the given case) is not permissible. Therefore, it is amply clear that in the absence of any such inclusive definition available in the statute, it cannot be said that the petitioners would fall within the mischief of "banking and other financial services". The entire action of the respondents of levying the service tax for the first time by way of a circular is merely an executive fiat, which is not permissible under the law.

In the light of the foregoing reasons, High Court set aside the impugned *Circular No. 96/7/2007-S.T dated 23-8-2007.* As a result, the High Court held that the chit fund activity does not fall within the expression "cash management" under "banking and other financial services".

16. Yes, the tax paid on purchases of goods which are stock transferred will be available as input tax credit after retention of 4% of such tax by the State Governments.

17. Computation of Sale Price and VAT payable thereon;

Particulars	Rupees
Raw material purchased from foreign market (Note – 1)	12,000
Raw material purchased from local market (Rs. 20,800 – Rs. 800) (Note – 2)	20,000
Raw material purchased from neighbouring state (Note – 3)	7,140
Storage, transportation cost and interest	2,500
Other manufacturing expenses incurred	600
Cost of production	42,240

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Add: Profit earned @10% on Rs. 42,240	4,224
Sale Price	46,464
VAT @ 12.5% on sales	5,808

Net VAT liability of Rishabh:-

VAT on sale price	5,808
Less: Set-off of VAT on purchases	
On imports	Nil
On local purchases	800
Net VAT payable by Rishabh	5,008

Notes:-

1. Since, the duty paid on imports is not a State VAT; it will form part of cost of input.
2. VAT charged by the local suppliers is Rs. 800. Since, the credit of this would be available; it shall not be included in the cost of input.
3. Credit/set-off for tax paid on inter-State purchases (inputs) is not allowed.

18. The subtraction method of computing VAT is normally applied where:-

(a) the tax is not charged separately and

(b) the same rate of tax is attracted on all, including consumables and services, added at all the stages of production/distribution.

19. Demerits of VAT system:-

1. The merits accrue in full measure only under a situation where there is only one rate of VAT and VAT applies to all commodities without any question of exemptions whatsoever. Once concessions like differential rates of VAT, composition schemes, exemption schemes, exempted category of goods etc. are built into the system, distortions are bound to occur.
2. In the federal structure of India in the context of sales-tax, so long as Central VAT is not integrated with the State VAT, it is difficult to put the purchases from other States at par with the State purchases. Therefore, the advantage of neutrality is confined only for purchases within the State.
3. For complying with the VAT provisions, the accounting cost increases. The burden of this increase does not commensurate with the benefit to traders and small firms.
4. Since VAT is imposed or paid at various stages and not on last stage, it increases the working capital requirements and the interest burden on the same. In this way, it

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is considered to be non-beneficial as compared to the single stage-last point taxation system.

5. VAT is a form of consumption tax. Since, the proportion of income spent on consumption is larger for the poor than for the rich, VAT tends to be regressive.

6. As a result of introduction of VAT, the administration cost to the State increases as the number of dealers to be administered goes up significantly.

20. The works contract is a deemed sale, which involves the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Under State VAT laws, works contract transactions too is subject to VAT within the purview of Entry 54 of the List II of the Seventh Schedule of the Constitution.

To ascertain whether a transaction is a works contract as contemplated in Article 366(29A)(b), the following points should be kept in mind:

1. There must exist an individual works contract; divisible contracts are out side the scope.

2. Goods must be involved in the execution of the works. Transfer of property in goods does qualify as works contract when it is incorporated in the works.

3. Transfer of property in goods must pass as goods or in some other form. Form of goods has no relevance (may have a relevance for determination of rate of tax).

4. Property in goods must pass during the execution of works not before or after the execution of works.

5. Some work has to be done on the property of the contractee by the contractor.

6. In the works contract, transfer of property must be an integral part of its execution.

7. Pure labour contracts or service contracts are out side the purview of the sales tax/VAT law.

8. If during the execution of works contract goods are consumed and their identity is lost then no transfer of property occurs in those goods.

9. There must be a dominant intention to effect the transfer of property in goods in execution of works contract. However, even if the dominant intention of the contract is rendering of a service, and in that process if there is a transfer of property in goods, the contract will amount to a works contract.

21. Section 26A of the Customs Act, 1962, containing the provisions for refund of the import duty, provides as follows:-

Conditions for claiming the refund of duty

Where on the importation of any goods capable of being easily identified as such imported goods, any duty has been paid on clearance of such goods for home consumption, such duty shall be refunded to the person by whom or on whose behalf it was paid, subject to the fulfillment of the following conditions:-

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(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:

Provided that the goods have not been worked, 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 and abandons them/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 such manner as may be prescribed and within a period not exceeding 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 three months.

Moreover, nothing contained in this section shall 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.

22. Finance (No.2) Act, 2009 provides that the following mentioned persons shall not be eligible for compounding under section 137(3):-

(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:—

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(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.

23. Computation of assessable value for Robotics Private Limited:-

CIF value	5000 US $
Less: Freight	1500 US $
Less: Insurance	500 US $
Therefore, FOB value	3000 US $

Assessable value for Customs purpose:

FOB value	3000 US $
Add:Freight (20% of FOB value) (Note – 1)	600 US $
Add: Insurance (actual)	500 US $
CIF for Customs purpose	4100 US $
Add: 1% for landing charges (Note – 2)	41 US$
Value for Customs purpose	4141 US $
Exchange rate as per CBEC (Note – 3)	Rs. 44.50 per US $
Assessable value =	Rs. 44.50 x 4141 US $
=	Rs. 184274.50

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Notes:

(1) As the material has been imported by air, the freight has been restricted to 20% of FOB value i.e. 600 US $. [Second proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]

(2) Landing charges at the rate of 1% of the CIF value of the imported goods, shall be added, whether ascertainable or not [First proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

(3) Applicable exchange rate is Rs. 44.50/- per $ as notified by CBEC because explanation to section 14(1) provides that rate of exchange shall be the rate as notified by CBEC.

24. The question as to whether the Port Trust is liable to pay duty on the goods pilfered while in their possession is answered in negative by the Bombay High Court in case of *Board of Trustees of the Port of Bombay v. UOI 2009 (241) E.L.T. 513*. In the instant case, the High Court viewed that considering the language of section 45(3) of the Customs Act, the liability to pay duty is of the person, in whose custody the goods remain, as an approved person under section 45 of the Customs Act. Considering that the possession of the goods by the Port Trust is by virtue of powers conferred on the Port Trust under the Port Trust Act, the Court found it impossible to hold that the Port Trust is an approved person or can be notified as an approved person. It implies that section 45(3) of the Customs Act refers to the persons who have approved warehouses in terms of sections 9 and 10 of the Customs Act.

The High Court further opined that under section 45 of the Customs Act, the person referred to in sub-section (1) thereof can only be the person approved by the Commissioner of Customs. It excludes a body of persons, who by virtue of a law for the time being in force, is entrusted with the custody of goods by incorporation of law under another enactment, (for example, the Port Trust Act in the given case).

The Court interpreted that the intention of the law might have been to check the pilferage taken place from a private warehouse or a customs warehouse run by a private party. The negligence on such private parties should not cause loss to the exchequer.

Thus, the Court held that under section 45(1) of the Customs Act, the recovery of duty in respect of pilfered goods could only from the approved person and the Port Trust is not liable to pay duty on goods pilfered while in their possession.

25. No, 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 held that the action of the Director of Revenue Intelligence (D.R.I. officers) in the Customs Department in seizing the goods and collecting money from the petitioners was wholly unjustified and uncalled for, because of following five reasons:-

(i) When the Commissioner of Customs (Appeals) in petitioner's own case had held that OFC imported by petitioners were classifiable under Heading 85.44 of the

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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 Bills of Entry filed by the petitioners by classifying the goods under Heading 85.44 had been assessed under Heading 85.44 and the goods had been cleared only on payment of duty as assessed. 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.

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

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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

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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

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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

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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

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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.

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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.

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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

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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:

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"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 transport of coastal goods and goods transported through inland water including National Waterways	zzzzl	*Category 2 [Rule 3(1)(ii)]	Category 2 [Rule 3(ii)]
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.

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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.

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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.

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