Chapter V

Non-Compliance with Rules and Regulations

5.1 Introduction

We examined the records maintained by the assessees in relation to the payment of Central Excise duty and checked the correctness of duty payment and availing of Cenvat credit. We noticed cases of incorrect availing/utilisation of Cenvat credit, non/short payment of Central Excise duty and other issues having financial implication of ₹ 66.74 crore. We communicated these observations to the Ministry through 56 draft audit paragraphs. The Ministry/Department accepted (December 2014) the audit observations in 52 draft audit paragraphs having financial implication of ₹ 65.75 crore of which ₹ 15.70 crore have been recovered. Out of above 52 cases, the Ministry/Department in 45 cases, initiated/completed corrective action having financial implication of ₹ 61.66 crore. We have furnished the details of these 45 paragraphs in Appendix II. The objections are covered under three major headings :

Non-payment/short payment of Central Excise duty

Cenvat credit

Other issues

5.2 Non-payment/short payment of Central Excise duty

5.2.1 Short levy of Excise duty

As per Rule 10A (i) of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, where the excisable goods are produced or manufactured by a job worker, then, in case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer.

M/s Durgapur Projects Ltd., in Bolpur Commissionerate, cleared coke as job worker during 2011-12 on payment of excise duty on assessable value arrived at on the basis of cost of production instead of at the transaction value of the goods sold by the principal manufacturer (required by the Rule cited above). This resulted in undervaluation of ₹ 2.78 crore for the year 2011-12 and consequent short levy of duty of ₹ 14.33 lakh which is recoverable alongwith applicable interest.

We pointed this out in March 2013.

The Ministry accepted the audit observation (October 2014) and intimated that show cause notice was under preparation.

5.2.2 Short levy of duty due to undervaluation

As per Section 4(3)(d) of the Central Excise Act, 1944, 'transaction value' means the price actually paid or payable for the goods, when sold, and includes any amount that the buyer is liable to pay to, or on behalf of the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time.

In the case of Richardson and Cruddas (1972) Ltd. Vs Collector of C.E. Nagpur, tribunal Delhi[4] and in case of Sukalp Agencies Vs CCE, Lucknow, the High Court of Allahabad, while upholding the department's view, held that testing charges were includable in the assessable value[5].

M/s Nampa Electricals Pvt. Ltd. (Division Nampa Steel), in Haldia Commissionerate, had cleared G.I. Structures, MS structures etc. and components thereof to different customers during 2010-11. The assessee had reflected 'Proto Test Charges' of ₹ 2.48 crore as collected/recoverable from buyers in connection with the sale of G.I./M.S. Structures etc. Such charges ought to have been added to the assessable value of the said goods for charging duty. Failure to do so, resulted in undervaluation of the said goods of ₹ 2.48 crore and consequent short levy of duty of ₹ 25.58 lakh which is recoverable with interest.

We pointed this out in January 2013.

We await the Department's/Ministry's response (December 2014).

5.2.3 Non-levy of duty on additional consideration

As per Section 4(1)(a) of the Central Excise Act, 1944, when the duty of excise is chargeable on any excisable goods with reference to their value, then such value shall be the transaction value. Transaction value means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to or on behalf of, the assessee, in connection with the sale, but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

Government of Maharashtra introduced the Package Incentive Scheme for deferred payment of Sales Tax whereby the assessee was allowed to collect

[4] 1999(110) E.L.T.874 (Tribunal-Delhi)

[5] 2013(298) E.L.T. 38 (Allahabad)

Sales Tax from the buyer and retain it and repay it after prescribed period. The Government of Maharashtra thereupon amended the provisions of Sales Tax Act and issued a Notification in November 2002 providing further incentive for premature repayment of Sales Tax liability. As the Sales Tax was not actually payable, it was includible in transaction value. Supreme Court in the case of Commissioner of Central Excise, Jaipur II Vs M/s Super Synotex (India) on similar issue while upholding department's view, held that additional consideration of sales tax is to be considered as transaction value.[6] We came across three instances where the additional consideration had not been included by the assessees in the transaction value.

i) M/s Fairfield Atlas Ltd., in Kolhapur Commissionerate, engaged in the manufacture of parts and accessories of the motor vehicles, opted for premature repayment of Sales Tax deferred liability during the years 2009-10 under the above mentioned scheme. Audit observed that the assessee received discount of ₹ 3.42 crore due to premature prepayment of sales tax liability accrued at Net Present Value (NPV). The difference between the actual sales tax collected from customers and the payment made at NPV was shown as other income in the accounts. Sales Tax amount collected but not paid to the Government was liable to be added as additional income in the assessable value. Non-inclusion of the additional income resulted in undervaluation of goods to the extent of ₹ 3.42 crore with consequential short levy of excise duty of ₹ 28.18 lakh which was recoverable with interest.

When we pointed this out (July 2013), the Ministry admitted the objection (December 2014) and stated that SCN for ₹ 55.71 lakh was issued to the assessee. Ministry further stated that instructions had been issued to field formations, vide letter dated 17 September 2014, to follow the judgment of Supreme Court in case of M/s Super Syncotex.

ii) M/s. JSW Steel Coated Products Ltd., in Nagpur Commissionerate, opted for premature repayment of Sales Tax deferred liability during the years 2011-12 and 2012-13 under the above mentioned scheme. During the scrutiny of the financial records of the assessee, Audit observed that the assessee received discount of ₹ 3.56 crore and ₹ 10.26 crore during the years 2011-12 and 2012-13 respectively due to premature prepayment of Sales Tax liability accrued at Net Present Value (NPV). The difference between the actual Sales Tax collected from customers and the payment made at NPV was shown as other income in the accounts. Sales Tax amount collected but not paid to the Government was liable to be added as additional income in the assessable value. Non-inclusion of the additional income resulted in

[6] 2014-TIOL-19-SC-CX

undervaluation of goods to the extent of ₹ 13.82 crore with consequential short levy of excise duty of ₹ 1.71 crore.

We pointed this out in January 2014.

We await the Department's/Ministry's response (December 2014).

iii) M/s. Tata Metaliks Ltd., in Kolhapur Commissionerate, opted for premature repayment of Sales Tax deferred liability during the years 2010-11 under the above mentioned scheme. The assessee had received discount of ₹ 3.48 crore during the year 2010-11 due to premature prepayment of sales tax liability accrued at Net Present Value (NPV). The difference between the actual sales tax collected from customers and the payment made at NPV was shown as other income in the accounts. Sales Tax amount collected but not paid to the Government was liable to be added as additional income in the assessable value. Non-inclusion of the additional income resulted in undervaluation of goods to the extent of ₹ 3.48 crore with consequential short levy of excise duty of ₹ 35.81 lakh.

When we pointed this out (January 2013), the Ministry admitted the objection and intimated (October 2014) that SCN was issued to the assessee demanding duty of ₹ 35.81 lakh alongwith interest.

5.3 Cenvat credit

5.3.1 Non-reversal of Cenvat credit

Rule 6(3) of the Cenvat Credit Rules, 2004 prescribes that where an assessee, engaged in the manufacture of dutiable and exempted final products, takes credit of duty paid on inputs/input services used in both dutiable and exempted final products, without maintaining separate account for inputs/input services used in the exempted products, then he shall pay an amount equal to ten per cent upto 6 July 2009 and five per cent thereafter of the total price of the exempted goods, at the time of their clearance from factory.

M/s Steel Authority of India Ltd.–IISCO Steel Plant, in Bolpur Commissionerate cleared iron and steel products on payment of excise duty. We observed that 'molten slag' was also produced in course of manufacture of iron and steel. Molten slag is exempt from duty. The assessee cleared molten slag without reversing the proportional credit or paying ten/five per cent, as applicable, of the total value of the slag cleared during 2008-09 and 2009-10. This resulted in non-payment of ₹ 28.36 lakh which is recoverable along with interest at applicable rates.

When we pointed this out (December 2010), the Commissionerate accepted the observation (October 2012) and informed (April 2013) that the assessee

had reversed an amount ₹ 2.52 lakh along with interest of ₹ 1.95 lakh. Further, a show cause notice had been issued (November 2013) for ₹ 22.21 lakh along with interest and applicable penalty covering the period from December 2008 to January 2010. Demand for the balance amount of ₹ 3.70 lakh is yet to be raised.

We await the Ministry's response (December 2014).

5.3.2 Absence of provision for reversal of Cenvat credit of input services

As per rule 3(5) of the Cenvat Credit Rules, 2004, when input or capital goods on which Cenvat credit has been taken, are removed as such from the factory, the manufacturer of final products shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9. However, there is no provision for reversal of proportionate Cenvat credit of input services at the time of clearance of inputs/capital goods as such.

M/s Jindal Steel and Power Ltd., Raigarh in Raipur Commissionerate, engaged in the manufacture of articles of Chapters 25, 26, 27, 28, 68, 72, 73, 74 and 84 of the Central Excise Tariff Act, 1985, cleared inputs and capital goods as such during the period 2009-10 and 2010-11. The attributable Cenvat credit availed on these inputs and capital goods was also reversed by the assessee but the Cenvat credit amounting to ₹ 13.10 lakh availed on Service Tax on GTA service attributable to these inputs and capital goods was not reversed by the assessee. This resulted in non-reversal of Cenvat credit of ₹ 13.10 lakh.

When we pointed this out (February 2013), the Ministry did not admit the objection (December 2014) and stated that there is no provision in rule 3 (5) requiring reversal of credit of Service Tax paid on GTA service.

Recommendation No. 1

- *Board may consider incorporating suitable provisions in Cenvat Credit Rules, 2004 requiring reversal of proportionate credit attributable to input services at the time of clearance of inputs or capital goods as such.*

5.3.3 Non-reversal of Cenvat credit on obsolete inputs

Sub-rule 5(B) of rule 3 of the Cenvat Credit Rules, 2004 provides that, if the value of any, input or capital goods before being put to use on which credit has been taken is written off fully or partially or where any provision to write off fully or partially has been made in the books of account, then the manufacturer or service provider, as the case may be, shall pay an amount equivalent to the Cenvat credit taken in respect of the said input or capital goods.

M/s DCM Shriram Consolidated Ltd., in Jaipur-I Commissionerate, made a provision for obsolete inputs valuing ₹ 1.21 crore in the books of accounts for the year ended March 2013. Since the provision for obsolete inputs was made before being their put to use, the assessee was required to pay an amount of ₹ 17.48 lakh equal to the Cenvat credit taken in respect of the said inputs.

When we pointed this out (March 2014), the Ministry admitted the observation (October 2014) and stated that the actual duty payable was ₹ 19.77 lakh and show cause notice was being issued to the assessee for ₹ 19.77 lakh.

5.3.4 Incorrect availing of Cenvat credit

As per notifications dated 1 March 2011 read with notification dated 17 March 2012 for specified goods thereunder, the effective rate of duty of one per cent was prescribed with the condition that no Cenvat credit on inputs or input services is availed and that the same should be treated as exempted goods.

M/s. Seshasayee Paper and Boards Ltd., in Salem Commissionerate imported coal (TSH 2701 19 20) by paying countervailing duty at the rate of one per cent under the Notification. The assessee, however, availed Cenvat credit of ₹ 89.83 lakh on the countervailing duty paid, which was in violation of condition prescribed in the notification. The ineligible credit was required to be reversed along with interest.

When we pointed this out (October 2013), the Ministry admitted the observation (October 2014) and stated that the actual ineligible Cenvat credit availed was ₹ 89.83 lakh and show cause notice for ₹ 89.83 lakh was being issued.

5.3.5 Irregular availment of Cenvat credit of education cess on Basic Custom Duty

The Government of India vide notification No. 13/2012-Customs and 14/2012-Customs, dated 17 March 2012, exempted all the goods falling within the First Schedule of the Custom Tariff Act 1975 from whole of Education Cess and Secondary Higher Education (SHE) Cess collected as a part of Countervailing Duty, when goods imported in India. Further, rule 3(1) of Cenvat credit Rules 2004, allows credit of Education Cess and SHE Cess levied on CVD only, but not levied as part of Basic Custom Duty (BCD).

Scrutiny of the records of the 18 assessees under jurisdiction of Meerut-I, Meerut-II, Lucknow and Kanpur Commissionerates revealed that these assessees availed Cenvat credit of ₹ 35.83 lakh of Education Cess and SHE

Cess paid as part of Customs duty during 2012-13 which was incorrect and hence, recoverable along with interest.

We pointed this out between January and June 2014.

We await the Department's/Ministry's response (December 2014).

5.4 Other issues

5.4.1 Absence of provision requiring assessee to intimate department for destruction of excisable goods by him or goods destroyed by natural cause

Section 5 of the Central Excise Act, 1944 and rule 21 of the Central Excise Rules, 2002 contain provisions for remission of duty if the excisable goods is found unfit for consumption or marketing. However, there is no provision in Act/Rules requiring the assessee to intimate department prior to the destruction of goods by him or goods destroyed by natural cause and claiming remission of duty. Chapter 18 of CBEC's Excise Manual of Supplementary Instructions, 2005 contain instructions and procedure to be followed by the assessee for destruction of goods and claiming remission of duty which requires that the assessee should intimate department about goods to be destroyed along with reasons and all goods will be destroyed under the supervision of the department. However, these instructions are binding only on the departmental officers. Though there are legal pronouncements which also confirm that prior permission is essential for remission, there is nothing in the rules which prevent destruction of goods suo-moto.

M/s Dow Agro Sciences India Pvt. Ltd. in Kolhapur Commissionerate, engaged in the manufacture of various types of pesticides classifiable under Chapter 38 of CETA, 1985, disposed off 32.11 MT Chloropyrifos Tech, a pesticide during the period 2011-12 to 2012-13. The assessee neither took permission for the destruction of goods nor paid the duty on removal of goods for destruction which was recoverable with interest.

When we pointed this out (May 2013), the department stated (August 2013) that the assessee had not sold the finished goods but sent it for incineration. Therefore, the amount to be reversed was worked out on the basis of the value of the inputs used in the finished goods. The assessee reversed an amount of ₹ 9.81 lakh in June 2013 and paid interest of ₹ 1.67 lakh in July 2013. The department further intimated (July 2014) that the assessee also reversed credit of Service Tax of ₹ 5.69 lakh with interest of ₹ 1.16 lakh. The department also intimated that the assessee neither filed any application for

remission of duty nor sought any permission from the department for destroying the unfit goods. The assessee destroyed goods, on their own.

As the assessee did not take permission from the department for destruction of goods, he was required to pay full excise duty on the manufactured goods. Reversing of Cenvat credit, arise only when a remission is granted. As the assessee destroyed goods without permission of the department and actual destruction was also not supervised, possibility of clandestine removal of goods cannot be ruled out. Instead of demanding full duty, the department accepted the activities relating to destruction of goods and reversal of Cenvat credit. This was not in accordance with the Board's supplementary instructions to its officers.

Recommendation No. 2

- *CBEC may consider inclusion of suitable provisions in the Rules for proper procedure to be followed by the assessee before destruction of excisable goods and for intimating department for goods destroyed by natural cause and claim remission of duty.*

We await the Ministry's response (December 2014).