

CENTRAL EXCISE BASIC CONCEPTS

Explanation to section 2(d) of the Central Excise Act, 1944

1. Have the aluminium dross and skimmings become excisable in view of the insertion of Explanation to section 2(d) of the Central Excise Act, 1944 by the Finance Act, 2008?

Ans. Hindalco Industries Ltd. UOI 2009 ((All.) -----YES

Because of deeming provision it would attract excise duty.

Section 2(f) of the Central Excise Act, 1944

2. Does the fabrication, assembly and erection of waste water treatment plant amount to manufacture?

Larsen & Toubro Limited v. UOI 2009 (Bom.)

The Court held that no commercial movable property came into existence until the assembling was completed by embedding different parts in the civil works. Hence, **the fabrication, assembly and erection of waste water treatment plant does not amount to manufacture.**

3. Whether the theoretical possibility of product being sold is sufficient to establish the marketability of a product?

Bata India Ltd. v. CCE 2010 (SC)

The mere theoretical possibility of the product being sold is not sufficient but there should be commercial capability of being sold.

Burden to show is entirely on the Revenue.

4. Whether the machine which is not assimilated in permanent structure would be considered to be moveable so as to be dutiable under the Central Excise Act?

CCE v. Solid & Correct Engineering Works and Ors 2010 (SC)

The Court observed that as per the assessee, the machine was fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth, but because a foundation was necessary to provide a wobble free operation to the machine.

Hence, the Supreme Court held that the plants in question were not immovable property.

Section 2(f) of the Central Excise Act, 1944

5. Does the activity of packing of imported compact discs in a jewel box along with inlay card amount to manufacture? -----NO

CCE v. Sony Music Entertainment (I) Pvt. Ltd. 2010 (Bom.)

The compact disc had been complete and finished when imported by the assessee

6. Does the process of preparation of tarpaulin made-ups after cutting and stitching the tarpaulin fabric and fixing the eye-lets amount to manufacture? -----NO decision based on facts

CCE v. Tarpaulin International 2010 (S.C.)

2. CLASSIFICATION OF EXCISABLE GOODS

1. Is the product “Scrabble” classifiable under sub-heading 9503.00 or sub-heading 9504.90 of the First Schedule to the Central Excise and Tariff Act, 1985?

Pleasantime Products v. CCE 2009 (S.C.)

“Scrabble” would not fall in the category or class mentioned in sub-heading 9503.00, namely, “puzzles of all kinds”.

“Scrabble” was a board game. It was not a puzzle. In the circumstances, it would fall under heading 95.04 and not under sub-heading 9503.00 of the Central Excise Tariff.

3. VALUATION OF EXCISABLE GOODS

Section 4(3)(d) of the Central Excise Act, 1944

1. Whether the charges towards pre-delivery inspection and after-sale-service recovered by dealers from buyers of the cars would be included in the assessable value of cars?

Maruti Suzuki India Ltd. v. CCE 2010 (Tri. – LB)

This dealer’s margin contained provision for rendering pre-delivery inspection and three after sale services

The Court noted that the transaction value does not merely include the amount paid to the assessee towards price, but also includes any amount a buyer is liable to pay **by reason of or in connection with the sale of the goods**, including any amount paid on behalf of assessee to the dealer or the person selling the vehicles. **The reason of sale and inter connection thereto are essential elements to contribute for assessable value.**

4. CENVAT CREDIT

Rule 2(l) of the CENVAT Credit Rules, 2004

1. Whether the manufacturers of concentrates are eligible to avail credit of the service-tax paid on advertising services, sales promotion, market research etc. availed by them and utilize such credit towards payment of excise duty on the concentrate? -----YES

Coca Cola India Pvt Ltd. v. CCE (2009) (Bom.)

Rule 2(k) of the CENVAT Credit Rules, 2004

2. Whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the factory to the joint ventures, vendors or gives it to the grid for distribution? -----No electricity to be used

Maruti Suzuki Ltd. v CCE (2009 (SC)

Rule 3(1) of the CENVAT Credit Rules, 2004

3. Whether CENVAT credit can be denied on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products shows a shortage as compared to the weight recorded in the relevant invoice?

CCE v. Bhuwalka Steel Industries Ltd. 2010 (Tri-LB)

The Larger Bench of the Tribunal held that **each case had to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of shortages.**

Tolerances in respect of hygroscopic, volatile and such other cargo has to be allowed as per industry norms excluding, however, unreasonable and exorbitant claims. Similarly, minor variations arising due to weightment by different machines will also have to be ignored if such variations are within tolerance limits.

4. **Whether penalty can be imposed on the directors of the company for the wrong CENVAT credit availed by the company? -----NO ,directors are not the assessee**

Ashok Kumar H. Fulwadhya v. UOI 2010 (Bom.)

5. **Can CENVAT credit be taken on the basis of private challans?**

CCEx. v. Stelko Strips Ltd. 2010 (P & H)

Thus, the High Court held that **MODVAT credit could be taken on the strength of private challans as the same were not found to be fake and there was a proper certification that duty had been paid.**

6. **Can the CENVAT credit of duty paid on inputs and capital goods used in mines be availed?**

Madras Cements Ltd. v. CCE 2010 (S.C.)

- (i) **CENVAT credit on inputs used in mines**

The credit on inputs is allowed.

- (ii) **CENVAT credit on capital goods used in mines**

(a) **If the mines are captive mines -----YES**

(b) **If the mines are not captive mines -----NO**

Rule 2(k) of the CENVAT Credit Rules, 2004

7. **Whether welding electrodes used in repairs/maintenance of plant and machinery can be considered as 'input' as defined under rule 2(g) of the erstwhile CENVAT Credit Rules, 2002 [now rule 2(k) of the CENVAT Credit Rules, 2004]?**

Ambuja Cements Eastern Ltd. v. CCE 2010 (Chhattisgarh)

Definition of "input" takes in its ambit all inputs, except the specifically excluded

The High Court, held that **welding electrodes used in repairs and maintenance of plant and machinery were inputs as defined under erstwhile rule 2(g) [now rule 2(k)] and thus, entitled for CENVAT credit**

5. DEMAND, ADJUDICATION AND OFFENCES

Section 11A(2B) and section 11AB of the Central Excise Act, 1944

1. **Is the assessee liable to pay interest under section 11AB on the differential duty paid on the difference between price at date of removal and enhanced price at which goods are ultimately sold?**

CCE v. International Auto Ltd. 2010 (S.C.)

. **When the differential duty was paid after the date of clearance, it indicated short-payment/short-levy on the date of removal, hence, interest which was for loss of revenue, became leviable under section 11AB of the Act.**

Section 11A of the Central Excise Act, 1944

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2. **Whether non-disclosure of a statutory requirement under law would amount to suppression for invoking the larger period of limitation under section 11A?**

CC Ex. & C v. Accrapac (India) Pvt. Ltd. 2010 (Guj.)

Failure on the part of the respondent to declare the same could not be held to be suppression as Department, knowing the fact that the respondent was manufacturing cosmetics, must have the knowledge of the said requirement. Further, as similarly situated assesses were not paying duty on denatured ethyl alcohol, the respondent entertained a reasonable belief that it was not liable to pay excise duty on such product.

The High Court upheld the Tribunal's judgment and pronounced that **non-disclosure of the said fact on the part of the assessee would not amount to suppression so as to call for invocation of the extended period of limitation.**

6. REFUND

Section 11B of the Central Excise Act, 1944

1. **Merely because assessee has sustained loss more than the refund claim, is it justifiable to hold that it is not a case of unjust enrichment even though the assessee failed to establish non-inclusion of duty in the cost of production?**

CCE v. Gem Properties (P) Ltd. 2010 (Kar.)

the burden had been heavy on the assessee to prove that while computing the cost of the material it had not included the duty paid by it.

The Court elucidated that merely because the assessee had sustained the loss in the relevant year, could not be a ground to hold it had not been a case of unjust enrichment

7. EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. **Whether the clearances of two firms having common brand name, goods being manufactured in the same factory premises, having common management and accounts etc. can be clubbed for the purposes of SSI exemption ----- YES**

CCE v. Deora Engineering Works 2010 (P & H)

8. SETTLEMENT COMMISSION

2. **Is the Settlement Commission empowered to grant the benefit under the proviso to section 11AC in cases of settlement?**

Ashwani Tobacco Co. Pvt. Ltd. v. UOI 2010 (Del.)

The Court ruled that benefit under the proviso to section 11AC could not be granted by the Settlement Commission in cases of settlement.

It elucidated that **the order of settlement made by the Settlement Commission is distinct from the adjudication order made by the Central Excise Officer.**

CUSTOMS

Section 23 of the Customs Act, 1962

1. Whether remission of duty is permissible under section 23 of the Customs Act, 1962 when the remission application is filed after the expiry of the warehousing period (including extended warehousing period)?----- **YES**

CCE v. Decorative Laminates (I) Pvt. Ltd. 2010 (Kar.)

The expression is “*at any time before clearance for home consumption*” would mean the time period as per the initial order during which the goods are warehoused or before the expiry of the extended date for clearance and not any period after the lapse of the aforesaid periods.

2. CLASSIFICATION OF GOODS

1. Whether classification of the imported product changes if it undergoes a change after importation and before being actually used?

Atherton Engineering Co. Pvt. Ltd. v. UOI 2010 (Cal.)

If a product undergoes some change after importation till the time it is actually used, it is immaterial

1. Will the description of the goods as per the documents submitted along with the Shipping Bill be a relevant criterion for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test? Whether a separate notice is required to be issued for payment of interest which is mandatory and automatically applies for recovery of excess drawback? -----**YES**

M/s CPS Textiles P Ltd. v. Joint Secretary 2010 Mad.)

The petitioner could not plead that the exported goods should be classified under different headings contrary to the description.

ANS. To second question is, not required.

3. WAREHOUSING

1. Whether the issue of the imported goods warehoused in the premises of 100% EOU for manufacture/production/processing in 100% EOU would amount to clearance for home consumption? -----**NO** since complete premises is treated as warehouse.

Paras Fab International v. CCE 2010 (Tri. – LB)

4. DEMAND & APPEALS

1. Whether Revenue can prefer an appeal in case of a consent order? -----**NO**

CCus v. Trilux Electronics 2010 (Kar.)

5. REFUND

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Section 27 of the Customs Act, 1962

1. **Can a refund claim be filed under section 27 of the Customs Act, 1962 if the payment of duty has not been made pursuant to an assessment order? -----YES**

Aman Medical products Ltd. v. CCus., Delhi 2010 (Del.)

Section 27

Any person claiming refund of any duty and interest, if any, paid on such duty -

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund

2. **Can the assessee be denied the refund claim only on the basis of contention that he had produced the attested copy of TR-6 challan* and not the original of the TR-6 challan*?**

Narayan Nambiar Meloths v. CCus. 2010 (Ker.) -----Cannot be deemed

This was purely a technical contention and could not be accepted.

6. PROVISIONS RELATING TO ILLEGAL IMPORT, ILLEGAL EXPORT, CONFISCATION, PENALTY & ALLIED PROVISIONS

1. **Whether, under section 125 of the Customs Act, 1962, discretion vests with the Adjudicating Authority to give option to redeem the goods even though the said goods are liable to absolute confiscation (since the importation of said goods is prohibited)?**

CCus v. Alfred Menezes 2009 (Bom.)

The High Court observed that section 125(1) deals with two situations:-

(1) Importation and exportation of prohibited goods----discretionary

(2) Importation and exportation of any other goods ---mandatory

2. **In case the imported goods are confiscated, and goods are not redeemed by paying fine, whether the importer is bound to pay the customs duty? -----YES**

Poona Health Services v. CCus. 2009 (Bom.)

The person who had imported the goods, does not cease to have liability for payment of duty because he continues to be the person who had imported the goods and claims title of the goods.

2. **Whether the goods held to be improperly imported are liable for confiscation under section 111 of the Customs Act, 1962, even though the same are cleared and not available for seizure? Whether redemption fine can be imposed with regard to such goods?**

CCus v. Finesse Creation Inc. 2009 (Bom.)

The question of confiscating the goods would not arise if there are no goods available for

confiscation nor consequently redemption. Once goods cannot be redeemed, no fine can be imposed.

3. In case of the goods liable to confiscation under section 111, issuing of a notice to the owner-original importer of the goods is enough or whether notice is also required to be issued to the person from whose custody the goods are seized? -----YES

Gawar Construction Ltd. v. UOI 2009 (Bom.)

Opportunity must be given to the person in possession of the goods because their confiscation would affect his civil right to possess the goods which were seized from his custody

4. Is the want of evidence from foreign supplier enough to cancel the confiscation order of goods undervalued? -----NO

CCus. v. Jaya Singh Vijaya Jhaveri (Ker.)

The Court considered it be illogical that a person who was a party to undervaluation would give evidence to the Department to prove the case that the invoice raised by him on the respondent was a bogus one .

7. SETTLEMENT COMMISSION

Section 127B of the Customs act, 1962

1. In case of a Settlement Commission's order, can the assessee be permitted to accept what is favourable to them and reject what is not? -----NO

Sanghvi Reconditioners Pvt. Ltd. V (SC)

Section 127M of the Customs Act, 1962

3. Can the order of the Settlement Commission be considered to be a judicial proceeding? -----YES

UOI v. East and West Shipping Agency 2010 (Bom.)

Section 127A of the Customs Act, 1962

4. Does the Settlement Commission have jurisdiction to settle cases relating to the recovery of drawback erroneously paid by the Revenue?

Union of India v. Cus. & C. Ex. Settlement Commission 2010 (Bom.)

drawback is nothing but remission of duty on account of statutory provisions in the Act and Scheme framed by the Government of India.

Settlement Commission has jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue.

SERVICE TAX

1. PRELIMINARY LEGAL PROVISIONS

2. Whether the value of SIM cards taxable service or it is taxable as sale of goods .

CCE v. Idea Mobile Communications Ltd. 2010 (Ker.)

SIM cards were not goods ,but supplied as part of service.

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2. GAMUT AND COVERAGE OF TAXABLE SERVICES

Can a commission agent also acting as a consignment agent be covered under the definition of 'clearing and forwarding agent'? -----YES

Specifically covered under definition of C&F agent

CCE v. Mahaveer Generics 2010 (Kar.)

Section 65(105)(zzzzz) of the Finance Act, 1994

1. Can a software be treated as goods and if so, whether its supply to a customer as per an "End User Licence Agreement" (EULA) would be treated as sale or service?

Infotech Software Dealers Association (ISODA) v. Union of India 2010 (Mad.)

software is goods as per Article 366(12) of the Constitution.

Though software is goods, the transaction may not amount to sale in all cases and it may vary depending upon the terms of EULA.

Section 65(105)(zza) of the Finance Act, 1994

2. Whether service tax is chargeable on the buffer subsidy provided by the Government for storage of free sale sugar, under the category of 'storage and warehousing services'?

CCE v. Nahar Industrial Enterprises Ltd. 2010 (P & H)

Just because the storage period of free sale sugar had to be extended at the behest of Government of India, neither the assessee becomes 'storage and warehouse keeper' nor the Government of India becomes their 'client' in this regard.

Section 65(105)(zb) of the Finance Act, 1994

3. Is the assessee liable to pay the service tax on the value of goods/material consumed, during the course of processing of photography or not?

CCE v. Vahoo Colour Lab 2010 (P & H)

The Court reiterated the view that as the photography was in the nature of works contract and it involved the elements of both sale and service, therefore, the service tax was not leviable on the sale portion, in the obtaining circumstances of the case. (Notification no. 12/2003 dated 20-06-03).

4. Will the service provided by way of "advice, consultancy or technical assistance" in the case of turnkey contracts attract service tax and can these turnkey contracts be vivisected?

CCE v. BSBK Pvt. Ltd. 2010 ((Tri. – LB)

Article 366(29-A)(b) to the Constitution has allowed the vivisection of indivisible contracts in order to find out goods component and value thereof. Therefore, the remnant part of the contract may be attributable to the scope of service tax under the provisions of the Finance Act, 1994.

Section 65(105)(zzm) of the Finance Act, 1994

5. In case where the respondent is authorized by the airport authority to collect entrance fee from visitors to airport, who is liable to pay service tax –respondent or Airport Authority?

CCE v. P. C. Paulose 2010 (Ker.)

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once the licence was given by the Airport Authority to the respondent to permit entry and allow enjoyment of the services provided there to the customers, respondent in fact became the service provider.

3. SERVICE TAX PROCEDURES

Rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

1. Can the option for composition scheme under works contract service be exercised after payment of service tax on a particular works contract?

Nagarjuna Construction Company Ltd v. GOI 2010 (A.P.) not permitted

2. Whether service tax is payable at the rate prevailing on the date of entry in service or at the rate prevailing at the time of billing and receipt of payment?

CCE v. Reliance Industries Ltd. 2010 (Guj.) ----- Date of entry in service

3. Whether the provisions of deemed registration under rule 4(5) of the Service Tax Rules, 1994 are attracted in case of centralized registration?

Karamchand Thapar & Bros. (Coal Sales) Ltd. v. UOI 2010 (Cal.) -----NO

No time stipulation in case centralized registration,hence not applicable.