CHAPTER V

INCORRECT APPLICATION OF GENERAL EXMEPTION NOTIFICATIONS

The Government under section 25 (1) of the Customs Act, 1962 is empowered to exempt either absolutely or subject to such conditions as may be specified in the notification, goods of any specified description from the whole or any part of duty of customs leviable thereon. Some illustrative cases of non-levy/short levy of duties aggregating ₹ 30.56 crore due to incorrect grant of exemption noticed (September 2011 to April 2014) are discussed in the following paragraphs and two exemption cases have been listed in **Annexure 5**.

Incorrect exemption of sugar and rubber cess

5.1 Government of India, in response to the revision application of M/s Bombay Burmah Trading Corporation Ltd. [2012(278) E.L.T.566 (G.O.I.)] held that where any Central law providing for levy and collection of any duty of excise, no notification issued under the Central Excise Act or Rules can grant exemption from such duty of Excise unless such notification expressly refers to the provisions of the said central law in the preamble. In this regard, it has been concluded that explicit provision referring to levy under central law is a statutory requirement and any interpretation by implication is statutorily barred.

Accordingly various types of cess (viz, tea cess, rubber cess, sugar cess etc.,) imposed by Central laws other than by Finance Act (viz., Tea Cess Act, Sugar Cess Act etc.) leviable as duties of Excise are levied for definite purpose (and not to augment the government revenues) and they need express mention in the Central Excise exemption notifications in order to be exempted.

It is pertinent to mention that such cess leviable under Central laws on domestic manufacturers are also leviable on imports as additional duty of Customs under Section 3 of the Customs Tariff Act 1975 (CTA). Thus, express mention of the central law is equally applicable to notifications issued under the Customs Act and Rules in order to provide exemption to cess levied under the Central laws.

Goods imported under Advance authorization scheme (DEEC) are exempted from additional duty leviable thereon under Section 3 of the CTA, 1975 (notification no.96/2009-cus dated 11 September 2009). However, express mention about any exemption from cess leviable under any of the Central Act (viz., Sugar Cess Act/Rubber Act 1947) has not been mentioned in the aforesaid exemption notification. Similar duty exemption has been provided to goods by notification no.97/2009-cus under DEPB scheme.

'Raw sugar' attract 'sugar cess' at the rate of ₹ 24 per quintal and 'natural rubber' attracts 'rubber cess' (imposed under Section 12 of the Rubber Act

1947) at the rate of ₹ 2 per kilogram (prior to September, 2011 rate was ₹ 1.50/kg) in terms of MOC notification SO.2020(E) dated 28 August 2011.

M/s Shree Renuka Sugars Ltd. and M/s Simbholi Sugar Ltd., Imported (March 2013 to December 2013) 5649687.30 quintal of 'Raw sugar' through Custom House (Kandla) for which exemption from 'Sugar cess' amounting to ₹ 1355.92 lakh was irregularly allowed under Advance authorization {(DEEC notification no.96/2009-cus dated 11 September 2009)}.

Similarly exemption from 'Rubber cess' was allowed irregularly to M/s Apollo tyres (₹ 142.61 lakh), M/s Balkrishna Industries (₹ 87.05 lakh) & M/s Malhotra Rubbers Ltd (₹ 2.06 lakh) for import of natural rubber through ICD Dashrath (Vadodara) & Custom House (MP & SEZ), Mundra by debiting Advance authorization DEPB license (notification no.97/2009-cus).

Since the aforesaid notifications governing DEEC and DEPB authorizations do not expressly provide exemption from Sugar cess or Rubber cess, this resulted in incorrect grant of exemption from sugar and rubber cess totaling ₹ 1587.64 lakh.

When we pointed this out (October 2012/January/March 2014) the department did not accept the observation stating that Board, vide circular no.17/99-cus dated 19 April 1999 has taken the view that exemption issued under Section 3 would have the effect of exempting the goods both from Central Excise duty as well as cess and no separate exemption from cess need to be issued under the Sugar Cess Act. It was also contested that notifications governing DEEC/DEPB scheme exempted imported goods from whole of additional duty leviable under Section 3 of CTA 1975 thus exempting it from rubber/sugar cess as it is levied under the Section 3 of Act.

Reply of the department is not tenable in view of the aforesaid GOI order which is self explanatory. It was held that exemption from cess levied under Cess Act could not be granted applying notification issued under Central Excise Rules/Act. On this analogy exemption from Sugar/Rubber cess was also not available for advance authorizations/DEPB licence.

Ministry response has not been received (January 2015).

Exemption from safeguard duty on carbon black

5.2 Safeguard duty is leviable under section 8C of Customs Tariff Act at the rate of 30 per cent less the anti-dumping duty payable, if any, on Carbon black falling under tariff heading (CTH) "28030010", if imported from the People's Republic of China during the period from 5 October, 2012 to 4 October 2013 (notification no.4/2012 (Safeguard) dated 5 October 2012).

M/s J K Tyre & Industries Ltd. and five others imported (December 2012 to March 2013) 96 consignments of Carbon black, originated from China PR,

valued at ₹ 31.50 crore through Chennai (Sea) and Tuticorin Commissionerates. The imported goods were exempted from payment of duty under the Advance authorization scheme in terms of notification no. 96/2009 dated 11 September 2009. The Advance authorization notification provides for exemption from whole of duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty and anti-dumping duty leviable thereon, under Section 2, 3, 8B and 9A respectively of the said Act.

Audit pointed out (December 2013) that Carbon black imported from China is subject to levy of safeguard duty under Section 8C of the Customs Tariff Act, 1975 which was not exempted by the aforesaid notification issued under Advance authorization Scheme and therefore the safeguard duty is leviable on import of Carbon Black. The incorrect grant of exemption had resulted in short levy of duty of ₹ 7.48 crore.

Tuticorin Commissionerate authorities issued demand cum show cause notice to M/s PRS Tyre Ltd., for ₹ 2.48 lakh. Reply in respect of remaining importers is awaited (January 2015).

Ministry response has not been received (January 2015).

Exemption to Electric Rickshaws

5.3 Electrically operated vehicles are classifiable under CTH 8703 90 10 and as leviable to countervailing duty (CVD) at the rate of 6 per cent (serial no. 274 of the Central Excise notification no.12/2012 dated 17 March 2012).

Further, as per the Central Motor Vehicles Rules, 1989 battery operated vehicle means a vehicle adopted for use upon roads and powered exclusively by the electric motor whose traction energy is supplied exclusively by traction battery installed in the vehicle provided that if the following conditions are verified and authorized by any testing agency specified in Rule 126, the battery operated vehicle shall not be deemed to be a motor vehicle.

(i) The thirty minutes power of the motor is less than 0.25 KW (250 Watts)

(ii) The maximum speed of the vehicle is less than 25 KM/H.

During test check of the Bills of entry (BsE) and ICES data audit noticed that various importers imported 332 consignments of 'Electric Rickshaws' during August 2013 to February 2014 valued at ₹ 61.26 crore through ICD, Tughlakabad. The goods were classified under CTH 8703 90 10 and assessed to concessional rate of CVD under notification no.12/2012 (serial no. 274).

Audit scrutiny revealed that the power of motors operating these vehicles is more than 250 Watts and apparently a 250 Watts power motor vehicle may not carry 5 to 7 persons on roads with gradients. Since the power of the

motor of these vehicles is more than maximum limits of 250 Watts, as per the Central Motor Vehicles Rules, 1989, these vehicles shall not be deemed to be battery operated motor vehicle eligible for concessional rate of CVD. Thus, extension of aforesaid notification benefit resulted in short levy of CVD amounting to ₹ 5.17 crore. Information was also sought (May and June 2014) from the Transport department of Delhi regarding the power of the motor and capacity to carry person by these electric rickshaws but their reply was awaited as of November 2014.

The Customs department stated (June 2014) that Serial no.274 of the notification no.12/2012-CE dated 17 March 2012 provides that the only condition for exemption is that the sole source of energy shall be electrical energy derived from an external source or from one or more electrical batteries fitted to such vehicles which was fulfilled in the instant case as in all battery operated E-rickshaws, the sole source of energy is electrical energy obtained from the rechargeable battery attached or fitted with the body of the such e-rickshaw. The capacity of motor does not in any way influence the classification of the subject goods, neither has it influenced the benefit provided under aforesaid notification. The department further stated that the protective demand to the importers is also being issued.

The reply of the department is not tenable as the power of motors operating these electric vehicles are more than 250 Watts and therefore, these vehicles should be deemed to be motor vehicles and thus were also required to comply with Central Motor Vehicles Rules, 1989. All the rules including Type Approval certification, as per the rule 126, are applicable on such vehicles which was not undertaken.

As the importers of these vehicles have not complied with Central Motor vehicles rules, 1989, passed by the Parliament under the Central Motor Vehicle Act, therefore, extension of the benefit of notification no.12/2012-CE (serial no.274) by the department while clearing these vehicles was incorrect.

Ministry response has not been received (January 2015).

Irregular refund of additional duty of customs on imported goods

5.4 The additional duty of custom (SAD) collected at the rate of 4 per cent on goods imported into India for subsequent sale may be refunded back to the importer subject to compliance with the conditions of the notification no.102/2007-cus dated 14 September 2007. The conditions of notification specify, inter alia, that refund of SAD is available only in case the imported goods are subsequently sold on payment of VAT. The CESTAT, New Delhi in its judgment in the case of Commissioner of Customs (ICD), New Delhi vs M/s. Reliance Communication Infrastructure Ltd [2012 (279) ELT 85(Tri- Del)] held that in absence of word 'sale' being defined in the Notification ibid, the

definition of sale in the VAT Act of State Government or the Central Sales Act, 1956 will have to considered for this purpose.

M/s. Tata Sky Ltd., had imported (March 2009 to August 2010) "Set Top Box (Digicomp)" along with 'Viewing card and Accessories' for a composite landed cost per set without any breakup of the price for each of the imported item either on the commercial invoice or on the bills of entry of the imported goods. The imported 'Set Top Box' were sold to buyers in India at abnormally low price ranging between ₹ 1121.33 to ₹ 1032.44 as compared to import value per set ranging between ₹ 4087.56 to ₹ 2417.40 (i.e. 27 per cent to 42 per cent of import invoice price) but the viewing card and other accessories were not sold. While Tata sky Ltd retained their ownership as these were transferred to the buyers of Set Top Box through specific endorsement on the body of the sale invoices and "Terms and Condition" of their subscription contract with the buyer. As these items were neither sold to buyers nor transferred to the buyers for any consideration that may be considered as sale as per the definition of sale in the State VAT Act, no VAT could be charged on value of such goods. Thus, it was apparent that the importer had neither sold imported viewing card and accessories nor appropriate VAT was paid on them thereby making them ineligible for refund of SAD under aforesaid notification dated 14 September 2007. However, the Kolkata (Port) Commissionerate authorities irregularly granted (June to August 2010) refund of ₹ 87.06 lakh on such goods imported under 19 Bills of Entry.

On this being pointed out (January 2012), the department stated (June 2014) that the objected viewing card and other accessories were sold with the imported set top boxes on the basis of the assumption that the set top box could not be functional in absence of any viewing card of the concerned service provider and their accessories.

The Department's contention was not tenable because the imported items were "Set Top Box (including viewing card & accessories)" whereas the item sold through the sale invoices were only "Set Top Boxes" without any accessories. Although the set top boxes contained viewing cards the latter were transferred to the buyers without any value consideration that may be covered under the definition of sale in the State VAT Act.

Ministry reported (January 2015) issued of demand notice to the imported. Further progress is awaited (January 2015).

Incorrect exemption from customs duties on sugar imports

5.5 The Board (CBEC) vide circular no.883/3/2009-CX dated 26 February 2009 has clarified that though all products viz., sugar, pharmaceutical sugar and bura sugar fall under the same CTH i.e. 1701, "Chemically Pure Pharma Grade

sugar" is a "product of Sugar". Thus, the "Extra fine Sugar (Chemically pure Pharma Grade)" are different from 'Refined or White Sugar'.

"Pharma Grade Sugar" classifiable under Customs tariff heading (CTH) 1701 are leviable to basic customs duty at the rate of 60 per cent (notification no.21/2002 and 12/2012) and additional duty of customs equivalent to excise duty along with the levy of cess under the Sugar Cess Act, 1982. Consequently, the concessional rate of basic customs duty applicable to "Refined or White Sugar" in terms of notification Nos. 21/2002 dated 1 March 2002 and 12/2012 dated 17 March 2012 could not be extended to "Pharma Grade Sugar".

M/s Micro Labs and M/s K.P Manish Global Ingredients Pvt. Ltd., imported (February 2012 to March 2013) seven consignments of 'Extra fine Sugar (chemically pure Pharma Grade)' valued at ₹ 81.99 lakh, through Chennai (Sea), Commissionerate. In respect of one consignment (February 2012), the goods were incorrectly classified under CTH 17049090 and exempted from basic customs duty at 'nil' rate (applicable to goods of CTH 1701) in terms of serial no.37J of notification no. 21/2002 and additional duty of customs equivalent to excise duty at 10 per cent in terms of serial no.5 of notification no.2/2008-CE. In respect of other consignments, the goods were classified under CTH 17019990 and assessed to basic customs duty at 'nil' rate /10 per cent in terms of Serial no.77 of notification no.12/2012-cus. Moreover, the additional duty of customs equivalent to excise duty was levied at different rates i.e, ₹ 38 per quintal/₹ 71 per quintal (notification no.12/2012-CE serial no.14 (a)/14 (b) dated 17 March 2012), 12 per cent (notification no.18/2012 –CE, Serial no.4).

Audit noticed that the concessional rate of duty available in terms of notification no.21/2002/notification no.12/2012-cus is applicable to "Refined or White Sugar" only and it could not be extended to "Pharma Grade Sugar" and the goods are leviable to basic customs duty at 60 per cent under notification no.21/2002 Serial no.38 notification no. 12/2012 Serial no.75 and additional duty of customs equivalent to excise duty at 10 per cent/ 12 per cent with applicable Sugar Cess. Thus, incorrect extension of concessional rate of duty resulted in short levy of duty amounting to ₹ 51.08 lakh.

When we pointed this out (November 2012, March and November 2013), the department replied (March and April 2014) that demand notices were issued to the importers for short levy of duty of ₹ 25.11 lakh in respect of five consignments. Further progress is awaited (January 2015).

Ministry reply has not been received (January 2015).

Incorrect exemption to re-imported goods

5.6 Re-import of exported goods, within three years from the date of exportation, for repairing or reconditioning, shall be exempted from levy of whole of the duty of customs and additional duty, subject to fulfillment of the prescribed conditions (notification no.158/95-cus dated 14 November 1995). In case of failure to re-export the same, within prescribed time, the importer is liable to pay duty benefits availed.

M/s Engser Ltd., and three others had re-imported (March 2010 to November 2010) their earlier exported products through Commissionerate of Custom (Port), Kolkata for repairing, without payment of duty under aforesaid notification dated 14 November 1995. However, the importers neither submitted the evidence of re-export of imported goods even after expiry of more than one year from import date nor paid back the duty exemption availed at the time of their import in compliance to the conditions of the said notification. The department did not initiate any action to recover the duty leviable but for exemption. The omission resulted in non-recovery of duty of ₹ 44.69 lakh.

The department reported (September 2013 and March 2014) that a demand notice for ₹ 3.93 lakh issued in respect of M/s Engser Ltd., had been confirmed and ₹ 21,000/- was realized by encashment of their Bank Guarantee (BE).

The department further stated that in remaining three cases importers have submitted documents in support of re-export of their imported goods.

However, audit scrutiny of re-export documents (four re-export shipping bills) submitted by M/s Supreme & Co. Pvt. Ltd., revealed that the date of all four shipping bills (6 and 8 September 2010) and their export General Manifest (EGM) date (15 September 2010) were prior to the out of charge (OOC) date (18 September 2010) of corresponding bill of entry of re-imported goods, indicating that the goods exported under these shipping bills were different from the re-imported goods. Thus, the condition prescribed under aforesaid notification to re-export the imported goods after repairs remained unfulfilled for which duty exemption benefits amounting to ₹ 30.40 lakh was recoverable from the importer along with applicable interest.

This was reported to the department in April 2014, their response has not been received (January 2015).

Ministry reply has not been received (January 2015).