CHAPTER VIII : CENTRAL EXCISE RECEIPTS

8.1 Budget estimates, revised budget estimates and actual receipts

The budget estimates, revised budget estimates and actual receipts of central excise duties during the years 2000-01 to 2004-05 are exhibited in the table below: -

(Amount in crore of rupees)

Year	Budget estimates	Revised budget estimates	Actual receipts*	Difference between actual receipts and budget estimates	Percentage variation
2000-01	70967	70399	68526	(-) 2441	(-) 3.44
2001-02	81720	74520	72555	(-) 9165	(-) 11.22
2002-03	91141	86993	82310	(-) 8831	(-) 9.69
2003-04	96396	91850	90774	(-) 5622	(-) 5.83
2004-05	108500	100000	99125**	(-) 9375	(-) 8.64

* Figure as per Finance Accounts.

** Figure is provisional.

The actual collections fell short of the budget estimates as well as the revised estimates year after year. Despite this, Government continued to make optimistic projections during presentation of the annual budget. The budget estimate 2004-05 was pitched at Rs.1,08,500 crore, an increase of 12.56 per cent over budget estimates, 18.13 per cent over revised estimate and 19.53 per cent over actuals of 2003-04. The collections fell short of the budget estimates by Rs.9375 crore or 8.64 per cent and short of revised estimates by Rs.875 crore or 0.88 per cent in 2004-05.

8.2 Value of output** *vis-à-vis* central excise receipts

The value of output from the manufacturing sector vis-a-vis receipt of central excise duties through personal ledger account (cash collection) during the years 2000-01 to 2004-05 are as follows: -

(Amount in crore of rupees)

Year	Value of output	Central excise	Percentage of central excise receipts to value of production
2000-01	991564	68526	6.91
2001-02	1050239	72555	6.91
2002-03	1158294	82310	7.11
2003-04*	1242849	90774	7.30
2004-05*	1357191	99125	7.30

* Estimated figure - as actual figure is under preparation in Ministry of Statistics and Programme Implementation.

****** Includes value of all goods produced during the given period including net increase in work-in-progress and products for use on own account. Valuation is, at producers values, that is the market price at the establishment of the producers. As separate figures of value of production by small scale industry units and for export production were not available, these have not been excluded from the value of output indicated. Value of output for the year 2004-05 is based on estimates. Source : Central Statistical Organisation (Government of India).

The foregoing table reveals that value of output had increased by a factor of 1.37 during the years 2000-01 to 2004-05 and the corresponding increase in the central excise receipts was by a factor of 1.45.

8.3 Central excise receipts vis-a-vis Modvat/Cenvat availed*

A comparative statement showing the details of central excise duty paid through personal ledger account (PLA) and the amount of Modvat/Cenvat availed during the years 2000-01 to 2004-05 is given in the following table: -

(Amount in crore of rupees)

Year	Central excise duty paid through PLA		Modvat/Cenvat availed		Percentage of Modvat/Cenvat to duty paid through PLA
	Amount	Percentage increase	Amount	Percentage increase	
2000-01	68526	11.11	44986	9.11	65.65
2001-02	72555	5.88	47509	5.61	65.48
2002-03	82310	13.44	53039	11.64	64.44
2003-04	90774	10.28	66576	25.52	73.34
2004-05	99125	9.20	76665	15.15	77.34

* Figures furnished by the Ministry of Finance (the Ministry).

The above table shows that while central excise receipts had grown only by 45 per cent during the years 2000-01 to 2004-05, growth in Modvat/Cenvat availed during the relevant period was much more at 70 per cent. Percentage of Modvat/Cenvat availed to duty paid by cash which decreased consistently from 65.65 to 64.44 till 2002-03, increased sharply to 73.34 in 2003-04 and 77.34 in 2004-05. This was also reflected in the steep rise in Modvat/Cenvat credit availed during 2002-03 and 2003-04.

8.4 Cost of collection

The expenditure incurred during the year 2003-04 in collecting central excise duty alongwith the corresponding figures for the preceding four years is given below: -

(Amount in crore of rupees)

Year	Receipts from excise duty		Expenditure on collection		Cost of collection as percentage of receipts
	Amount	Percentage increase over previous year	Amount*	Percentage increase over previous year	
2000-01	68526	11.11	615.84	5.30	0.90
2001-02	72555	5.88	635.78	3.24	0.88
2002-03	82310	13.44	702.80	10.54	0.85
2003-04	90774	10.28	750.58	6.80	0.83
2004-05	99125*	9.20	825.90**	10.03	0.83

* Figure as per Finance Accounts.

** Figure is provisional.

8.5 Outstanding demands *

The number of cases and amount involved in demands for excise duty outstanding for adjudication/recovery as on 31 March 2004 and 31 March 2005 are as follows: -

(Amount in crore of rupees)

		As on 31 March 2004				As on 31 March 2005			
		Number of cases		Amount		Number of cases		Amount	
		More than five years	Less than five years	More than five years	Less than five years	More than five years	Less than five years	More than five years	Less than five years
(a)	**Pending with** Adjudicating officers	860	19988	566.64	10963.23	963	19452	985.56	11061.77
(b)	**Pending before**								
(i)	Appellate Commissioners	826	9724	273.59	1640.77	498	4954	53.54	1445.64
(ii)	Board	4	1	0.01	0.39	4	5	0.01	0.03
(iii)	Government	181	48	6.13	5.27	13	129	0.13	64.23
(iv)	Tribunals	1989	7879	755.95	6300.17	1789	7969	921.23	6944.79
(v)	High Courts	514	1382	224.61	722.55	551	1082	377.29	1886.59
(vi)	Supreme Court	121	346	142.64	676.01	92	282	87.44	2144.44
(c)	**Pending for coercive recovery measures**	3884	6243	317.27	1115.85	2514	5507	632.38	2085.95
	Total	**8379**	**45611**	**2286.83**	**21424.24**	**6424**	**39380**	**3057.58**	**25633.44**

* Figure furnished by the Ministry and relates to 93 commissionerates of central excise.

A total of 45,804 cases involving duty of Rs.28,691.02 crore were pending finalisation as on 31 March 2005 with different authorities.

8.6 Fraud/presumptive fraud cases **

The position of fraud/presumptive fraud cases alongwith the action taken by the department against the defaulting assessees during the period 2002-03 and 2004-05 is depicted in the following table :

(Amount in crore of rupees)

Year	Cases detected		Demand of duty raised	Penalty imposed		Duty collected	Penalty collected	
	Number	Amount	Amount	Number	Amount	Amount	Number	Amount
2002-03	1757	1692.06	593.12	284	589.74	51.80	97	0.33
2003-04	2274	1832.18	1103.70	596	188.20	56.81	62	0.16
2004-05	1368	1373.90	891.09	189	88.04	96.22	29	0.09
Total	**5399**	**4898.14**	**2587.91**	**1069**	**865.98**	**204.83**	**188**	**0.58**

** Figure furnished by the Ministry and relates to 93 commissionerates.

The above data reveals that while a total of 5,399 cases of fraud/presumptive fraud were detected during the years 2002-05 by the department, involving duty of Rs.4,898.14 crore, it raised a demand of Rs.2,587.91 crore only and recovered Rs.204.83 crore (7.91 per cent) out

of it. Similarly, out of penalty of Rs.865.98 crore imposed, the department recovered only Rs.0.58 crore (0.07 per cent).

8.7 Commodities contributing major revenue *

Commodities which yielded revenue of more than Rs.1,000 crore during 2004-05 alongwith corresponding figures for 2003-04 are as follows :

(Amount in crore of rupees)

Sl. No.	Commodity	2003-04 (Actual)	2004-05 (Actual)	Percentage variation of actual over previous year	Percentage share in total collection
1.	Refined diesel oil	13469.72	14454.83	7.31	13.83
2.	Motor spirit	12574.96	13791.95	9.68	13.19
3.	Iron & steel	7330.33	7662.86	4.54	7.33
4.	Cigarettes and cigarillos of tobacco or tobacco substitutes	5495.34	5994.85	9.09	5.73
5.	Cement, clinkers, cement all sorts	4219.93	4522.65	7.17	4.33
6.	All other machinery articles and tools falling under chapter 84	2321.21	2851.04	22.83	2.73
7.	Motor cars and other motor vehicles for transport of persons	2141.10	2739.22	27.94	2.62
8.	All other motor vehicles falling under chapter 87	2061.52	2730.61	32.46	2.61
9.	Plastics and article thereof	2151.83	2531.12	17.63	2.42
10.	Petroleum gases and other gaseous hydrocarbons	2552.10	2424.36	(-) 5.01	2.32
11.	Organic chemicals	1722.34	2170.66	26.03	2.08
12.	Articles of iron and steel	1137.39	2106.57	85.21	2.01
13.	Sugar	1779.38	1766.76	(-) 0.71	1.69
14.	Pharmaceutical products	1434.45	1616.40	12.68	1.55
15.	All other electronic and electrical goods falling under chapter 85	1104.41	1316.88	19.24	1.26
16.	Paper and paper board, articles of paper pulp or paper or paper board	1350.40	1300.43	(-) 3.70	1.24
17.	Public transport type passenger motor vehicles and motor vehicles for the transport of goods	1239.41	1278.03	3.12	1.22
18.	Kerosene	1700.08	1273.26	(-) 25.11	1.22
19.	Diesel oil, N.E.S.	991.58	1246.16	25.67	1.19
20.	Tyre, tubes and flaps	808.79	1095.38	35.43	1.05
21.	Miscellaneous chemical products	942.82	1088.00	15.40	1.04
22.	Aluminium and articles thereof	745.56	1035.31	38.86	0.99

* Figure furnished by the Ministry.

The above table reveals that there was lower collection of revenue during 2004-05 in kerosene, petroleum gases and other gaseous hydrocarbons, paper and paper board, articles of paper pulp or paper or paper board and sugar to the extent of (-) 25.11, (-) 5.01, (-) 3.70 and (-) 0.71 per cent respectively over previous year.

8.8 Provisional assessments*

The number of cases of provisional assessments and amount involved therein as on 31 March 2004 and 31 March 2005 is exhibited in following table.

(Amount in crore of rupees)

		As on 31 March 2004		As on 31 March 2005	
		Number of cases	**Duty involved**	**Number of cases**	**Duty involved**
(a)	Pending decision by court of law	47	119.62	26	21.05
(b)	Pending decision by Ministry or Board	6	30.43	25	71.58
(c)	Pending adjudication with the Commissioner	179	180.88	97	17.08
	Total	**232**	**330.93**	**166**	**109.71**

* Figure furnished by the Ministry and relates to 93 commissionerates.

8.9 Revenue remitted or abandoned**

Amount of central excise duty remitted/abandoned or written off due to various reasons for the years 2003-04 and 2004-05 are shown below:

(Amount in crore of rupees)

		2003-04		2004-05	
		Number of cases	**Amount**	**Number of cases**	**Amount**
	Remitted due to :				
(a)	Fire	8	1.18	17	2.44
(b)	Flood	4	0.15	5	0.62
(c)	Theft	1	0.01	0	0.00
(d)	Other reasons	438	2.45	545	2.04
	Total	**451**	**3.79**	**567**	**5.10**
	Abandoned or written off due to :				
(a)	Assessees having died leaving behind no assets	10	0.14	109	0.13
(b)	Assessees untraceable	64	15.61	49	13.31
(c)	Assessees left India	0	0.00	4	0.03
(d)	Assessees incapable of payment of duty	19	12.46	8	0.06
(e)	Other reasons	16	0.20	432	2.42
	Total	**109**	**28.41**	**602**	**15.95**

** Figure furnished by the Ministry and relates to 93 commissionerates.

8.10 Refunds*

The amount of duty refunded by the department during 2002-05 because of excess collection is given below:

(Amount in crore of rupees)

		2002-03	2003-04	2004-05
(i)	No. of cases	31574	33965	16541
(ii)	Amount of refunds (other than rebate)	999.77	965.75	1128.83
(iii)	Interest on refunds			
	(a) No. of cases	16	44	35
	(b) Amount paid	1.22	25.11	61.02

* Figure furnished by the Ministry and relates to 93 commissionerates.

Interest is payable under section 11BB of Central Excise Act, 1944 if amount is not refunded within three months from the date of receipt of application. However table shows consistent increase in amount of interest refunded indicating delayed disposal of cases.

8.11 Contents

This section contains 227 paragraphs (including cases of total under assessment), featured individually or grouped together, arising from test check of records maintained in departmental offices and premises of the manufacturers. Of these, 183 paragraphs contain monetary impact of Rs.911.60 crore directly attributable to audit pointing out non-compliance to rules/regulations and 43 paragraphs involving Rs.6781.54 crore dealing with lacunae in law or procedure or control weakness. Audit has in one paragraph pointed out notional interest amounting to Rs.3.80 crore. In 16 cases replies from Ministries were awaited (January 2006). The concerned Ministries/departments had accepted (January 2006) audit observations in 122 paragraphs involving Rs.200.40 crore and recovered Rs.20.02 crore. Statutory audit has detected objections in 111 cases where internal audit had already been conducted by the department but it had not detected the irregularity.

CHAPTER IX : TOPICS OF SPECIAL IMPORTANCE

9.1 Export of goods allowed free of additional duties without notification

Additional duty of excise (AED) at the rate of one rupee per litre was imposed on motor spirit (MS) with effect from 2 June 1998 by Finance Act, 1998 and on high speed diesel (HSD) oil with effect from 1 March 1999 by Finance Act, 1999. This rate was increased to one rupee fifty paise per litre on both products from 1 March 2003 by Finance Act, 2003. Besides, special additional excise duty (SAED) is leviable on MS at the rate of six rupees per litre from 1 March 2002 by Finance Act, 2002.

Under rule 13 of Central Excise Rules, 1944 (now rule 19 of Central Excise Rules, 2002), read with notification dated 22 September 1994, as amended and superceded on 26 June 2001, excisable goods meant for export outside India may be cleared from factory of the manufacturer or warehouse without payment of duty under bond. Rule 2(7) of the said rules read with rule 2(e) of Central Excise Rules, 2002 defines the term 'duty' to mean duty payable under section 3 of Central Excise Act. Additional duty/SAED leviable under the Finance Act is not covered under notification ibid, since this duty is distinct and different from that leviable under section 3 of the Act ibid.

Supreme Court in the case of M/s. Modi Rubber Ltd. {1986 (25) ELT 849 SC} held that where notification was issued under rule 8(1) of Central Excise Rules, simpliciter without reference to any other statute, exemption granted under it must be construed as limited only to duty of excise payable under Central Excise Act and not to special, auxiliary or other kind of duty leviable under Finance Act.

9.1.1 Six assessees in Haldia, Lucknow, Rajkot, Siliguri and Visakhapatnam I commissionerates, engaged in manufacture/marketing of petroleum products cleared MS and HSD oil for export under bond during the period from April 2001 to August 2004. The clearance was without payment of additional duty and special additional duty leviable under the Finance Acts ibid. Since additional excise duty and SAED leviable was not covered under rebate/exemption, clearance of HSD oil and MS without payment thereof resulted in non-levy of duty of Rs.6118.07 crore.

On this being pointed out (between June 2003 and June 2005), the Ministry stated (January 2006) that for levy and collection of AED, SAED, NCCD and education cess, provisions of Central Excise Act and Rules were extended by respective Finance Acts and hence the provisions of rebate of central excise duty would be applicable to such duties as well. The Board, however issued section 37B order on 13 January 2006 requiring department not to recover said duties payable on export of goods under bond.

Reply is not tenable in view of Supreme Court decision in the case of Modi Rubber Limited upholding that exemption from duty of excise did not mean exemption from special excise duty or additional duty of excise. Further notification dated 26 June 2001 had been amended on 24 March 2003 to cover AED leviable on tea and tea waste under Finance Act 2003 and on 10 August 2004 to cover NCCD and education cess leviable under respective Finance Acts but no such amendment had been made for AED and SAED leviable on MS and HSD.

9.1.2 Seven manufacturers, in four commissionerates, engaged in manufacture of tobacco products/yarn/textile products falling under chapters 24, 52, 54 and 55 of Central Excise Tariff exported their products under bond/letter of undertaking during 1997-98 to

2004-05 without payment of duties under provisions of notifications issued under rule 13 of Central Excise Rules, 1944/rule 19 of new Central Excise Rules, 2001/2002. Since the goods attracted levy of additional duties under Goods of Special Importance Act, 1957/Textiles and Textile Articles Act, 1978 (T&TA), assessees were liable to pay additional duties amounting to Rs.62.10 crore on these exports in the absence of specific exemption in the relevant notifications.

Non-levy of additional duty in four cases was pointed out between May 2000 and February 2001. The Ministry stated (May 2003) that (i) intention of both rules 12 and 13 was to make duty incidence 'nil' in the case of all exports (ii) when exports were made under claim for rebate in terms of erstwhile rule 12, additional duty of excise (T&TA) was also abatable along with duty of excise paid under Central Excise Act and (iii) on harmonious construction of these two rules, it was to be construed that the facility stands extended to additional duties of excise both for purpose of export under claim for rebate as well as export under bond.

Contentions of Ministry are not tenable since notification issued under rule 13 of erstwhile Central Excise Rules, 1944 or rule 19 of Central Excise Rules, 2001/2002, unlike the notifications issued under rule 12/rule 18 ibid, did not cover additional duties leviable under Goods of Special Importance Act, 1957 or T&TA upto 9 August 2004. Further, the term 'duty' as defined under rule 2(7) of Central Excise Rules, 1944/rule 2(e) of Central Excise Rules, 2001/2002 means only the duty payable under section 3 of Central Excise Act, 1944. Therefore, the provisions of any notification issued under the rules framed under Central Excise Act shall normally have application only to the duties leviable under the said Act unless the notification itself makes a specific mention about duties of excise payable under other Acts. Since benefit of rebate of additional duties was specifically extended to exports made under rule 12/rule 18 only, the same cannot be interpreted as having been extended as well to exports made under bond. If this was so, there was no necessity of issuing amending notification dated 10 August 2004. Further, the said amendment shall take effect only from the date of issue in terms of provisions of section 38A of Central Excise Act, 1944.

9.2 Short realisation of revenue due to incorrect adoption of rate of duty

In terms of notification dated 1 March 2002 concessional/effective rate of basic and additional duty of excise on processed textile fabrics was prescribed at 12 per cent (BED 8 per cent and AED 4 per cent) subject to the condition that they were manufactured from textile fabrics on which appropriate duty of excise and duty as specified in Additional Duties of Excise (Goods of Special Importance) Act, 1957 had been paid. The interpretation of the expression "appropriate duty of excise has been paid" was considered by Supreme Court in the case of M/s. Dhiren Chemical Industries {2002 (139) ELT 3 (SC)} and followed by the Board while issuing circular dated 26 September 2002, wherein it was held that the word "appropriate" in the context of such exemption notification means the correct or specified rate of duty and that where an exemption was subject to the condition that "appropriate duty of excise had been paid" on the inputs, the exemption would not be available if the inputs were exempted from excise duty or were subject to nil rate of excise duty.

Seventy six assessees in Ahmedabad I, Delhi IV, Hyderabad II, III, IV, Jaipur II, Surat I and II commissionerates, engaged in manufacture of processed fabrics from duty free grey fabrics, cleared finished goods on payment of concessional rate of 12 per cent availing exemption under notification dated 1 March 2002 ibid. Since grey fabrics were exempted

from duty, concessional rate of duty on finished goods was not admissible in terms of Supreme Court decision ibid. Duty was required to be paid at the rate of 24 per cent (BED 16 per cent and AED 8 per cent). This resulted in short realisation of duty of Rs.266.24 crore between March 2002 and February 2003.

On this being pointed out (between May 2004 and August 2005), the Ministry stated (December 2005) that the condition of payment of appropriate duty was satisfied by virtue of explanation II of the notification dated 1 March 2002 and clarification of the Board dated 10 December 2002.

Reply is not tenable as explanation II to the notification allows exemption from production of documents only. Deeming provisions cannot be made applicable to those fabrics which are exempt from duty. While interpreting a similar provision, the tribunal in case of M/s. Machine Builders vs. collector of central excise {1996 (83) ELT 576} ruled that the intention was not to deem that the inputs which actually did not suffer duty can be treated as duty paid inputs. The purpose was to ensure benefit to those who use duty paid inputs but where it may not be possible for them to produce duty paying documents. Further the clarification dated 10 December 2002 is not relevant to independent processors who procure unprocessed fabrics at nil rate of duty and use in the manufacture of processed fabric.

9.3 Non-levy of national calamity contingent duty (NCCD) on exports made under bond

Section 136 of Finance Act, 2001, imposed surcharge by way of duty of excise called NCCD with effect from 1 March 2001 on cigarettes, chewing tobacco, pan masala etc. falling under chapter 24 of Central Excise Tariff Act, 1985. Similarly by section 169 of Finance Act, 2003, NCCD has been imposed on manufacture of motor vehicle and motor cycles with effect from 1 March 2003.

Rule 13 of Central Excise Rules, 1944/now rule 19 of Central Excise Rules, 2001/2002, and notifications issued thereunder from time to time allows clearance of goods from factory of manufacturer for export outside India without payment of duty under bond. On imposition of NCCD, consequential amendments were not introduced simultaneously in relevant notifications extending benefit of exemption to NCCD also when goods are exported under bond. This particular duty was notified by Government as duty eligible for exemption only on 10 August 2004 by amending the relevant notification issued under rule 19 ibid.

Test check of records of six assessees in six commissionerates, engaged in manufacture of cigarettes, chewing tobacco etc. showed that they exported different brands of cigarettes and chewing tobacco under bond without payment of central excise duties as well as NCCD during the period from April 2001 and 9 August 2004. Similarly six assessees in five commissionerates engaged in manufacture of motor vehicles, motor cycles etc. falling under chapter 87 exported motor vehicles and motor cycles under bond without payment of central excise duties as well as NCCD. Exemption from payment of NCCD was not available in respect of goods exported under bond upto 9 August 2004 as the term 'duty' mentioned in the pre-amended notification meant only duty payable under Central Excise Act whereas NCCD is levied under Finance Act which was not covered by the notification till the date of amendment. Amendment in the relevant notification was only prospective in application. Therefore clearance of goods for export without payment of NCCD was incorrect. This resulted in non-payment of NCCD of Rs. 208.85 crore on chewing tobacco exported between

April 2001 and 9 August 2004. and Rs.25.69 crore on motor vehicles and motor cycles exported between March 2003 and 9 August 2004. Aggregate duty not paid on products ibid worked out to Rs.234.54 crore.

On this being pointed out (between January 2004 and May 2005), the Ministry stated (August and September 2005) that Board had clarified on 26 June 2002 that no NCCD was leviable on goods exported under bond since it was the policy of the Government to grant relief from element of domestic taxes on goods exported. It further stated (January 2006) that for levy and collection of AED, SAED, NCCD and education cess, provisions of Central Excise Act and Rules were extended by respective Finance Acts and hence the provisions of rebate of central excise duty would be applicable to such duties as well. The Board, however issued section 37B order on 13 January 2006 requiring department not to recover said duties payable on export of goods under bond.

Reply of the Ministry is not tenable as exemption from duty on export goods should have been extended only through amendment to the relevant notification and not by clarification. Such benefit was extended by the Government by issue of notification dated 10 August 2004 hence was not applicable prior to that date.

9.4 Shortcomings in exemption on goods manufactured in notified areas of Himachal Pradesh (H.P) and Uttaranchal

Government of India introduced concessions for the States of Uttaranchal and H.P. in January 2003 with a view to develop industries and generate employment in the two States. Accordingly, notifications 49/2003-CE and 50/2003-CE both dated 10 June 2003 were issued exempting specified goods (other than certain restricted items) cleared from industrial units located in the specified areas from excise duty for a period of ten years from date of their publication or from the date of commencement of commercial production, whichever was later. Exemption under these notifications was available to (i) new industrial units which had commenced commercial production on or after 7 January 2003; and (ii) industrial units existing before 7 January 2003 but which had undertaken substantial expansion by way of increase in installed capacity by not less than 25 per cent on or after 7 January 2003 but not later than 31 March 2007.

Audit scrutiny of 38 units (30 in H.P. and 8 units in Uttaranchal) revealed several major shortcomings in the manner in which notifications were being resorted to. Given that Government foregoes huge revenue, unintended or skewed benefits warrant deep scrutiny of the scheme. Major audit findings are given below: -

9.4.1 Definition of 'new unit'

An assessee, filed declaration claiming to be 'new industrial unit' in H.P. Audit scrutiny, however, revealed that unit was already functioning in the same name and style at Noida and had shifted to H.P. where a unit owned by managing director of the company was already engaged in manufacture. The proprietary unit was declared closed and taken on lease where the assessee, claiming to be a 'new industrial unit' started manufacturing goods of same product line.

Government was, thus, deprived of revenue amounting to Rs.3.99 crore which the erstwhile unit had paid during 2003-04 before opting for the exemption.

9.4.2 Shifting of units to exempted areas as 'new units'

An assessee established a unit at Parwanoo H.P. and filed declaration as 'new unit' for the manufacture of wrist watches (heading 91.02). The manufacturer already had a unit in the same name at Noida where 93,862 watches per month (average) were manufactured during the year 2003-04. Production at Noida unit came down to 57,848 watches per month (average) during 2004-05 and to 14,120 (average) during April and May 2005. Production at Parwanoo unit during 2005-06 was 57,395 watches per month (average). Duty forgone at Parwanoo unit amounted to Rs.8.57 crore (Rs.6.87 crore during 2004-05 and Rs.1.70 crore during 2005-06 upto June 2005).

Another assessee in Baddi Tehsil Nalagarh, District Solan H.P. established as a 'new unit' for manufacture of medicaments (sub-heading 3003.10), had another manufacturing unit at Ahmedabad from where product line was shifted and established in exempted area in H.P. Duty forgone by the Government amounted to Rs.18.38 crore (Rs.8.36 crore during 2004-05 and Rs.10.02 crore during 2005-06).

Similarly another assessee in Nahan H.P. established as a 'new unit' engaged in manufacture of aluminium cans (sub-heading 7612.91) had a manufacturing unit of the same type at Jagadhari (Haryana) which was closed and activities shifted to the exempted area in H.P. Manufacturer had cleared goods valuing Rs.5.25 crore during 2004-05 on which duty forgone by Government amounted to Rs.83.98 lakh.

Audit noticed that exemptions were afforded under Income Tax Act, 1961, in fact, after section 80-1(C)(4) clearly spelt out the following conditions for new units: -

(i) it is not formed by splitting up or the re-construction of the business already in existence; and

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

No such clarity existed under central excise notifications due to which several units as described above could avail exemption as new units after shifting.

9.4.3 Definition of substantial expansion

An existing unit could avail exemption if substantial expansion by way of increase in installed capacity by not less than 25 per cent had been undertaken on or after 7 January 2003. In the subsequent clarification issued by the Government vide circular dated 21 January 2004, it was clarified that the only criterion to be satisfied was increase in the installed capacity by at least 25 per cent with additional plant and machinery irrespective of the quantum of increase in the value of investment in plant and machinery. Some lacunae came to notice: -

No addition in plant and machinery

An assessee in Meerut I commissionerate, an existing unit engaged in manufacture of mild steel ingot falling under sub-heading 7206.90, had declared substantial expansion by way of increase in installed capacity and availed exemption on clearance of 26828.645 tonne during the period 3 August 2003 to 31 March 2005 without payment of duty of Rs.5.08 crore calculated at the rate of 16 per cent on assessable value of Rs.31.77 crore whereas as per balance sheet for the year 2002-03 and 2003-04 no addition in plant and machinery had been

made by the assessee unit. As such, the unit had irregularly availed exemption amounting to Rs.5.08 crore on the clearance of M.S. ingot.

Increase in installed capacity not linked with increase in investment

Records of an assessee in Meerut I commissionerate, revealed that assessee started availing exemption by substantially increasing installed capacity from 20 lakh watches to 30 lakh watches per annum (50 per cent increase) from 15 October 2003. In support of their claim, they furnished a certificate from chartered engineer which had not linked increase in installed capacity with increase in value of plant and machinery. Unit's records disclosed that during 2002-03, the assessee had produced 18,58,572 watches against capacity of 20 lakh watches (thus there was an idle capacity of seven per cent), whereas production during the period 2004-05 (under exemption) jumped to 31,76,995 watches against the new installed capacity of 30 lakh per annum (there was excess production over capacity by 1,76,995 watches) which was about six per cent even after off setting shortfall of 1,41,428 watches during 2002-03.

Annual report of the assessee showed that the main manufacturing plant was located at Hosur in Chennai. Main components were manufactured there and 'stock transferred' to Dehradun unit for assembly, after which same were sent to clearing and forwarding agents as per their headquarters specific instructions. Thus, neither was there complete manufacturing nor any genuine sale being made from the factory gate.

Moot question of whether benefit envisaged for manufacturer should be given to assessee who was essentially engaged as a job worker/assembler was not addressed in the scheme.

Unutilised capacity

An existing duty paying unit opted for exemption from April 2004 as it claimed to have undertaken substantial expansion (30 per cent) of installed capacity. Scrutiny, however, revealed that existing installed capacity had remained unutilised by almost 22, 23 and 19 per cent during 2001-02 to 2003-04 respectively.

Since there was no provision to link installed capacity, with actual production, this resulted in creation of 'idle assets'. The assessee had paid revenue of Rs.2.81 crore per annum before opting for exemption which would be the net annual loss to Government exchequer from April 2004 onwards.

Basis of calculation of 'expansion in installed capacity' not spelt out in notification

An assessee engaged in manufacture of kraft paper (sub-heading 4804.90), filed declaration as an existing unit opting for exemption on basis of substantial increase in installed capacity.

The unit started availing exemption with effect from 22 October 2003 on the basis of chartered engineer's certificate of increased capacity given to State industries department. However, jurisdictional central excise department later detected that the unit already had existing capacity of 30,000 tonne per annum instead of 26,400 tonne as claimed by the unit and consequently issued show cause notice (SCN) (June 2005) demanding duty of Rs.3.53 crore. The fact remained that the exemption notification was silent about (i) the authority empowered to certify installed capacity; and (ii) clear definition of the term 'existing capacity'. In the instant case unit did not exceed 93 per cent of its capacity utilization and by enhancing installed capacity by about 25 per cent it would still remain short by seven percent of the requirement of 25 per cent of expansion (as contemplated in the notification) if installed capacity was co-related with actual production.

9.4.4 Utilisation of resources from outside the State

Audit scrutiny revealed instances of large manufacturers/brand name owners transferring dutiable manufactured goods from outside the state only for processes of packing/repacking through job workers in H.P./Uttaranchal. In four cases noticed by audit, products such as razors, cells, toiletries, razor blades, shoes, perfumed hair oil, cosmetics etc., were sent by large manufacturers/brand name owners for packing/repacking. The duty forgone by revenue in case of these four units amounted to Rs.27.45 crore.

Since no manufacturing was involved in the processes carried out by job worker, there was no evidence of utilisation of resources from within the State.

9.4.5 Flight of capital by relocation of units

Notifications lack provision to prevent misuse of the exemption as a result of which established brand name owners were found to have shifted from duty paying areas to exempted areas in H.P./Uttaranchal. Some instances noticed in audit are as under: -

An assessee established as a 'new unit' are manufacturing branded air conditioners (heading 84.15). Their entire production was supplied to two brand name owners were earlier supplied to brand name owners from their other unit situated at Punjab which was duty paying area. Manufacturing activities were shifted to exempted areas in H.P. The sale pattern remained the same. Goods valued at Rs.9.70 crore were supplied in the month of March 2005 upon which duty forgone amounted to Rs.1.55 crore.

An assessee established as new unit were engaged in manufacture of food preparation of flour/edible preparations with brand name 'Spert' (heading 1901.19/2108.99) which was a popular brand name in the market even before its production started in H.P. Brand name owner apparently searched for vendors in exempted area. During 2004-05, manufactured goods valued at Rs.2.50 crore were supplied by the assessee to the brand name owner on which duty forgone amounted to Rs.39.98 lakh.

Six assessees of home appliances like electric iron, mixer and grinders, electric fans and water heaters had since established their 'new units' in the notified area at Kala Amb H.P. in Chandigarh commissionerate. Goods were being manufactured with the brand name 'Bajaj'/'Hotline' and were solely supplied to the depots of brand name owners. Cross check of records revealed that vendors had earlier supplied branded goods from their own or sister units at Delhi or Noida (Uttar Pradesh). Introduction of grant of exemption in H.P. encouraged 'brand name owners' to shift vendors and procure supplies of the manufactured goods from exempted areas.

Shifting of supply line from Delhi/Noida to notified areas of H.P. led to duty to the extent of Rs.13.63 crore being foregone by Government with corresponding gain to large manufacturers during the period between 2003-04 and 2005-06 (upto June 2005) from these five vendor units alone.

9.4.6 No provision for recovery of Cenvat credit on inputs/capital goods diverted for use in production of final goods under exemption notification

According to sub-rule (4) of Rule 6 of Cenvat Credit Rules, 2002, no Cenvat credit shall be allowed on capital goods which are used exclusively in manufacture of exempted goods.

There is no provision in notification dated 10 June 2003 for recovery of Cenvat credit already taken, before opting for exemption, on inputs/capital goods. Cases of irregular utilization of Cenvat credit are given below: -

Two existing manufacturers availed total exemption from central excise duty after undertaking substantial expansion in plant and machinery as per provisions of notification dated 10 June 2003. They had also availed and utilised Cenvat credit involved on plant and machinery installed during expansion of the project. Availment of credit was not in order because expansion was undertaken with clear understanding that such capital goods would be utilised in manufacture of goods which would be cleared without payment of duty.

Credit amounting to Rs.45.54 lakh had been availed and utilised by manufacturers during the period when expansion was going on. Omission to make provision in this regard in the notifications resulted in incorrect availment of credit of Rs.45.54 lakh by them.

9.4.7 Non-recovery of duty on finished dutiable goods lying in stock on the date of opting exemption

An assessee in Meerut II commissionerate, an 'existing unit' engaged in production of sugar and molasses (headings 17.01 and 17.03) had dutiable goods (sugar and molasses) lying in stock as on date of opting for exemption (i.e 8 November 2004) under notification dated 10 June 2003. Such goods were also cleared from the mill without payment of duty on the plea that there was no specific provision in the said notifications to charge duty on such goods lying in stock and subsequently cleared under the said notification. Audit scrutiny revealed that the sugar mill had on date of declaration, an unsold stock of sugar (3,95,895 quintal) and molasses (14,47,715 quintal) on which duty at normal rate was payable by the sugar mill. However, instead of paying duty on entire stock, the sugar mill cleared 3,24,162 quintal of sugar worth Rs.50.79 crore without payment of duty of Rs.9.57 crore. Department neither proceeded for recovery of duty nor initiated any penal proceedings.

On balance quantity of sugar and molasses central excise duty at the rate of 16 per cent on sugar and Rs.750 per tonne on molasses was also recoverable.

9.4.8 Shifting of duty paying units out of State

Though, promulgation of the scheme of duty exemption under notifications 49/2003-CE and 50/2003-CE attracted new units in H.P. at the same time it also resulted in shifting of existing duty paying units to other areas where similar exemption was available, thereby negating the desired objective of development of the State.

A renowned group of companies had number of duty paying units functioning in H.P. before grant of exemption. After promulgation of the exemption scheme the company shifted duty paying units viz. amla extract unit, hair oil unit from H.P. to areas in Uttaranchal where similar exemption was available and in turn shifted duty paying units such as glucose unit, shampoo unit and toothpaste unit from other areas to exempted areas in H.P.

Duty forgone on goods manufactured in H.P. after availing exemption amounted to Rs.12.72 crore on account of goods cleared during 2004-05 and duty loss due to shifting of unit out of H.P. amounted to Rs.7.28 crore (duty which the unit had paid). There was, therefore, no check on migration of units from one area to the other.

Audit, therefore, recommends that lacunae in the notifications be taken care of by clearly defining the conditions and a review of the benefits in terms of value additions and large scale employment generation be undertaken.

Reply of the Ministry to the above observations had not been received (January 2006).

9.5 Non-payment of education cess on goods exported under bond

Section 91 read with section 93 of Finance Act, 2004, provide for levy of education cess at the rate of two per cent on all goods cleared on or after 9 July 2004. Notification dated 26 June 2001 issued under rule 19 of Central Excise Rules allows clearance of goods for export without payment of duty under bond/letter of undertaking. For purpose of this notification, duty means duty as defined in Central Excise Act, 1944 and also additional duty levied under section 157 of Finance Act, 2003. Definition of duty under the said notification was expanded vide notification dated 10 August 2004 to include education cess leviable under Finance Act, 2004. Hence for the intervening period i.e. during 9 July 2004 to 9 August 2004, goods exported under above said notification were not exempted from levy of education cess.

Twenty nine assessees in eighteen commissionerates, exported various excisable goods during the period from 9 July 2004 to 9 August 2004 without payment of education cess, which was not correct. Non-levy of education cess amounted to Rs1.93 crore.

On this being pointed out (between October 2004 and May 2005), the Ministry stated (January 2006) that for levy and collection of AED, SAED, NCCD and education cess, provisions of Central Excise Act and Rules were extended by respective Finance Acts and hence the provisions of rebate of central excise duty would be applicable to such duties as well. The Board, however issued section 37B order on 13 January 2006 requiring department not to recover said duties payable on export of goods under bond.

The Ministry's reply is not tenable in view of Supreme Court decision in the case of Modi Rubber Limited upholding that exemption from duty of excise did not mean exemption from special excise duty or additional duty of excise. If benefit of rebate of education cess was extendable to exports made under rule 12/rule 18 then there was no necessity of issuing amending notification dated 10 August 2004. Moreover, the said amendment shall take effect only from the date of issue in terms of provisions of section 38A of Central Excise Act, 1944.

CHAPTER X : GRANT OF MODVAT/CENVAT CREDIT

Under Modvat/Cenvat scheme, credit is allowed for duty paid on 'specified inputs' and 'specified capital goods' used in manufacture of finished goods. Credit can be utilised towards payment of duty on finished goods subject to fulfilment of certain conditions. Some cases of incorrect availment of Modvat/Cenvat credit noticed in test audit are elucidated in the following paragraphs :-

10.1 Incorrect availment of credit on inputs not involving purchase and sale

Rule 57AE(3) of Central Excise Rules, 1944, prescribes maintenance of proper records for receipt, disposal, consumption and inventory of inputs and capital goods by manufacturers. Relevant information regarding value, duty paid, person from whom inputs or capital goods have been purchased were to be recorded. Burden of proof regarding admissibility of Cenvat credit shall be upon the manufacturer taking such credit. Similar provision has also been made in rule 7(4) of Cenvat Credit Rules, 2001 effective from 1 July 2001. The Ministry clarified on 3 April 2000 that the basic responsibility to prove that inputs or capital goods were purchased and used by him for intended purpose lay upon the manufacturer.

Test check of records of seventeen assessees in Ahmedabad II, Belapur, Bhopal, Mumbai II, IV, V, Pune III, Surat I, Thane I, II and Vapi commissionerates, manufacturing excisable goods, revealed that they received inputs from sister units on stock transfer basis. Invoices indicated that goods sent were not sale and valuation of such inputs by the sender unit was made under rule 8 of Valuation Rules, 2000. Sales tax was not paid on such goods as the transaction was not a sale. Since assessees did not purchase the inputs, availment of Cenvat credit of Rs.144.19 crore between April 2000 and February 2003 was not correct.

On this being pointed out (between December 2002 and June 2005), the Ministry stated (November 2005) that rule 4 of Cenvat Credit Rules, 2000 allows Cenvat credit on inputs received in the factory of manufacturer irrespective of whether goods in question were purchased or procured. It further stated that rule 57AE (3) stipulated maintenance of relevant information and did not impose condition regarding admissibility of credit on purchase of inputs. It further stated that the word 'purchased' had been replaced by 'procured' to alter the nature of information to be maintained.

Reply of the Ministry is not tenable as rule 57AE(3) stipulates condition of purchase and to have proof in this regard for admissibility of Cenvat credit. Supreme Court in case of A.N. Sehgal vs. Raje Ram Sheoram (AIR 1991 SC 1406} held that effect should be given to both provisions of an enactment which cannot be reconciled with each other. Ministry remained silent on its own circular dated 3 April 2000 where it was clarified that basic responsibility was upon the manufacturer to prove that inputs or capital goods were purchased and used for the intended purpose. Moreover, rule 57AE(3) has been amended by a notification dated 1 March 2003 in which the word 'purchased' in rule 7 (4) (identical to rule 57AE (3)) of Cenvat Credit Rules, 2001 has been substituted by the word 'procured' prospectively. This lends credence to the stand taken by Audit. Hence, credit availed was recoverable for the period before 1 March 2003.

10.2 Removal of inputs without payment of duty

10.2.1 Rule 3(4) of Cenvat Credit Rules, 2002, stipulates that when inputs or capital goods on which Cenvat credit has been taken are removed as such from the factory, manufacturer of the final products shall pay an amount equal to duty of excise leviable on the date of removal of inputs/capital goods and such removal shall be made under the cover of invoice referred to in rule 7. From 1 March 2003, this rule has been amended requiring payment of duty equal to credit availed in respect of such inputs or capital goods. However, requirement of removal under cover of an invoice remained unchanged thereby implying that each removal of inputs/capital goods should be made on payment of duty.

Further, rules 12 and 13 of the said rules, provide that where Cenvat credit has been taken or utilized wrongly, the same along with interest shall be recovered from the manufacturer and provisions of sections 11A and 11AB of Central Excise Act, 1944, shall apply mutatis mutandis for effecting such recoveries. On contravention of any of the provisions in respect of any inputs or capital goods, such person shall also be liable to penalty not exceeding the amount of duty or ten thousand rupees whichever is greater.

As stipulated in rule 4 of Central Excise Rules, 2002, excisable goods produced or manufactured in a factory shall be cleared on payment of duty leviable on such goods in the manner provided in rule 8 of Central Excise Rules, ibid. It, therefore follows that facility to make payment of duty on monthly basis (by fifth of the following month) shall not be applicable to goods not manufactured in the factory but removed as such in terms of rule 3(4) of Cenvat Credit Rules.

During test check of records of twenty one assessees in twelve commissionerates, it was noticed that they had removed input and capital goods as such during April 2002 to November 2004. Duty amounting to Rs.71.54 crore was not paid on the date of removal of inputs but on 15th day or the last day of the month or 20th and fifth of the next month availing facility of fortnightly/monthly payment under rule 8 of Central Excise Rules, 2002 (erstwhile rule 173 G of Central Excise Rules, 1944). This was in contravention of rule 3(4) ibid since inputs were not manufactured by the assessees and tantamounted to removal of inputs/capital goods without payment of duty. The assessees were, therefore, liable to pay interest of Rs.45.63 lakh and penalty of Rs.71.54 crore under rules 12 and 13 of rules ibid.

On this being pointed out (between October 2004 and May 2005), the Ministry stated (between September and December 2005) that subsequent reversal under rule 3(4) of credit taken was payment of duty which was correct under rule 8 of Central Excise Rules, 2002.

Reply of the Ministry is not tenable as rule 8 of Central Excise Rules refers to time and manner of payment of duty of manufactured goods. Rule 3(4) of Cenvat Credit Rules 2002 stipulates that an amount equal to credit availed shall be paid when goods (inputs/capital goods) are removed as such. Since such goods were not manufactured in the factory from where they were removed, provisions of rule 8 (read with rule 4) of Central Excise Rules were not applicable.

10.2.2 In terms of provisions of rule 57AB(1)(c) of Central Excise Rules, 1944, and rule 3(4) of Cenvat Credit Rules, 2001, for all inputs on which credits have been taken, and removed as such from the factory, manufacturer of final product shall pay an amount equal to credits availed/duty of excise which is leviable on such goods on the date of such removal and on the value determined for such goods under section 4 of Central Excise Act. Such removal shall be made under cover of an invoice referred to in rule 52A.

M/s. Kandhari Beverages Ltd., Baddi and M/s. Pepsico India holdings Pvt. Ltd., in Chandigarh and Raigad commissionerates, engaged in manufacture of aerated water (heading 2202.20) and availing Cenvat credit on inputs viz., glass bottles and plastic crates etc., cleared/transferred such inputs to other units without issuing invoice and without payment of duty or reversing credit which was not correct. This resulted in non-recovery of Rs.71.04 lakh between the period from April 2000 and July 2004.

On this being pointed out (July 2002 and December 2002), the Ministry stated (October and November 2005) that the bottles and crates returned from distributors being durable and returnable containers, no credit was taken on them. Therefore no duty was payable on subsequent removal of such goods.

Reply of the Ministry is not tenable as credit was taken on crates and bottles on purchase thereof and these remain the property of the assessee even on receipt from distributors. Further, the practice of distribution of finished goods and collection of empties is such that Modvatable and non-Modvatable bottles cannot be distinguished, as there is no mark on bottles as such, therefore duty was required to be paid on clearance to other units.

10.3 Loss of revenue due to absence of appropriate provisions in Modvat/Cenvat credit rules

Under erstwhile rule 57CC/rule 57AD of Central Excise Rules, 1944 and present rule 6 of Cenvat Credit Rules, 2002, where a manufacturer is engaged in manufacture of any final product which is chargeable to duty as well as any other final product which is exempt or is chargeable to 'nil' rate of duty and the manufacturer takes credit of specified duty paid on any inputs for manufacture of both categories of final products without maintaining separate accounts, he shall pay an amount equal to eight per cent of the price of second category of final product (viz. exempted one) as charged by the manufacturer at the time of clearance from the factory.

Bangalore I commissionerate, issued periodical SCNs to M/s. Rail Wheel Factory, Bangalore demanding differential duty of Rs.62.96 crore for the period between September 1996 and March 2001 for clearance of goods without raising invoices, non-reversal of an amount equal to eight per cent of the price charged in terms of erstwhile rule 57CC/rule 57AD/present rule 6 and incorrect valuation etc. Demands were confirmed in April 2002 and 28 January 2003. CESTAT in August 2003 and August 2004 set them aside on appeal by assessee relying upon their earlier decision in the case of Gas Authority of India Ltd. {2001 (135) ELT 795} upholding that recoveries under rule 57CC were not in the nature of duty and, therefore, rule 57(I) could not be invoked for recovery. Department had lost an appeal in similar case against the tribunal's order in M/s. Pushpaaman Forgings case {2002 (149) ELT 490 (T)} in Apex Court on the grounds that there were no machinery/provisions for recovery of eight per cent amount under erstwhile rule 57CC of Central Excise Rules or new rule 6 of Cenvat Credit Rules, 2002. Hence, lack of suitable provisions in the said rules resulted in total loss of revenue of Rs.62.96 crore to the Government.

On this being pointed out (November 2004), the Ministry admitted the objection and stated (December 2005) that recovery mechanism had been introduced by Finance Act 2005.

10.4 Incorrect availment of Cenvat credit on capital goods before use

Rule 57AC of Central Excise Rules, 2001, as amended and superceded by rule 4 of Cenvat Credit Rules 2002, provides that Cenvat credit in respect of capital goods received in factory in a financial year shall be taken only for an amount not exceeding 50 per cent of duty paid on such capital goods in the same financial year. Balance 50 per cent can be availed in any subsequent year provided that capital goods are still in possession and use of the manufacturer of the final product in such subsequent years. The Ministry clarified on 5 May 2000 that balance credit may be taken in subsequent financial year subject to the capital goods still being in use and in possession of the assessee.

10.4.1 M/s. National Aluminium Company Ltd., Angul in Bhubaneswar I commissionerate, availed of balance 50 per cent Cenvat credit of Rs.6.02 crore in April 2002, of Rs.6.10 crore in April 2003, of Rs.11.95 crore in April 2004 on capital goods received during 2001-02, 2002-03 and 2003-04, respectively before installation and actual use of the said goods which were either lying with co-ordinator of the expansion programme of the captive power plants or partly issued to construction site after availment of credit. Expansion programme of power plants of both units was under progress and production had not commenced by the time the assessee availed of the balance 50 per cent credit. Therefore, availing of the balance credit of Rs.24.07 crore was incorrect.

On this being pointed out (February 2004), Ministry stated (August 2005) that so long as capital goods were in possession of the manufacturer it could not be said that the manufacturer was not using capital goods in his factory of manufacture.

Reply of the Ministry is not borne from the provisions of rule 57AC (2)(b) ibid. Further deletion of word 'use' from rule 4(2)(b) of Cenvat Credit Rules with effect from 10 September 2004 corroborates audit views. In a similar case Ministry had admitted the objection in December 2003.

10.4.2 Similarly, M/s. Jayaswals NECO Ltd., M/s. Raipur Alloys and Steel Ltd. and M/s. Ambuja Cement Eastern Ltd. in Raipur commissionerate, M/s. IOCL Vadodara in Vadodara I commissionerate and M/s. Maruti Udyog Ltd. in Gurgaon commissionerate availed balance fifty per cent Cenvat credit of Rs.3.31 crore in April 2004 on capital goods received during 2003-04. Assessees availed/utilised the credit before installation and actual use of the capital goods which was incorrect.

On this being pointed out (between July 2004 and January 2005), the department stated (March and April 2005) that Cenvat Credit Rules did not provide for installation of capital goods as pre-requisite for taking Cenvat credit and keeping of capital goods itself would imply their possession and use. In one case it also stated that though installation work was completed on 13 August 2004 right to avail Cenvat credit stood unaffected.

Reply of the department was not tenable as rule 4(2)(b) clearly prescribed that possession and use of capital goods for availing Cenvat credit were pre-conditions. Further deletion of word "use" from rule 4(2)(b) with effect from 10 September 2004 also supported audit stand.

Reply of the Ministry had not been received (January 2006).

10.4.3 Three other assessees in Mumbai III, Pune I and Thane II commissionerates, availed initial 50 per cent of Cenvat credit on capital goods during 2000-01, 2001-02 and 2003-04. Balance 50 per cent of Cenvat credit amounting to Rs.55.96 lakh was incorrectly availed in subsequent years even though the said capital goods were not put to use.

On this being pointed out (February 2004, January 2002 and September 2004), department in one case intimated (September 2004) recovery of Cenvat credit of Rs.4.90 lakh. In remaining two cases, it stated (May 2004 and January 2005) that there was no legal requirement of installation/use of capital goods for availing of balance 50 per cent of credit and quoted decision of tribunal in case of M/s. Ballarpur Industries Ltd. {2003 (156) ELT 423 (Tri-Mumbai)} in favour of their argument.

Department's reply is not tenable in view of tribunal's subsequent judgment in the case of M/s. Parasrampuria Synthetics {2004 (170) ELT 327 (Tri-Del)} wherein it was held that balance 50 per cent credit could not be allowed without installation and use of goods in financial year during which it was claimed. Further, decision in the case of M/s. Ballarpur Industries Ltd. was also reckoned with in case of M/s. Parasrampuria Synthetics.

Reply of the Ministry had not been received (January 2006).

10.5 Cenvat credit availed but amount not paid on final goods

Rule 57CC of Central Excise Rules, 1944 and rule 6(3)(b) of Cenvat Credit Rules 2001/2002, stipulate that where manufacturer is engaged in manufacture of any final product which is chargeable to duty as well as any other final product which is exempt or chargeable to nil rate of duty and he takes credit of specified duty on any input which is used in relation to manufacture of both categories of final products, whether contained in the said final product or not, and opts not to maintain separate accounts of common inputs, he shall pay an amount equal to eight per cent of price of second category of final product charged for sale of such goods, at the time of clearance from the factory.

Above position was further clarified by the Board on 19 August 2002 wherein manufacturer had no option but to reverse eight per cent of price of the exempted goods if he had taken credit on common inputs used in both dutiable and non-dutiable products.

10.5.1 Six assessees in Bhopal, Kolkata III, IV, VII, Pune I and Raigad commissionerates, availed Cenvat credit on inputs and used them in dutiable as well as exempted finished goods. No separate inventory was kept in respect of exempted category of goods. Assessees were therefore liable to pay sum of Rs.10.94 crore representing eight per cent of value of exempted goods cleared between April 2000 and June 2005. Three assessees had, however paid a sum of Rs.42 lakh, Rs.3 lakh and Rs.10 lakh representing reversal of actual credit availed on such inputs. This did not absolve assessee from responsibility of making payment of duty of Rs.10.94 crore. Differential amount of Rs.10.39 crore was required to be recovered.

On this being pointed out (between October 2003 and June 2005), the Ministry admitted objection in five cases and reported (between September and November 2005) issue of SCNs for Rs.3.27 crore out of which Rs.1.40 lakh stands recovered. In sixth case it stated (August 2005) that assessee was maintaining two separate stores for keeping raw material required for dutiable and exempted category of boilers and only on limited occasions did it transfer inputs from dutiable stores to exempted stores with reversal of appropriate credit. Ministry further

stated that assessee was not required to pay eight per cent of price of the final product in view of maintenance of separate records.

Reply of the Ministry was not tenable as no separate account for items used in manufacture of exempted goods were maintained. Further, credit would not have been ab-initio available on all such inputs which were subsequently transferred for use in exempted final products. Pro rata reversal of credit was not supported by any legal provisions. Recovery of eight per cent of price of exempted product is also required to be made in terms of Board's clarification of 19 August 2002 on which Ministry's reply is silent.

10.5.2 M/s. Orient Paper Mills, Amlai and M/s. Ispat Godawari Ltd., in Bhopal and Raipur commissionerates, engaged in manufacture of paper and paper board, sponge iron, steel ingots and billets, also produced electricity which was partly used in production of final products and partly sold outside the factory to residential colony of the staff, government offices, autonomous bodies, shopkeepers, industrial units, Chhattisgarh State Electricity Board (CGSEB), and two other manufacturers through its transmission grid. Assessees had availed credit on inputs such as furnace oil, caustic soda, hydrochloric acid, clean flo and other chemicals for generation of electricity (non-excisable). Cenvat credit so availed was utilised for payment of duty on final products. Since no separate accounts of inputs intended to be used in the generation of electricity cleared for sale were maintained and electricity valuing Rs.5.55 crore between April 2001 and October 2004 was sold, amount of Rs.44.41 lakh, being eight per cent of the price of electricity, was recoverable.

On this being pointed out (August 2004 and January 2005), the Ministry admitted the objection in principle and stated (December 2005 and January 2006) that electricity being non-excisable product, credit of duty paid on inputs used for generation of electricity sold outside factory should be recovered proportionately.

Reply of the Ministry is not tenable as Cenvat Credit Rules do not provide proportionate reversal of credit after opting of the facility of non-maintenance of separate inventory of common inputs to be used in both dutiable and non-dutiable output goods.

10.6 Incorrect availment of Cenvat credit on inputs cleared to job workers

Rule 4(5)(a) of Cenvat Credit Rules, 2002, stipulates that Cenvat credit shall be allowed even if inputs as such or after being partially processed are sent to job workers for further processing, testing, repair, re-conditioning or any other purpose, and it is established from records, challans, memos or any other document produced by assessee that goods are received back in the factory within one hundred and eighty days of their despatch to job workers. If such inputs are not received back within the stipulated period, the assessee shall pay an amount equivalent to Cenvat credit availed on such inputs or capital goods by debiting Cenvat account or otherwise.

Benefit of job work in respect of clearance of petroleum oils for generation of electricity outside the factory of production and getting back electricity is neither available under notification dated 25 March 1986 nor under rule 4 of Cenvat Credit Rules, 2001, since electricity has not been specified in Central Excise Tariff Act, 1985.

10.6.1 M/s. Gujarat Alkalis and Chemicals Ltd., Vadodara, in Vadodara commissionerate, availed Cenvat credit on naphtha and supplied naphtha to their other unit at Dahej to generate electricity on job work basis. Electricity so generated by consignee was transmitted to

consignor through Gujarat Electricity Board. Since electricity has not been specified in the first schedule of Central Excise Tariff Act, 1985 and provisions of Cenvat Credit Rules also do not permit availment of Cenvat credit on fuel used outside the factory, availment of Cenvat credit of Rs.5.88 crore during the period from January to October 2001 was incorrect.

On this being pointed out (November 2001), the Ministry stated (December 2005) that the Cenvat credit scheme was basically to avoid cascading effect of taxes and it would be unfair to deny credit on technicalities.

The Ministry's contention is untenable since application of sub rule (5)(a) of rule 4 of the Cenvat Credit Rules, 2002, was restricted to cases where the goods returned from the job worker were covered under the schedule to the Central Excise Tariff Act, 1985 which was not the case here. Further, intermediate goods sent to the job worker for generation of electricity outside the factory of production did not satisfy the definition of inputs as per rule 2.

10.6.2 Fifteen assessees in eight commissionerates, engaged in manufacture of various excisable goods removed certain inputs on which Cenvat credit was availed between the years 2002-03 and 2004-05 to job workers for undertaking certain processes. Input materials sent to job workers were not received back in assessee's factory after processing even after expiry of permissible limit of 180 days. Cenvat credit amounting to Rs.1.54 crore attributable to such inputs was neither paid back nor demanded by the department.

On this being pointed out (between September 2003 and April 2005), the Ministry admitted the objection and intimated (between August and October 2005) recovery of Rs.1.20 crore in twelve cases. In one case it stated that the assesses had received back all the inputs/semi finished goods from job worker, therefore, reversal of credit was not required. Recovery of duty in two cases was awaited.

10.7 Incorrect availment of Cenvat credit of additional duties of excise

Prior to 1 March 2003, utilisation of Cenvat credit on Additional Duties of Excise (Goods of Special Importance) Act, 1957 {AED (GSI)}was restricted to payment of AED (GSI) only. Rule 3(6)(b) of Cenvat Credit Rules, 2002, was amended with effect from 1 March 2003 to allow credit of AED (GSI) for payment of duty of excise leviable under the first or the second schedule of Central Excise Tariff Act, 1985.

M/s. J.K. Industries, Banmore, in Indore commissionerate, engaged in manufacture of tyres and tubes availed Cenvat credit of Rs.5.52 crore on 16 March 2004 which related to duty paid under Additional Excise Duties (Goods of Special Importance) Act, 1957, on inputs purchased between July 1995 to July 1998. Credit so availed was utilized on 30 April 2004 for payment of basic excise duty/special excise duty on finished goods. Amendment allowing utilisation of AED (GSI) for payment of duty other than AED (GSI) was effective from 1 March 2003 with no retrospective effect, as such availment and utilization of credit for the period July 1995 to June 1998 was not admissible on 16 March 2004. Duty of Rs.5.52 crore was recoverable with interest, and penalty of Rs.5.52 crore under rules 12 and 13 of Cenvat Credit Rules, 2002.

On this being pointed out (January 2005), the department stated (January 2005) that draft SCN was under process. Subsequent verification revealed that it was issued on 22 February 2005.

The Ministry admitted the objection in principle (December 2005).

10.8 Non-recovery of Cenvat credit on inputs written off/destroyed

Board clarified vide circular dated 22 February 1995 that where Modvat credit is availed on inputs, but later on they are not used in manufacture and their value written off from stock accounts for any reason, it should be reversed. It further clarified on 16 July 2002 that Modvat/Cenvat credit of duty availed on inputs/capital goods which are subsequently written off being obsolete or unfit for use is to be reversed.

Tribunal in the case of M/s. Mafatlal Industries vs. commissioner, Ahmedabad {2003 (154) ELT 543 (Tri-Mumbai)} held in March 2003 that when duty on finished goods burnt/destroyed in fire, etc was remitted and the manufacturer received compensation from insurance companies in respect of destroyed goods, credit of duty taken on inputs used in finished goods burnt/destroyed is recoverable from the manufacturer.

10.8.1 M/s. Telco, Jamshedpur and M/s. Indian Petrochemical Corporation Ltd. (IPCL), in Jamshedpur and Raigad commissionerates, engaged in the manufacture of motor vehicles and parts thereof, and plastic articles respectively availed Modvat/Cenvat credit on inputs received. Verification of their records revealed that they had written off materials and spares/components valuing Rs.42.38 crore in their accounts between April 2000 and March 2003. Corresponding credit of duty of Rs.4.39 crore on such inputs/components was, however, not reversed/paid back.

On this being pointed out (March 2003 and February 2004), the Ministry admitted (September 2005) the objection and stated that two SCNs for Rs.4.39 crore were issued out of which one pertaining to M/s. IPCL (for Rs.2.14 crore) had been confirmed besides imposition of penalty of Rs.2.64 crore against which assessee had gone in appeal.

10.8.2 M/s. Vinoram Ltd. and M/s. Bharat Fritz Wrener Pvt. Ltd. in Bangalore I and III commissionerates, engaged in manufacture of lathes, bearing and mills machines, industrial perfumes and flavours etc., availed Cenvat credit of duty paid on inputs received in their factory from time to time. During 1999-2000 and 2003-04, the assessees had written off raw materials valued at Rs.9.53 crore in their annual accounts declaring them as obsolete or as surplus/redundant due to non-movement of such inventories. Corresponding credit of duty of Rs.1.52 crore on such inputs was, however, not reversed from their Cenvat accounts notwithstanding the fact that the items became unfit for use for the specified purposes and thus ceased to be inputs.

On this being pointed out (November 2003 and August 2004), the Ministry stated (August 2005) that assessees had made provision for slow moving stocks in accordance with the generally accepted accounting principles and that inputs were available in the stores ledger for future utilization in production.

Reply is not tenable as Ministry did not have proof of full value of inputs not written off, hence credit was to be paid back irrespective of whether or not such inputs were capable of being used in terms of Board's clarification dated 16 July 2002.

10.8.3 M/s. Dharampal Satyapal Ltd., Barotiwala in Chandigarh commissionerate, engaged in manufacture of tobacco products viz. 'tulsi mawa mix' (heading 2404.49) destroyed some consignments of defective finished goods and raw material (inputs). However, corresponding credit of Rs.27.77 lakh availed on the inputs during April 2000 to January 2001 was not reversed.

On this being pointed out (January 2002), the Ministry stated (August 2005) that permission of destruction of goods in question and remission of duty thereon was granted on 4 January 2002 subject to reversal of Cenvat credit availed. Therefore appropriate amount of Cenvat credit would be got reversed as and when the party undertook destruction of goods.

Reply of the Ministry is not tenable as credit should have been recovered immediately on granting of permission on 4 January 2002. Since duty involved has been remitted and the assessee has already used the credit of defective unusable material leaving no proportionate credit balance in Cenvat credit account, as such there was also financial accommodation in the shape of interest of Rs.10.32 lakh for the period from February 2002 to August 2005.

10.8.4 M/s. Kalyani Sharp India Ltd. and M/s. Expogel (I) Ltd., in Pune III commissionerate, were granted remission of duty amounting to Rs.91.73 lakh in the month of July 2003 in respect of finished goods/semi finished goods, valued at Rs.5.73 crore, destroyed in fire during April 1999 and May 2001. Assessees had received compensation from insurance companies in respect of the value of goods destroyed in fire. Department did not take action to recover Cenvat credit taken on inputs used in the manufacture of goods destroyed in fire. In the absence of exact details of credit taken on inputs, the amount required to be reversed worked out to Rs.45.86 lakh at the rate of eight per cent of the value of goods destroyed and for which remission of duty was granted.

On this being pointed (April 2004), the department stated (June 2004) that as per Board's circular dated 7 August 2002, no recovery of such credit was to be made. The Ministry stated (December 2005) that delay in withdrawal of Board's circular was on account of factors like deliberation of the issue within the Board, soliciting views of the trade interests etc.

The fact remains that the tribunal decided the matter in favour of revenue in March 2003 and the Board withdrew its circular dated 7 August 2002 only on 1 October 2004. Delay in withdrawal of circular by the Board resulted in loss of revenue.

10.9 Incorrect utilisation of Cenvat credit of NCCD

Notification dated 17 May 2003 grants exemption to goods falling under heading 54.02, from whole of NCCD leviable thereon if they are manufactured from goods falling under the same heading. Further, as per explanation under rule 3 (6)(b) of Cenvat Credit Rules 2002, where the provisions of any other rule or notification provide for grant of partial or full exemption on condition of non-availability of credit of duty paid on any input, provisions of such other rule or notification shall prevail over the provision of the rules.

M/s. Central India Polyester Ltd. and M/s. Indorama Synthetics Ltd., in Nagpur commissionerate, manufactured partially oriented polyester yarn (POY) under sub-heading 5402.42 and cleared it for captive consumption by making payment of NCCD at the rate of 1 per cent ad valorem for manufacture of polyester filament yarn (drawn) falling under sub-heading 5402.43 and texturised yarn of polyester (drawn) under sub-heading 5402.32 respectively. They availed credit of NCCD of Rs.3.49 crore between June 2003 and September 2004 and utilised it for making payment of NCCD on domestic clearances of POY. Subsequently both claimed exemption from payment of NCCD on POY (drawn) on the plea that the goods were manufactured from NCCD paid POY, though on these goods NCCD stood exempted since 17 May 2003. Thus, they irregularly availed credit of NCCD of Rs.3.49

crore, and claimed exemption from payment of NCCD on POY (drawn). The assessees thus by taking credit of NCCD at captive stage cleared POY drawn without payment of NCCD.

On this being pointed out (March 2004 and January 2005), the Ministry admitted the objection and intimated (November 2005) issue of SCNs for Rs.3.30 crore. Further developments in the case had not been intimated.

10.10 Inputs credits availed for manufacture of exempted goods

As per rule 57C of Central Excise Rules, 1944, Modvat credit on inputs was not admissible if it was used in the manufacture of fully exempted final products or if the final product was chargeable to nil rate of duty.

Board in consultation with Ministry of Law, clarified on 4 January 1991 that if a manufacturer availed of Modvat credit and paid duty on exempted products on his own volition, such payments were not in the nature of duty and were to be treated as deposits, hence, credits of duty paid on inputs would not be admissible.

10.10.1 M/s. Rungta Irrigation Ltd., in Chandigarh commissionerate, engaged in manufacture of 'sprinkler irrigation system' (sub-heading 8424.10) manufactured high density polyethylene (HDPE) pipes which were cleared on payment of duty after availing of Modvat credit of duty paid on inputs which were finally used in manufacture of 'sprinkler irrigation system (final product) although final goods and parts (HDPE pipes)both attracted nil tariff rate of duty. This resulted in irregular availment of credits amounting to R.1.79 crore during October 1994 to January 1999.

On this being pointed out (between April 1997 and April 1999), the Ministry admitted the objection in principle (December 2005).

10.10.2 In case of M/s. Sidwal Refrigeration Industries Pvt. Ltd., and M/s. Intec Industries, in Chandigarh commissionerate, engaged in manufacture of roof mounted package air conditioners and their parts for railway coaches (heading 84.15) and control panels (heading 85.37), the assessee availed credits of BED and SED paid on main chassis cabinets and control panels received as parts of the air-conditioning machines from their sister unit. As parts of air conditioners attracted nil rate of SED, credit of Rs.1.77 crore availed during the period from April 2001 to October 2002 was not correct.

On this being pointed out (March 2004), the Ministry stated (August 2005) that suppliers of inputs had paid duty at instance of department and on vacation of demand, they had not claimed any refund. As such payment of SED should not be treated as duty deposit with Government. It was further stated that there was no ground for the department to deny Modvat credit to the purchaser of inputs since goods with duty paid documents were received by them.

Since SED on parts of air conditioners was unconditionally exempt under notification dated 1 March 2002, payment of duty enabled the assessees to pass on duty paid on inputs which could not be recovered.

10.11 Simultaneous availing of Cenvat credit on capital goods and depreciation under Income Tax Act.

Rule 4(4) of Cenvat Credit Rules, 2002, stipulates that Cenvat credit in respect of goods shall not be allowed in respect of that part of value of capital goods which represents amount of duty on such capital goods, which the manufacturer claims as depreciation under section 32 of Income Tax Act, 1961.

10.11.1 M/s. Mahanagar Gas Ltd., in Mumbai II commissionerate, engaged in manufacture and supply of compressed natural gas received capital goods during the years 2001-02 and 2002-03 and availed 100 per cent of Cenvat credit of Rs.4.79 lakh and Rs.134.16 lakh in March 2004. Scrutiny of financial accounts of assessee for 2001-02 and 2002-03 revealed that they had claimed depreciation under Income Tax Act, 1961 on entire value of capital goods upto 2002-03. Availment of Cenvat credit of Rs.1.39 crore was, therefore, not correct.

On this being pointed out (July 2004), the Ministry stated (November 2005) that assessee had not availed credit in 2001-02 and 2002-03 and for regulating credit availed during March 2004, the assessee had filed revised return on 31 August 2004 to the income tax authorities excluding the duty amount.

Ministry's reply is not tenable as rules specifically restrict availment of credit of duty where depreciation was claimed under section 32 of Income Tax Act, 1961.

10.11.2 M/s. Bajaj Auto Ltd., in Pune I commissionerate, engaged in manufacture of motor vehicles, claimed Cenvat credit on dies and moulds. Dies were cleared to vendors/job workers on payment of duty. The assessee then capitalized excise duty in books of account in respect of such dies on which excise duty was paid while clearing them to vendors/job workers. They also claimed depreciation on value including excise duty element under section 32 of Income Tax Act till the dies were received back from vendors. Again, the assessee availed Cenvat credit on receipt of these dies from vendors. This resulted in incorrect availment of Cenvat credit to the extent of Rs.69.21 lakh.

On this being pointed out (September 2003), the Ministry admitted the objection (September 2005).

10.12 Loss of revenue due to allowance of deemed credit in respect of unprocessed fabrics in stock

10.12.1 Rule 9A of Cenvat Credit Rules, 2002 (inserted on 25 March 2003) envisages that manufacturers of processed fabrics were allowed credit of duty paid on inputs of processed fabrics lying in stock or in process or contained in finished products lying in stock as on 31 March 2003 subject to availability of the documents evidencing actual payment of duty thereon. In case where manufacturer was unable to produce documents evidencing actual payment of duty he was allowed to take such credit on deemed basis {as per provisions contained in sub rule (2) and (3) of rule 9A} at rates as were notified by Central government.

While interpreting rule 57G(2), tribunal in case of M/s. Machine builders {1996 (83) ELT 576} held that intention was not to deem that inputs which actually did not suffer duty were inputs which suffered duty, the purpose was to ensure benefit to those who used inputs in manufacture of which, duty had actually been paid, but it might not have been possible to produce duty paying documents.

Nine assessees, in Jaipur II and Surat I commissionerates, engaged in manufacture of processed fabrics from duty free unprocessed fabrics availed deemed credit of Rs.1.26 crore

on inputs (unprocessed fabrics) lying in stock or in process or contained in finished goods as on 31 March 2003. Since duty was not leviable on unprocessed fabrics lying in stock or in process or contained in finished goods, grant of deemed credit was incorrect which resulted in loss of revenue of Rs.1.26 crore.

On this being pointed out (July 2004), the Ministry confirmed the facts (August 2005) in two cases. In remaining seven cases, it stated (December 2005) that credit was taken as per rule 9A as the grey fabrics were manufactured out of duty paid yarn/fibre. It further stated that though the yarn/fibre was not directly used by the independent processors, grey fabrics used contained duty paid yarn/fibre.

Reply of Ministry is not tenable as the assessees procured grey fabrics which did not suffer duty. Further grey fabrics was not specified input for availing deemed credit under notifications which was in force till 31 March 2003 and hence grant of deemed credit on stock of grey fabrics lying in stock as on 31 March 2003 was incorrect.

10.12.2 As per notification dated 1 March 2001 (as amended on 29 June 2001) and 1 March 2002, government allowed deemed credit ranging from 20 per cent to 66.66 per cent of aggregate of duty of excise leviable under Central Excise Act, 1944, and Additional Duty of Excise (Goods of Special Importance) Act, 1957 on the final product declared therein. Grey fabrics had not been declared as inputs.

M/s. Saroj Textiles, in Kanpur commissionerate, engaged in manufacture of processed fabrics out of grey fabrics, received on job work basis from outside availed and utilized deemed credit of Rs.98.30 lakh during the period from March 2001 to March 2003, even though grey fabrics were not leviable to basic duty and additional duty {under Additional Duty of Excise (Goods of Special Importance) Act, 1957} and were not declared as an eligible input. Allowance of deemed credit was not correct.

On this being pointed out (June 2004), the Ministry stated (December 2005) that deemed credit scheme was introduced to complete the Modvat chain and in no way provided credit where no duty incidence had been suffered on the inputs. It was further stated that this issue had recently been taken up in litigation and the CEGAT, New Delhi had held (November 2002) that the assessee was entitled to deemed credit.

Reply of the Ministry does not address the issues raised in audit.

10.13 Excess availment of Cenvat credit on grinding media

Rule 4 of Cenvat Credit Rules stipulates that Cenvat credit in respect of capital goods including their components, spares and accessories, shall be taken only for an amount not exceeding 50 per cent of duty paid on such capital goods in the same financial year and balance of Cenvat credit may be taken in subsequent financial year.

Tribunal in the case of collector, Mumbai vs. New Heaven Engineering Co. Pvt. Ltd. {1994 (72) ELT 307) decided that grinding steel balls (rough shaped) are used solely and principally with the particular kind of machine and hence are required to be classified alongwith machines under heading 84.74

M/s. Hindustan Zinc Ltd., Rampura and three others in Jaipur II commissionerates, engaged in manufacture of zinc concentrate/lead concentrate and cement allowed Cenvat credit on grinding media balls treating them as inputs for manufacture of cement. Grinding balls were

an integral part of grinding mill/ball mill {1998 (99) ELT 278} and were capital goods. So credit thereon was admissible to extent of 50 per cent (instead of 100 per cent) in the same financial year. Omission resulted in excess allowance of credit amounting to Rs.72.53 lakh.

On this being pointed out (between August 2004 and January 2005), the Ministry stated (December 2005) that Tribunal in its various decisions had held grinding media as inputs.

Reply of the Ministry is not tenable as the decision of tribunal relied upon by the Ministry were given under the Modvat rules which were no more in existence. Even under Modvat rules, decision of CEGAT, treating grinding media as input, given in case of M/s. Indian Rayon & Industries was appealed against in Rajasthan High Court (OTR/04/2002-40 I). Hence there were differing decision of tribunals and the matter remained unresolved.

10.14 Availment of Cenvat credit on the basis of invalid documents

Rule 57AE of Central Excise Rules, 1944, specifies the documents on basis of which Cenvat credit may be taken. Supplementary invoice was eligible for grant of credit except where additional duty became recoverable from manufacturer of inputs or capital goods on account of any non-levy or short levy of duty by reason of fraud, collusion or any willful mis-statement or suppression of facts in contravention of any provisions of the Act or rules made thereunder with intent to evade payment of duty.

10.14.1 M/s. Ispat Industries Ltd., in Mumbai VII (now Raigad) commissionerate, availed Cenvat credit of Rs.68.89 lakh on basis of supplementary invoice issued by M/s. Ispat Metallics India Ltd. (manufacturer-supplier) in respect of oxygen supplied to the assessee during the period from 1 October 2000 to 15 March2001. Test check of records of manufacturer revealed that they had neither maintained production records shown in the monthly return nor issued any excise invoice for clearance of oxygen during the period from 1 October 2000 to 15 March 2001. Manufacturer had filed declaration under rule 173B only on 28 February 2001. Hence for the period from 10 October 2000 to 28 February 2001 the fact of manufacture and supply of oxygen to the assessee was suppressed from department by supplier.

On this being pointed out (November 2002), the Ministry admitted the objection and intimated (August 2005) that amount had been recovered but SCN had been issued (September 2004) for appropriation of duty already recovered, imposition of penalty and recovery of interest.

10.14.2 M/s. Aditya Cement, in Jaipur II commissionerate, took Cenvat credit amounting to Rs.35.99 lakh for which no valid document was available with them. In fact, assessee had taken credit on these goods earlier (March and June 1994), which was disallowed. Matter was pending in appeal before commissioner (appeals) till date. Taking of suo-motu credit on such goods, which were subject matter of appeal was not correct.

On this being pointed out (July 2004), the Ministry admitted the objection in principle (December 2005).

10.15 Excess availment of Cenvat credit

Rule 8 of Central Excise (Valuation) Rules, 2000, envisages that where excisable goods are not sold by the assessee but are used for consumption by him or on his behalf, in production

or manufacture of other articles, the value shall be 115 per cent of the cost of production or manufacture of such goods.

M/s. Ranbaxy Laboratories Ltd., in Chandigarh commissionerate, engaged in manufacture of bulk drugs (heading 29.42) and medicinal formulations (heading 30.03), besides exporting 'bulk drugs' under rebate of duty, also transferred provastatin sodium (bulk drug) on payment of duty to their formulation unit located within the same premises, at value which was nearly thrice higher than cost of production. For duty paid in bulk drug unit, they availed credits in formulation unit. Modus operandi for overvaluation was to artificially inflate price of bulk drug so that surplus credits, mainly on account of export under rebate of duty, could be transferred and utilised in the formulation unit. This resulted in excess transfer/availment of credit amounting to Rs.38.09 lakh during the year 2001-02.

On this being pointed out (March 2003), the Ministry admitted the objection in principle (December 2005).

10.16 Incorrect passing on Cenvat credit to buyers of exempted goods

Erstwhile rule 57CC of Central Excise Rules, 1944 and now rule 6 of Cenvat Credit Rules, 2001/2002, envisages that where an assessee manufactures final products which are chargeable to duty as well as exempted goods but avails credit of duty on inputs meant for use in both categories of final products, and does not maintain separate accounts, he shall pay an amount equivalent to eight per cent of the total price of the exempted goods. The amount so payable is in lieu of Cenvat credit availed on inputs used in exempted goods and hence liability is to be borne by the manufacturer himself.

In case of M/s. Vimal Moulders (India) Ltd., CESTAT held that amount of eight per cent paid by manufacturer but collected from customer was to be deposited with Central government as excess collection of duty as per provisions of section 11D of Central Excise Act, 1944 {2004 (164) ELT 302}.

M/s. Electronic Corporation of India Ltd., M/s. Kesoram Spun Pipe and Foundry and M/s. Larsen and Toubro Ltd., in Hyderabad III, Kolkata IV and Pondicherry commissionerates, manufacturing both dutiable and exempted goods availed Cenvat credit on common inputs but did not maintain separate account. While clearing exempted goods or goods chargeable to nil rate of duty assessees paid Rs.52.92 lakh (i.e. Rs.13.35 lakh + Rs.28.02 lakh + Rs.11.55 lakh respectively) which was equal to eight per cent of the exempted goods from Cenvat account. Assessees at the same time collected such amount in the name of excise duty from customers between April 1999 and August 2004. Since there was no provision to collect such amount from customer, such collection ought to have been paid to the Government as per section 11D of the Act.

On this being pointed out (between July 2000 and October 2004), Ministry admitted (August 2005) the objection in two cases (viz M/s. Electronic Corporation India and M/s. Kesoram Spun Pipe and Foundry) and stated in the case of M/s. Larsen and Toubro Ltd. that excise duty had neither been charged to the buyer nor received.

The reply of the Ministry is not borne out by invoices issued in this case, which indicate value of goods, BED and central sales tax charged separately. Since eight per cent had been charged as BED on them, amount was recoverable under section 11D of Central Excise Act, 1944 in terms of Board's circular dated 12 November 2001.

10.17 Availment of inadmissible Modvat credit

As per erstwhile rule 57 G of Central Excise Rules, 1944 and Board's circular dated 26 November 1996, a manufacturer could take credit of duty paid on inputs within six months from the date of payment of countervailing duty on the basis of triplicate copy of relevant bill of entry.

Test check (January 1998) of central excise records of M/s. Dujodwala Resins and Tarpens Ltd. in Jammu division revealed that assessee had availed (January to September 1997) Modvat credit of Rs.54.24 lakh on inputs after six months from the dates of issue of 18 bills of entry between May 1996 and March 1997 which included inadmissible Modvat credit of Rs.40.08 lakh availed (March to July 1997) after six months from the dates of payment of CVD (September 1996 to January 1997) as recorded on nine bills of entry.

On this being pointed out (January and August 1998), the department stated (May 1998, September 1999 and March 2001) that credit had been correctly availed by the assessee within six months from dates of payment of CVD. Audit scrutiny of the attested photocopies of the relevant bills of entry furnished (March 2001) by the department in support of their reply revealed that payment dates on photocopies of nine bills of entry were not in conformity with those recorded on the original triplicate copies of the relevant bills of entry and in seven bills of entry duty payment dates were not in conformity with the Mumbai customs house record. The remaining two bills of entry could not be confirmed due to illegible name of the concerned customs house recorded on the photocopies. On this again being pointed out (November 2003), the department persistently maintained that the fact of tampering/alteration of duty payment dates by the assessee could not be established in absence of original triplicate copies of the bills of entry which had reportedly been destroyed

Audit rebuttal to department's reply was issued in December 2004 whereupon it admitted (April 2005) that dates verified by audit were in conformity with the duty payment dates in the custom house and that disciplinary action was being initiated against the officer concerned for not issuing a protective demand to the assessee when audit objection was received (August 1998). It was further stated that the assessee had paid (February and March 2005) Rs.12.26 lakh besides promising to pay the balance and that department was contemplating initiation of prosecution proceedings against him after examining the documents, but alleged that demand could not be raised due to the receipt of audit objection after six months from the relevant date prescribed for raising demand under the Act/Rules.

Contention of the department was not tenable as demand could have been raised within five years from the relevant date as per proviso to section 11A of the Act and rule 57I. Failure of the department in not taking immediate action resulted in demand becoming time barred.

The Ministry admitted the objection in principle (November 2005).

10.18 Other cases

In 393 other cases of grant of Modvat/Cenvat credit, the Ministry/department had accepted objections involving duty of Rs.7.13 crore and reported recovery of Rs.4.70 crore in 379 cases till January 2006.

CHAPTER XI : VALUATION OF EXCISABLE GOODS

Ad valorem rates of duty are charged on a wide range of excisable commodities. Valuation of such goods is governed by section 4 of Central Excise Act, 1944, read with Central Excise (Valuation) Rules, 1975 and Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Valuation of excisable goods introduced with effect from 14 May 1997 with reference to retail sale price is governed by section 4A. Some illustrative cases of short levy due to incorrect valuation are narrated in the following paragraphs :

11.1 Revenue foregone due to non-valuation of branded goods on MRP basis

Section 4A of Central Excise Act, 1944, empowers Central government to charge duties of excise on specified goods with reference to maximum of retail sale price (MRP). In response to Audit Report 1996-97, the Ministry stated that the primary objective for introduction of MRP was to check undervaluation to safeguard Government revenue. It was also stated that the scheme was meant to prevent revenue loss due to adoption of lower assessable value by job workers in respect of goods manufactured and cleared by brand owners. Having been vested with requisite powers by Parliament, it was imperative that Government plug revenue leakage expeditiously.

11.1.1 Test check revealed that 17 assessees, in 13 commissionerates, manufacturing motor vehicles, two and three wheelers, IC engines etc. got automobile parts manufactured by vendors at contract price (procurement price). Vendors paid duty on this contract price. When goods were sold in the market as spare parts, the assessees used brand name with MRP rate on the packages. Sales were made through dealers adopting only net dealer price. Test check of procurement prices and net dealer prices of various spare parts, procured from vendors revealed that net dealer prices were higher than the procurement prices. This difference between procurement price and dealer price was due to adoption of lower assessable value at job workers end and very high MRP at the time of clearance under brand name of the owner. MRP is fixed taking into account, the value of advertising/selling expenses and brand value. Non-inclusion of branded automobile spare parts within the ambit of section 4A, resulted in revenue of Rs.178.16 crore being foregone during 2001-02 and 2004-05.

11.1.2 M/s. Menon Pistons Ltd. and M/s. Menon Piston Rings Pvt. Ltd. in Pune II commissionerate and M/s. NRB Bearing Ltd. in Aurangabad commissionerate were engaged in manufacture and clearance of automobile spare parts to original equipments (OE) manufacturers as well as to the replacement market i.e, dealers and distributors. Clearance to OE manufacturers was as per purchase orders. However, in case of clearances to the replacement market, the goods were packed, affixed with brand name and MRP labels and sold on payment of duty at transaction value. It was noticed that value under section 4A after abatement of 40 per cent from MRP would be ten to 20 per cent higher than transaction value. Had the goods being cleared under MRP tag been brought under ambit of section 4A, assessee would have paid higher excise duty. Non-inclusion of branded automobile spare parts within the ambit of section 4A, resulted in escapement of duty of Rs.1.12 crore on goods cleared between April 2003 and January 2005.

11.1.3 M/s. Diparneena Investments Pvt. Ltd., in Nasik Commissionerate, engaged in manufacture of electric distribution board cleared them after affixing MRP on each packet. Goods not being covered under section 4A, duty was discharged on the value at which such

goods were cleared to the marketing company who finally sold them based on printed MRP. After allowing abatement at 40 per cent from MRP, assessable value would be thrice higher than value at which duty was being paid. Had the goods being cleared under MRP been brought under the ambit of section 4A, the assessee would have paid higher excise duty. Non-inclusion thereof resulted in short collection of duty amounting to Rs.3.50 crore between April 2003 and December 2004.

11.1.4 M/s. Rishivally Bio Tech Pvt. Ltd., in Thiruvananthapuram commissionerate, manufactured and cleared medicated plaster (sub-heading 3004.90) under brand name 'plastaid' for M/s. Hindustan Latex Ltd., and paid duty on value based on contract price, whereas the products were sold in the market with MRP affixed on them. Non-inclusion of medicated plaster under MRP based assessment, resulted in revenue of Rs.11.79 lakh being foregone for the period April 2002 to October 2004.

On the above being pointed out (between August 2003 and May 2005), the Ministry stated (October/November 2005) that assessees were not manufacturer and were not liable to pay duty with reference to section 4A. Government had not yet issued notification covering the products under MRP.

The fact remains that, had the Government covered automobile parts under section 4A, interest of revenue could have been protected.

11.2 Undervaluation due to non-inclusion of additional considerations

11.2.1 Notification dated 13 May 2002 as amended on 21 June 2002, provides that all petroleum products cleared from specified refinery would be exempted from so much of the amount of excise duties as is in excess of the amount collected at the rate of 50 per cent of each of the duties.

As per provisions of section 4(1)(a) of Central Excise Act, 1944 read with rule 6 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, where excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances where price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

M/s. Bongaigaon Refinery and Petrochemicals Ltd. and M/s. IOCL both situated in Shillong commissionerate, cleared petroleum products against payment of duty at eight per cent of BED availing exemption under notification dated 13 May 2002 for onward sale through their marketing terminals/marketing agents on uniform cum-duty price. Records of the assessees revealed that the difference of excise duty allowed through exemption notifications mentioned above (16 per cent realized from the customers minus eight per cent paid to Government) amounted to Rs.747.90 crore for the years 2002-03 and 2003-04 which was received back from the marketing terminals/marketing agents and credited to the company's profit and loss account as "north east refinery benefits". Since this amount was received by the assessees as an additional consideration in relation to the sale of goods, it was required to be added to the assessable value of the goods cleared from the refineries and entailed differential duty of Rs.59.83 crore.

On this being pointed out (August 2005), the Ministry stated (January 2006) that the amounts transferred by marketing companies to the refineries were their internal fund flows which could not be treated as additional consideration.

Reply of the Ministry is not tenable as the exempted amount of duty was recovered from the customers through marketing companies and passed back to the assessees and hence it was additional consideration flowing indirectly to the assessees.

11.2.2 Board's circular dated 1 July 2002 read with circular dated 12 December 2002 clarifies that pre-delivery inspection (PDI) charges and cost of after sales service (free service charges) provided by dealer of vehicle during warranty period are includible in transaction value with effect from 1 July 2000.

M/s. Fiat India Pvt. Ltd. and M/s. Tata Motors Ltd., in Mumbai II and Pune I commissionerates, cleared motor vehicles to various dealers appointed by them. Agreement entered with dealers revealed that they were required to carry out pre delivery inspection of the vehicles, free after sales services and incur expenses on advertisement. Cost of these services was incurred by dealers out of dealer's margin/discount passed on by the assessee. As per provisions cited above, cost of the services was includible in assessable value. Non-inclusion thereof resulted in short levy of duty of Rs.15.84 crore for the period from 1 July 2000 to 30 September 2003.

On this being pointed out (June 2003 and January 2004), the Ministry admitted the objection and stated (October/November 2005) that demand of duty of Rs.3.02 crore with penalty of Rs.3.02 crore had been confirmed in February 2005 on account of PDI and after sale service charges but M/s. Fiat India Pvt. Ltd. had preferred appeal with CESTAT. Another SCN for Rs.3.90 crore on account of advertisement charges to M/s. Fiat India Pvt. Ltd. and two SCNs for Rs.14.13 crore to M/s. Tata Motors Ltd. had also been issued which were pending adjudication.

11.2.3 Government of Maharashtra introduced package incentive scheme for deferred payment of sales tax whereby assessee was allowed to collect sales tax from the buyer, retain it and repay it after prescribed period. Government thereupon amended provisions of Sales Tax Act and issued a notification in November 2002 providing further incentive for premature repayment of sales tax liability.

Five assessees in Pune I, III, Nagpur and Nasik commissionerates, engaged in manufacture of excisable goods had opted for premature repayment of sales tax deferred liability under the scheme. Scrutiny of their financial records revealed that they had received abatement of Rs.24.84 crore due to premature repayment of sales tax liability accrued upto March 2002 and March 2004 at net present value (NPV). Difference between actual sales tax collected from customers and payment made at NPV was retained by them as income in the respective annual accounts. Non-inclusion of sales tax amount collected but not paid or payable to the Government in the assessable value resulted in undervaluation of goods with consequential short levy of Rs.3.53 crore.

On this being pointed out (January and March 2005), the Ministry admitted the objection in principle (November 2005).

11.2.4 M/s. Diamond Beverages Pvt. Ltd., in Kolkata IV commissionerate, manufacturing aerated water (heading 22.02) and syrup (sub-heading 2108.10), sold syrups in canisters of 18 litre capacity to different dealers having dispensing machines supplied by M/s. Taratala Soft

Drinks Pvt. Ltd. who was a related person of the assessee (as confirmed by the assessee on 16 June 2003). The canisters were fitted to dispensing machines which had an inbuilt system to mix syrup, water and carbon-di-oxide gas to produce aerated water. Dealers then sold such aerated water in cups to ultimate customers. The assessee while clearing syrup to the dealers also supplied appropriate number of cups and gases (in cylinder) along with such syrup from the factory paying duty only on value of syrup. Audit noticed from the agreement with dealers and the related person of the assessee that (i) the dealer would get dispensing machine free of cost, (ii) would have to purchase appropriate number of cups alongwith carbon-di-oxide gas, and (iii) would have to pay annual maintenance charges for such machines. The assessee recovered all such charges from the dealers through his related person but did not include them in the assessable value of syrup. This resulted in short levy of duty of Rs.83.10 lakh during the period from April 2001 to February 2003.

On this being pointed out (July 2003), the Ministry admitted the objection and intimated (August 2005) issue of SCN for Rs.2.47 crore for the period from April 1999 to December 2004.

11.2.5 M/s. Vesuvius India Ltd., in Kolkata V commissionerate, manufacturing refractory products which included mono block stopper, ingate sleeve and other ceramic parts of the plant and also powder –mix coating material of blast furnace cleared such capital goods to iron and steel industry. In connection with the sale of such goods, the assessee also charged customers for providing technology services like tube changer device and robotic gunning of blast furnace stack through machines and personnel provided by them. Scrutiny revealed that the goods were high technology replacement parts and/or application materials and could be consumed within the plant only with the help of such advanced technology services provided by the assessee which therefore formed an integral part of the sale. The assessee collected 'service charge' and 'machine hire charge' over and above the assessable value but did not include the same in the value. Non-inclusion of this charge resulted in short levy of duty of Rs.80.08 lakh during the period between April 1999 and December 2000.

On this being pointed out (July 2003), the Ministry admitted the objection (December 2005).

11.2.6 M/s. HPCL (Suryapet), M/s. IOCL (Siliguri) and M/s. BPCL (terminal) Kharirohar and Siliguri, in Hyderabad III, Rajkot and Siliguri commissionerates, engaged in manufacture and sale of petroleum products cleared MS and HSD oil through dealers and also through their own outlet viz., company owned and company operated (COCO) outlets in different zones. Assessable value of the products cleared through dealers and COCO outlets remained the same. But in cases of goods cleared to COCO outlets, dealers' margins in the name of COCO charges and delivery charges was retained by assessees who owned such outlets. Such dealers' margins should therefore have formed part of assessable value as per rule 9 of the rules, ibid. Non-inclusion of dealers' margins resulted in short payment of duty of Rs.64.18 lakh between July 2000 and April 2004.

On this being pointed out (between September 2003 and June 2004), the Ministry admitted the objection and intimated (December 2005) recovery of Rs.12.26 lakh.

11.2.7 M/s. Oil and Natural Gas Commission (ONGC), Hazira in Surat I commissionerate, supplied superior Kerosene oil (SKO) to M/s. IOCL, charging higher rate than the price fixed under administered price mechanism. Duty was paid on the administered price. Records revealed that an amount of Rs.1.79 crore was recovered as additional

consideration during November and December 2000 on which no differential duty was paid. This resulted in short levy of duty to the extent of Rs.14.31 lakh.

On this being pointed out (June 2001), the department stated (September 2001) that except for above two months ONGC had paid duty at higher value though they got lower value for their products. Department, however, issued protective demand to the assessee in October 2001 which was pending adjudication.

The reply of the department is not tenable in view of the fact that additional consideration had been retained by the assessee.

Reply of the Ministry had not been received (January 2006).

11.3 Undervaluation due to adoption of lower mutually agreed price

Section 4 as effective from 1 July 2000 brought the concept of transaction value. The Ministry in circular dated 30 June 2000 clarified that but for the normal value being replaced by transaction value, there was no difference in the scheme of valuation of petroleum products under the old section 4 and new section 4 and that the provisions of new section 4 when applied to the administered price of petroleum products should not make any material difference in assessable value.

Five terminals of M/s. IOCL at Bhatinda, Jalandhar, Jaipur, Jodhpur and Sangrur in Jaipur I, II, Ludhiana and Jalandhar commissionerates were engaged in storage and marketing of various petroleum products received in their bonded warehouse, stock of MS, HSD and SKO etc. from their refineries. The IOCL terminals apart from clearing the products to their own distribution outlets also cleared MS, HSD and SKO etc. to terminals/depots belonging to other oil companies like M/s. BPCL and M/s. HPCL on payment of duty on assessable value which was much less than that charged from their own outlets/terminals.

It was observed that though the administered price mechanism was dismantled from April 2002, prices of petroleum products continued to be monitored and regulated by Oil Co-ordination Committee (OCC). Basic price structure of the products which formed the basis for determination of retail outlet prices charged from the ultimate consumer remained uniform for all the oil companies. As such adoption of lower assessable value at the stage of clearance of the products by IOCL installations to other oil companies resulted in lower duty realisation. Clearance of products at lower (agreed) rates resulted in inflow of extra consideration to the other oil companies from ultimate consumers because the benefit of lower excise duty was not passed on to the ultimate consumer retail sale price having remained same. Accordingly, the price charged did not remain the sole consideration for sale and, hence, could not be considered as 'transaction value' for the purpose of levy of duty. The differential duty lost on the clearances of MS and HSD made to M/s. BPCL and M/s. HPCL terminals and their depots during April 2003 to September 2004 amounted to Rs.27.76 crore.

On this being pointed out (between July 2003 and August 2004), the department in respect of two terminals (Bhatinda and Sangrur) intimated (May 2005) that SCNs for Rs.5.90 crore covering clearance upto 31 March 2004 had been issued and in respect of Jalandhar and Jodhpur that SCNs were being issued. Reply in respect of Jaipur had not been received.

The Ministry stated (November 2005) that the transactions had taken place in accordance with an agreement entered into between IOCL and other oil marketing companies and the

price charged was the sole consideration for sale. It further stated that the transactions satisfied the conditions laid down in section 4 leaving no ground for invoking the provisions of Valuation Rules.

Reply of the Ministry is not tenable as the price mutually agreed upon by the oil companies cannot be considered as transaction value in terms of section 4(i)(a) as products so cleared were actually sold by other petroleum companies at the same price at which their own products were sold. The clearance by IOCL to other oil companies at lower assessable value was thus not based upon purely commercial considerations and the assessable value was to be determined in terms of rule 11 read with rule 7 of the Valuation Rules.

11.4 Undervaluation of goods cleared for job work or sold through job worker

11.4.1 Section 4 of Central Excise Act, 1944, as amended with effect from 1 July 2000, read with rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, provides that where excisable goods are not sold by the assessee but are used for captive consumption by him or on his behalf in the production or manufacture of other articles, the value shall be 115 per cent of the cost of production or manufacture of such goods.

M/s. Alloy Steel Plant (a unit of SAIL), Durgapur, in Bolpur commissionerate, engaged in manufacture of articles of iron and steel stock transferred some excisable products like billets, rounds and high tensile bars on payment of duty for conversion job. As this transaction was not a sale, the assessee was required to determine the value of the product on cost basis. However, the assessee undervalued the products arbitrarily and treated such value as the assessable value. Incorrect determination of price thus led to undervaluation as well as short levy of duty of Rs.2.97 crore on clearances during the year 2002-03.

On this being pointed out (March 2004); the Ministry admitted the objection and intimated (September 2005) issue of demand for Rs.15.65 crore in August 2005.

11.4.2 Notification dated 25 March 2003 prescribed that merchant manufacturer manufacturing goods under chapters 61 and 62 on his account, could authorise job worker to pay duty leviable on goods on his behalf on clearance of the same from job worker's end and the job worker so authorized undertook to discharge all liabilities and comply with the provisions of these rules.

M/s. Indian Rayon and Industries Ltd., Bangalore in Bangalore I commissionerate, engaged in manufacture of ready made garments supplied raw material to job worker free of cost. The job worker after carrying out processing, returned the ready made garments to assessee on payment of duty on the assessable value determined at mutually agreed value. The assessee after carrying out processes like packing, affixing brand names etc cleared the goods without payment of duty. Audit noticed that the value adopted for payment of duty by job worker was much lower than 60 per cent of retail sale price declared by the assessee and resulted in short levy of duty of Rs.4.62 crore from January 2004 to April 2004.

On this being pointed out (June 2004), the Ministry admitted the objection (November 2005).

11.4.3 M/s. Saralee Household and Body Care India Pvt. Ltd. (unit I), in Chennai III commissionerate, manufactured shoe polish (sub-heading 3405.10) and cleared them to Saralee godown on payment of duty on MRP basis (goods were notified under section 4A).

Assessee also cleared shoe polish in bulk to job worker for repacking into smaller containers, adopting value determined on cost basis under section 4. Such clearance in bulk was not on sale and the job worker did not take credit of the duty paid by the assessee. The job worker transferred the repacked goods to Saralee godown without payment of duty availing SSI exemption for unit located in a rural area. Sale of repacked goods took place only from Saralee godown to stockist/dealer/customer. By getting the goods repacked through job worker and eventually selling branded goods, the brand name owner avoided payment of duty of Rs.90.75 lakh during the period from April 2003 to March 2004.

On this being pointed out (November 2004 and February 2005), the Ministry stated (December 2005) that the goods cleared in bulk was not a packaged commodity at the time of removal to the job workers place in rural area and therefore, there was no requirement to adopt MRP.

Reply is not tenable as section 4A was introduced to check undervaluation of goods. By getting the goods repacked through job worker and eventually selling branded goods, the assessee avoided payment of duty under section 4A and paid duty under section 4. Necessary provisions in Central Excise Act are needed to check avoidance of payment of duty under section 4A in such cases.

11.5 Incorrect adoption of transaction value

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

The Board, clarified on 30 June 2000 that cash discount or prompt payment discount would not form part of the transaction value unless such discount had actually been passed on to the buyer of the goods.

11.5.1 Twelve assessees, in five commissionerates, engaged in manufacture of motor vehicle parts and accessories (heading 87.08) and fasteners (sub-heading 7318.10) cleared the subject goods to M/s. TELCO on purchase order basis after abating 1.9 per cent towards bill discounting charges from the contract price. The bill discounting charges were payable by the buyer to M/s. HDFC Bank Ltd. on the basis of agreement between them. Since deduction made from contract price was paid by the buyer to the banker as bank charges, on behalf of the assessee, it was inadmissible because it was not in the nature of trade discount/cash discount/prompt payment discount and was not passed on to the customer. This resulted in short levy of duty of Rs.1.87 crore during the period from April 2000 to May 2004.

On this being pointed out (between May 2002 and October 2004), the department stated (between July 2002 and March 2005) that it was in the nature of cash discount/prompt payment discount and quoted CESTAT decision, in the case of M/s. PACE Marketing Specialities Ltd. vs. commissionerate of central excise {2004 (167) ELT 401(T)}, wherein discounts availed by the seller from the bank for immediate payment were allowed to be excluded from the value. Price discount was exhibited in invoice and the amount payable as per invoice was transaction value of which there was no flow back to assessee.

Reply of the department is not acceptable since the abatement had not been passed on to the customer; discount of 1.9 per cent was also in the nature of bill discounting charges and was

not a consideration for the sale of goods. Case law is not relevant as arrangement was between seller and bank whereas this case dealt with customer and bank. However, department had issued SCNs for Rs.52.66 lakh in respect of three assessees.

Reply of the Ministry had not been received (January 2006).

11.5.2 The Board clarified on 30 June 2000 that exclusion of cost of transportation is allowed only if assessee has shown them separately in the invoice for such excisable goods and the exclusion was permissible only for the actual cost so charged from buyers.

M/s. Thermax Ltd. and M/s. Thermax B&W Ltd., in Pune I commissionerate, engaged in the manufacture of boilers had not shown cost of transportation in invoices. Those charges were separately recovered by the assessee. Transportation charges so recovered from the buyers after the sale of excisable goods were includible in the assessable value. Non-inclusion thereof resulted in short levy of Rs.1.59 crore during the period between July 2000 and February 2003.

On this being pointed out (December 2003), the Ministry admitted the objection and intimated (November 2005) issue of SCNs for Rs.2.43 crore

11.5.3 The Board clarified on 1 July 2002 that where an assessee recovered an amount from the buyer towards cost of return fare in addition to the outward freight from the place of delivery, the amount so charged towards return freight was not available as deduction.

M/s. BPCL and M/s. IOCL, in Visakhapatnam I and Kolkata II commissionerates, cleared petroleum products to various distribution outlets located at different places on payment of duty on ex-terminal prices. Companies had been delivering goods at distribution points in hired tankers for which they collected delivery charges in the name of round trip kilo meter (RTKM) charges from dealers. The entire amount so collected on account of transportation both ways was claimed as deduction by them whereas deduction or exclusion from assessable value was permissible only for onward freight. Incorrect deduction resulted in short levy of duty of Rs.1.79 crore for the period from July 2000 to September 2004.

On this being pointed out (June and August 2003), the Ministry admitted (October 2005) the objection in one case. However in the second case it stated (December 2005) that the Tribunal had held that the transportation charges incurred for return journey of specialized vehicles were permissible for deduction {2004 (61) RLT 480 (CESTAT)}. Though the Ministry had accepted the Tribunal's decision, the Board has not withdrawn circular of July 2002, ibid.

11.5.4 Section 4A(1) of Central Excise Act, 1944, envisages that excisable goods covered under the provisions of the Standards of Weights and Measures Act, 1976 or the rules made thereunder may be notified by the Central government under sub-section (2) ibid for the purpose of levy of duty with reference to MRP (R.S.P. from 14 May 2005) after allowing permissible abatement. Accordingly toilet soaps (sub-heading 3401.19) have been notified under section 4A for MRP basis assessment.

M/s. V.V.F. Ltd., in Daman commissionerate, manufactured and cleared toilet soap (weighing 75/50 grams) valued Rs.65.93 lakh during the period from September to December 2001 to M/s. Dabur India Ltd. for free supply alongwith 'dabur lal tel'. The goods were incorrectly assessed to duty under section 4 though similar products were also cleared for sale and duty was paid on assessable value under section 4A.

On this being pointed out (February 2002), the department admitted the objection (September 2003) and stated that demands for Rs.1.17 crore for the period from February 2001 to August 2002 were issued out of which demand of Rs.0.51 crore with penalty of equal amount had been confirmed in July 2002.

The Ministry admitted the objection in principle (November 2005).

11.5.5 M/s. IOCL, in Siliguri commissionerate, engaged in warehousing and clearing of petroleum products received goods from north-east refineries under the cover of AR-3A and/or joint certificate (for pipeline products only) and subsequently cleared such goods on payment of duty. The assessee while clearing the goods of north-east origin availed of duty concession under notification dated 13 May 2002 meant for north east refineries and paid such duty on assessable value lower than that meant for products of north-east origin. The undervaluation, thus, resulted in short levy of duty of Rs.46.05 lakh between April 2003 and March 2004.

On this being pointed out (September 2004), the Ministry stated (November 2005) that they followed the principle of parity of cum-duty values irrespective of origin of the product. The fact, however, remained that even after adoption of the parity principle the transaction price differed and products of north-east origin were transacted at a lower value.

11.5.6 M/s. Bharath Aluminium Company Ltd., Korba placed an order on 30 October 2002 with M/s. Bharat Heavy Electricals Ltd. (BHEL), New Delhi for supply, erection and commissioning of pulverised fuel fired steam generator and auxiliaries at a total cost of Rs.44.40 crore. Work of design, manufacture and supply of steam generator and auxiliaries was allocated to M/s. BHEL (High Pressure Boiler Plant), Trichy at a cost of Rs.25.72 crore. The assessee was also entrusted work of system engineering, design and detailed engineering including supply of 93 drawings at a cost of Rs.3.50 crore over and above the contract price of Rs.25.72 crore. The assessee had supplied 63 drawings and collected Rs.2.37 crore till March 2003. Value of the drawings was, however, not included in the transaction value of the goods resulting in short levy of duty of Rs.41.61 lakh.

On this being pointed out (between November 2003 and March 2005), the Ministry stated (November 2005) that manufacturer did consultancy work like feasibility study/preparation of project report, erection and commissioning of boiler system etc. which were not subjected to excise duty. System engineering drawings were predominantly relatable to laying down broad parameters for each component, procurement of bought out items, erection and commissioning. The charges for erection and commissioning had been kept outside the value of manufactured item and service tax at appropriate rate was paid.

Reply of the Ministry is not tenable since system engineering comprised activities related to design and detailed engineering for the creation of product. The value of system engineering was therefore includible in the value of manufactured items. Further, since the customer had entered into separate erection and commissioning contract at cost of Rs.4.30 crore, system engineering would not cover post manufacturing activities to a large extent.

Department, however, reported issue of SCN demanding differential duty of Rs.41.16 lakh in March 2004. Further developments were awaited.

11.6 Undervaluation of goods sold through depots/stockyards

The Board clarified vide 3rd March 2003 order that where excisable goods removed from factory were sold at depot or consignment agent's premises or at any other place, assessable value of such goods would be determined with reference to the point of sale. Resultantly, factory gate price ceased to be the basis for discharging duty liability and closing stocks lying uncleared with depots/stockyards/consignment agents but sold on or after 1 March 2003 attracted levy of duty based on actual sale price.

M/s. Rashtriya Ispat Nigam Ltd., an integrated steel plant in Vizag I commissionerate, cleared huge quantities of stocks of iron and steel products on which exemption was availed of under notification dated 1 March 2000 (remained effective upto 28 February 2003) at the time of their clearance from factory, which were lying as closing stock at depots/stockyards/consignment agents as on 28 February 2003. These stocks were actually sold from such depots/stockyards, etc. at much higher prices on or after 1 March 2003. The assessee did not, however, discharge differential duty liability on those higher prices charged from customers as per Board's clarification dated 3 March 2003 ibid. Department was asked to take necessary action towards recovery of differential duty.

On this being pointed out (September 2003), department reported (February 2005) issue of SCN for Rs.1.43 crore. Ministry stated (November 2005) that the goods were assessed at the time of removal from the factory without reference to the value at the depot and re-assessment was not consequent on withdrawal of the notification of 1 March 2000.

Ministry's reply is silent on action taken to realise the differential duty.

11.7 Incorrect valuation of inputs/capital goods cleared as such

Rule 57AB(I)(b) of Central Excise Rules and explanation thereunder provides that when the inputs or capital goods are removed from the factory, the manufacturer of the final product shall pay the appropriate duty of excise leviable thereon as if such inputs or capital goods have been manufactured in the said factory. Further, according to rule 3(4) of Cenvat Credit Rules, 2002, as applicable upto 28 February 2003 when inputs or capital goods, on which Cenvat credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be.

Further, rule 8 of Central Excise (Valuation) Rules, 2000, provides that where excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be 115 per cent of the cost of production or manufacture of such goods.

11.7.1 Five assessees one each in Belapur, Delhi II, Gulbarga, Mumbai III and Nasik commissionerates, procured inputs/capital goods and availed Modvat/Cenvat credit, thereafter cleared them as such to their other units for further use in manufacture of excisable goods. Assessees discharged duty liability equivalent to credit taken which was not correct as the goods were not sold. Various expenses like freight, octroi etc. incurred for procurement of inputs/capital goods and 15 per cent were to be added to the landed cost of inputs/capital goods cleared as such for purpose of determining value for payment of duty. Non-

determination of correct value resulted in short levy of duty of Rs.66.22 lakh during the period between July 2000 and February 2003.

On this being pointed out (March 2004), Ministry stated (August 2005) in one case that rule 8 of Valuation Rules was not applicable as the inputs/capital goods were not manufactured by the assessees in their factory. In three cases it stated (October and November 2005) that objection would be revenue neutral. In one case it stated (November 2005) that the clearance made and duty paid was very much in conformity with rule 3(4) of Cenvat Credit Rules and Boards letter dated 1 July 2002.

Reply of the Ministry is not tenable in view of clear provisions of rule 57AB of Central Excise Rules, 1944/rule 3(4) of Cenvat Credit Rules 2002. Reply relating to neutrality of revenue is not relevant as assessment is to be done correctly irrespective of whether credit would be available to sister units for utilisation. Further, Boards clarification of July 2002 was not in conformity with rule 8 of Valuation Rules.

11.7.2 Tribunal in the case of M/s. Bharat Berg Ltd. vs. Collector {1995 (80) ELT 312 CEGAT} held that defective portion of C.R. coils were liable to pay duty as C.R. coils itself and not as waste and scrap.

M/s. Him Ispat Ltd., in Chandigarh commissionerate, engaged in manufacture of C.R. strips/C.R. sheets (heading 72.09/72.11) cleared 2827.810 tonne of defective H.R. Coils/H.R. narrow slit on payment of duty as waste and scrap to their own depot at value much lower than the value of 'inputs' upon which credits were taken. This resulted in short levy of duty amounting to Rs.26.77 lakh during the period 1998-99.

On this being pointed out (April 2000), the Ministry stated (November 2005) that the case of M/s. Bharat Berg Ltd. was distinct as in that case HR coils were cleared which were found unfit for galvanization.

Reply of the Ministry is not acceptable because case cited was specific to the issue reported by Audit as CEGAT had determined line of action for treatment of defective H.R. coils/H.R. narrow slit as such and not as waste and scrap for purposes of valuation and subsequent recovery of excise duty.

11.8 Undervaluation of goods cleared to related person

Where excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in any other factory of the same manufacturer, in the production or manufacture of other articles, assessable value is to be determined under section 4(1)(b) of Central Excise Act read with rule 8 of Central Excise (Valuation) Rules, 2000 on the basis of 115 per cent (110 per cent from 5 August 2003) of the cost of production or manufacture of such goods.

Section 4(3)(b) stipulates that persons shall be deemed to be related if (i) they are inter-connected undertakings; (ii) they are relatives; (iii) amongst them the buyer is a relative and distributor of the assessee or a sub-distributor of such distributor; or (iv) they are so associated that they have interest directly or indirectly in the business of each other. This section also stipulates that 'inter-connected undertakings' shall have the meaning assigned to them in clause (g) of section 2 of Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). Section 2(g) of MRTP Act provides that two bodies corporate shall be deemed to be under the same management if managing director or manager of one such body corporate is the managing director or manager of the other.

11.8.1 M/s. Escorts Piston Ltd., formerly known as M/s. Escorts Mahale Ltd. {up to 1 November 2002 merged with M/s. Goetze (India) Ltd.} in Bangalore II commissionerate, transferred nickel iron waste and scrap (heading 72.14) to their amalgamated unit M/s. Goetze (India) Ltd. on payment of duty on the assessable value arrived at on cost basis. While arriving at assessable value, profit margin at 15 per cent was not included and increase in cost of basic raw material not taken into account. This resulted in undervaluation of goods by Rs.2.13 crore with consequential short levy of duty of Rs.34.11 lakh during the period July 2000 and May 2003.

On this being pointed out (November 2000), the Ministry stated (November 2004 and September 2005) that though the two units had the same managing director and would merit being called as inter-connected undertaking as per MRTP Act, it would not be sufficient to bring them under rule 9 of Central Excise (Valuation) Rules, 2000 unless it was established that relationship was in terms of sub-clause (ii), (iii) or (iv) of section 4(3)(b) of Central Excise Act.

The Ministry's reply is not tenable as companies in 'related party disclosure' which is exhibited in balance sheet as per Companies Act, 1956, were shown as related. Further, the fact that the managing director was common, showed that conditions (i) and (iv) of section 4(3)(b) ibid were satisfied.

11.8.2 M/s. Gujarat Narmada Valley Fertilizers Company Ltd., in Vadodara II commissionerate, engaged in manufacture of fertilizers cleared 12490.825 tonne of concentrate nitric acid between December 2003 and March 2004 to its subsidiary company M/s. Narmada Chematur Petrochemicals Ltd. for further use in production of goods. The assessee paid duty at the rate of Rs.8600 per tonne instead of at 110 per cent of cost of production which ranged between Rs.8836 and Rs.11,858 per tonne from December 2003 to March 2004. Payment of duty on lower assessable value resulted in short levy of duty of Rs.34.31 lakh.

On this being pointed out (January 2005), the Ministry admitted the objection and intimated (September 2005) recovery of Rs.72.43 lakh in February 2005.

11.8.3 M/s. Jamipol Ltd., in Jamshedpur commissionerate, engaged in manufacture of desulphonising compound (heading 38.24) cleared products (Mag 97 and Mag 87) to M/s. TISCO Ltd., Jamshedpur, a sister concern of the assessee at a price which was lower than its cost of production during the year 2003-04. As the clearances were made by the assessee to a related person for consumption in the manufacture of final products its valuation was to be done at the rate of 115 per cent (110 per cent from 5 August 2003) of the cost of production. Incorrect valuation of products resulted in short levy of duty of Rs.13.33 lakh during the period April 2003 and March 2004.

On this being pointed out (September 2004), the Ministry stated (September 2005) that the assessee was not related and that their transaction with M/s. TISCO was purely on commercial consideration.

Reply of the Ministry is not tenable as duty had been paid (i) at a price which was less than cost of production of the products and (ii) note 16 to the schedule 15 on balance sheet and profit and loss account for the year 2003-04 of the assessee indicated that M/s. TISCO was related party of the assessee well covered in the definition of the term 'related' under section 4(3)(b)(iv) of Central Excise Act, 1944.

11.9 Other cases

In 71 other cases of grant of valuation of excisable goods, the Ministry/department had accepted objections involving duty of Rs.4.91 crore and reported recovery of Rs.2.73 crore in 58 cases till January 2006.

CHAPTER XII : EXEMPTIONS

Under section 5A(1) of Central Excise Act, 1944, Government is empowered to exempt excisable goods from the whole or any part of the duty leviable thereon either absolutely or subject to such conditions as may be specified in the notification granting the exemption. Some of the major cases of incorrect allowance of exemption noticed in audit are detailed in the following paragraphs:

12.1 Exemption for units manufacturing tobacco products situated in North Eastern States

12.1.1 Non recovery of revenue on withdrawal of exemption

Government vide notification dated 8 July 1999 allowed exemption by way of refund of duty paid on specified goods through PLA by certain manufacturers of North Eastern States. Exemption for manufacturers of tobacco products was withdrawn on 1 March 2001. By section 154 of Finance Act, 2003 (enacted on 14 May 2003) the benefit of refund of duty paid on cigarettes (chapter 24) and pan masala containing tobacco (heading 21.06 or sub-heading 2404.49) were withdrawn retrospectively from 8 July 1999. Recoveries of exemption already availed were to be made within 30 days from 14 May 2003.

Scrutiny of records of five manufacturing units engaged in manufacture of tobacco products (pan masala and gutkha), one under Dibrugarh commissionerate and four under Shillong commissionerate, enjoying benefit under the notification ibid revealed that assessees aggrieved on withdrawal of exemption filed writ petition before Guwahati High Court. They continued claiming exemption through refund. Court allowed (December 2002) them to make adjustment from their refund claims. Accordingly, four assessees, in Shillong commissionerate, adjusted Rs.46.52 crore, being their duty liabilities from November 2002 to May 2003, from their refund claims.

With withdrawal of exemption with effect from 8 July 1999, sum of Rs.101.02 crore for the period upto February 2001 had become recoverable by 13 June 2003. Assessees, however, challenged the constitutional validity of section 154 before Guwahati High Court, which stayed the recovery by their interim order dated 27 June 2003.

Section 154 of Finance Act, 2003 (already enacted on 14 May 2003) stipulated that no enforcement be made by any court, tribunal or other authority of any decree or order relating to such action taken or omitted to be taken as if the amendments made by sub-section (1) had been in force at all material times. Despite this, there was no evidence to show that department had made any attempts to pursue vacation of stay. Resultantly recovery of Government revenue to the tune of Rs.101.02 crore alongwith interest remained blocked.

12.1.2 Non recovery of duty on rejection of investment claim

Exemption was re-introduced vide notification dated 25 August 2003 with new terms and conditions for those manufacturers of tobacco products who had availed exemption benefit under notification dated 8 July 1999. Notification of 25 August 2003 as superseded and amended upto 9 July 2004 stipulated that if the manufacturer failed to make the deposit or did not invest the amount within the stipulated period, duty equivalent to the amount not so

deposited or invested would be recoverable from him along with interest thereon at the rate specified under section 11AB of Central Excise Act, 1944.

Test check of records of four assessees in Shillong commissionerate, revealed that Investment Appraisal Committee had rejected investment claims amounting to Rs.22.78 crore in August 2004. The amount was, therefore, recoverable with interest. No action, however, was taken by the department for its recovery.

12.1.3 Exempted duty collected but not paid to Government

M/s. Kothari Product Ltd. Jorhat, in Dibrugarh commissionerate, charged all duties of excise in their invoices. The amount so charged amounted to Rs.7.06 crore during the period from April 2004 to December 2004 against which only Rs.0.99 crore was paid by way of debit from their Cenvat credit account. Remaining Rs.6.07 crore was not paid into Government account. Since duty had been collected from customers, benefit of the exemption notification was not available and the amount alongwith interest as stipulated under rule 8 of Central Excise Rules, 2002 was recoverable.

Reply of the Ministry on above audit observations was awaited (January 2006).

12.2 Incorrect grant of exemption on goods captively consumed

12.2.1 Rubberised tyres cord fabrics

Tyre cord fabrics (TCF) classifiable under heading 59.02 is liable to AED under Additional Duties of Excise (Goods of Special Importance Act, 1957). Notification dated 2 June 1998 granted exemption from AED to processed tyre cord fabrics falling under heading 59.02 manufactured from unprocessed TCF on which AED had been paid.

M/s. J.K. Industries, Banmore, in Indore commissionerate, manufactured dipped tyre cord fabrics and rubberized tyre cord fabrics of high tenacity yarn of nylon from purchased nylon tyre cord fabrics. TCF was dipped in chemical to produce dipped tyre cord fabrics. This dipped TCF was consumed captively for rubberisation without payment of duty. It was thereafter coated with rubber on calendering machine to produce rubberized tyre cord fabrics, which were again cleared for manufacture of tyres without payment of either excise duty or AED. Since rubberized tyre cord fabrics manufactured from processed tyre cord fabrics (i.e. dipped tyre cord fabrics) were not exempt under notification dated 2 June 1998, AED was leviable. This resulted in non-levy of duty of Rs.17.39 crore during the period 2 June 1998 to 31 March 2003 which was recoverable with penalty of equal amount under Rule 25 of Central Excise Rules, 2001 (erstwhile Rule 173Q of Central Excise Rules, 1944).

On this being pointed out (February 2005), the Ministry stated (December 2005) that rubberized tyre cord fabrics was classifiable under heading 59.06 as per Supreme Court decision in MRF case and hence it did not attract AED.

Reply of the Ministry is not tenable and is contradictory to it's own actions, as after considering Supreme Court decision in MRF case, the Commissioner Central Excise Indore in its order in original dated 4 March 2005 for assessee had decided classification of dipped rubberized fabrics under heading 59.02 due to non-predominance of rubber content in the product.

12.2.2 Bunkers, saw beams etc.

By notification dated 16 March 1995, capital goods manufactured in a factory and used within it are exempt from whole of duty of excise leviable thereon provided they conform to the definition of capital goods as specified in rule 57Q of Central Excise Rules, 1944/Rule 2(b) of Cenvat Credit Rules, 2001/2002. Tribunals while interpreting scope of the above exemption notification, in a number of cases held that benefit of exemption was not available to structural and other fabricated items of iron and steel if assessee failed to establish that such items manufactured in factory were used as components of capital goods specified in Rule 57Q of erstwhile Central Excise Rules, 1944 {2000 (121) ELT 114/ 2003 (160) ELT 440}.

M/s. Rashtriya Ispat Nigam Ltd. Visakhapatnam, in Visakhapatnam I commissionerate, engaged in manufacture of iron and steel products had several auxiliary shops within their factory which manufactured different structural items and other articles of iron and steel and claimed exemption during the years 1999-2000 to 2002-2003 on a variety of products like bunkers, saw beams, etc. on the ground that the said goods were being used internally as parts of capital goods. Scrutiny revealed that none of the items were identifiable as parts or components of any individual machines installed in their factory. They also did not fall under the description of capital goods or parts as provided under rule 57Q/rule 2(b) ibid. They were cleared for captive consumption and assessable to duty as iron and steel products falling under chapter 72 of Central Excise Tariff Act. Duty of Rs.1.18 crore was not levied on such goods manufactured and cleared from auxiliary shops during the period from July 1999 to June 2002. Duty was arrived at on the basis of cost of raw materials used in the said products.

On this being pointed out (September 2002), department issued (July 2004) SCN demanding duty of Rs.2.97 crore in respect of clearances during June 1999 to March 2000. The Ministry stated (November 2005) that the goods manufactured in auxiliary shops were internal parts of the machinery which in turn was used in manufacture of final products and hence eligible for credit. It also stated that the goods are eligible for exemption under notification dated 16 March 1995.

Contention of Ministry is not tenable as none of the goods manufactured by the assessee in its auxiliary shops were identifiable as parts or components of any individual machinery installed in the factory and hence they did not, prima facie, satisfy the definition of capital goods. Further the notification specifically mentions that goods manufactured for use within the factory should be capital goods as defined in rule 57Q/rule 2(b) ibid. In case of M/s. Nava Bharati Ferro Alloys Ltd. {2004 (174) ELT 375} CESTAT held that coal bunkers, chequered plates, hard plates etc. were not capital goods and that columns of heavy fabricated structures and bracing used as supporting columns were in the nature of construction material and therefore, were not to be regarded as capital goods under rule 57Q.

12.2.3 Parts of footwear

By notification dated 23 July 1996, goods produced and consumed within the factory of production in manufacture of footwear of retail sale price not exceeding Rs.125 are fully exempt from payment of duty. Notification dated 1 March 2002 fully exempts footwear of retail sale price not exceeding Rs.125 from payment of duty. This has been amended on 9 July 2004 to provide exemption to footwear of retail sale price not exceeding Rs.250. However, the other notification dated 23 July 1996 has been amended on 9 August 2004 to provide exemption to intermediate products (parts or components) consumed in manufacture of footwear of retail sale price not exceeding Rs.250. Thus captive consumption of

intermediate products used in the manufacture of footwear of retail price exceeding Rs.125 but not exceeding Rs.250 were not covered under exemption till 8 August 2004.

M/s. Elastrex Polymers (P) Ltd., M/s. Bata India Ltd. and M/s. Condor Footwear (I) Ltd. in Bangalore II, Kolkata V and Surat I commissionerates, engaged in manufacture of footwear and parts thereof cleared some models of footwear of retail price exceeding Rs.125 but not exceeding Rs.250. Scrutiny revealed that the assessee captively consumed different intermediate products in manufacture of such footwear between 9 July 2004 and 8 August 2004. Neither did assessees pay any duty on such captive consumption nor did the department demand it. This resulted in non-levy of duty of Rs.29.27 lakh which was recoverable with interest of Rs.2.37 lakh.

On this being pointed out (December 2004), the Ministry admitted the objection and intimated (November and December 2005) issue of three SCNs for Rs.29.79 lakh.

12.3 Exemption availed without exemption notification

By three different notifications dated 1 March 2003, Government exempted 'five per cent ethanol blended petrol' (sub-heading 2710.19 consisting by volume 95 per cent MS and five per cent ethanol and conforming to Indian Standard Specification 2796) from levy of BED, SED, AED leviable under section 111 of Finance Act, 1998 and also SAED leviable under Finance Act 2002 subject to the condition that such ethanol blended petrol was manufactured out of MS and ethanol on which appropriate duties of excise had already been paid. These notifications were initially given validity upto 29 February 2004 which was further extended upto 30 June 2004 by subsequent notification dated 4 February 2004. No further extension was, however, granted beyond the said date. Through three other notifications issued on 4 August 2004, exemption from levy of all the above mentioned duties had once again been given subject to fulfilment of the same conditions stipulated in earlier notifications. These fresh notifications restoring the exemption took effect only from the date of issue, and hence ethanol blended petrol cleared during the intervening period from 1 July 2004 to 3 August 2004 attracted levy of the said duties.

Two bulk terminals of M/s. BPCL and M/s. IOCL in Hyderabad III and IV commissionerates, engaged in marketing of various petroleum product, undertook the process of blending ethanol with petrol in their warehousing stations and cleared the resultant product 'five per cent ethanol blended petrol' without payment of duties availing exemption under the aforementioned notifications. Availment of exemption on 2730 kilo litre of ethanol blended petrol cleared during the period from 1 July 2004 to 3 August 2004 was not correct and resulted in non-payment of excise duties aggregating to Rs.3.07 crore.

On this being pointed out (January/February 2005), the department stated (April 2005) that the issue was already under investigation by director general of central excise intelligence and issue of notification under section 11C of Central Excise Act, 1944 was under consideration.

The fact however, remained that neither SCN demanding duty nor notification under 11C waiving such duty had been issued (May 2005).

Reply of the Ministry had not been received (January 2006).

12.4 Incorrect availment of exemption on goods cleared

12.4.1 Cement

By notifications dated 1 March 2002 and 1 March 2003, manufacturers of cement were allowed to clear cement at concessional rate of duty viz. Rs.200 per tonne (in place of tariff rate Rs.350 per tonne) and Rs.250 per tonne (in place of Rs.400 per tonne) respectively upto maximum quantity of 99000 tonne in a financial year subject to conditions that (i) it was manufactured in factory with installed capacity not exceeding 900 tonne per day or 2,97,000 tonne per annum; and (ii) the total clearances of cement produced by the factory, in the financial year did not exceed 3,00,000 tonne.

M/s. DCM Shriram Consolidated Ltd., in Jaipur I commissionerate, produced 294317 tonne cement during 2002-03 and 295101 tonne in 2003-04. They cleared 1,98,000 tonne, during April 2002 to March 2004 at concessional rate of duty whereas installed capacity of the plant worked out to 327018 tonne per annum. Availment of exemption was incorrect and resulted in short payment of duty amounting to Rs.2.97 crore during the said period.

On this being pointed out (November 2003/March 2004), the Ministry stated (December 2005) that the assessee had fulfilled the conditions of the notification as the notification speaks about installed capacity of the klin and not about the capacity of cement plant.

Reply of the Ministry is not tenable as assessee had manufactured 1100 tonne of cement per day against declared capacity of 900 tonne per day during some of the days of the year indicating an increased production capacity. Reply of the Ministry that the said notification speaks about installed capacity of klin is also not tenable as it speaks about the installed capacity of the plant/factory as a whole and not only klin capacity as plant can not have two capacities. The assessee had, since, stopped availing exemption with effect from 24 May 2004.

12.4.2 Electronic relays

Notifications dated 4 January 1995 and 31 March 2003 specify that goods cleared to an electronic hardware technology park (EHTP) unit in connection with manufacture or development of electronic hardware or software for export would be exempt from the whole of duty of excise including additional duty of excise leviable under the Additional Duty of Excise (Goods of Special Importance) Act, 1957 subject to conditions stipulated in the notifications. Conditions, inter alia, included that (i) manufacturer of the said goods follow the procedure contained in rule 156A and rule 156B of Central Excise Rules, 1944/rule 11 and 20 of Central Excise Rules 2002, (ii) user industry follow the procedure contained in chapter X of Central Excise Rules 1944/Central Excise (Removal of Goods at Concessional Rate of Duty for manufacture of Excisable Goods) Rules, 2001. Notifications stipulated issuance of certificate in form CT 3 in place of usual CT 2 certificate by central excise officer in charge of the user industry.

M/s. American Power Conversion (India) Ltd., EHTP unit based at Bangalore obtained permission to remove 9,78,000 electronic relays and parts thereof from OEN India Ltd. in Cochin commissionerate vide two CT 3 certificates without payment of duty in terms of the

notifications mentioned above. However, OEN India Ltd. cleared excess quantity of 14,76,745 relays valued at Rs.5.05 crore without production of valid CT 3 certificates. Such clearance without payment of duty of Rs.80.83 lakh in the absence of a valid CT3 certificate was not in order.

On this being pointed out (July 2003), the Ministry admitted the objection (September 2005).

12.4.3 Sewing thread

Under note 3 to section XI of schedule to Central Excise Tariff Act, 1985, 'sewing thread' means multiple (folded) or cabled yarn (a) put up on supports (e.g reels and tubes etc.) of a weight (including supports) not exceeding 1000 gram, (b) dressed for use as sewing thread; and (c) with a final 'z' twist.

In terms of notification dated 7 May 1997 and 2 June 1998, sewing thread was chargeable to concessional rate of duty at 15 per cent ad valorem.

M/s. Pasupati Weaving & Spinning Mills Ltd., in Chandigarh commissionerate, engaged in manufacture of sewing thread of polyester (heading 55.08) besides clearing it on reels, also cleared thread in hanks form each weighing 250 gram by paying duty at concessional rate of 15 per cent ad valorem. The good cleared in hanks form, and not on supports, was thus thread/yarn and could not be termed as 'sewing thread'. As such concessional rate of duty was not admissible. This resulted in short levy of duty of Rs.52.56 lakh during the period from May 1997 to March 1999.

On this being pointed out (March 1999 and March 2000), the Ministry admitted the objection in principle (August 2005).

12.4.4 Writing or printing paper

Sub-heading note 1 to sub-heading 4802.10 of chapter 48 of first schedule to Central Excise Tariff Act, 1985, prescribes nil rate of duty only to "writing or printing papers" when supplied directly from the factory of its manufacture against a purchase order (a) placed upon the manufacturer by a State text book publication corporation or Board, or in case of State which do not have such corporation or Board, by an officer not below the rank of deputy secretary in the State, and (b) in which the said Corporation or Board or the said officer of the State Government declares that the said paper shall be used for the printing of educational text books.

M/s. Hindustan Paper Corporation Ltd., in Shillong commissionerate, cleared 1002.07 tonne printing paper valuing Rs.2.53 crore during 23 May 2004 to 30 June 2004. Goods were cleared at nil rate of duty. Clearance was made on the basis of an order placed by the State project director, Sarva Shiksha Abhiyan Authority (SSAA), Punjab according to which supply and billing of paper was to be made to M/s. Capital Business System of Delhi and end use certificate was to be issued by that unit. Clearance of goods at nil rate of duty was not correct as SSAA was not specified in tariff note ibid and benefit was passed on to party other than government agency. This resulted in non-levy of duty of Rs.40.45 lakh.

On this being pointed out (August 2004), the Ministry admitted the objection (November 2005) and reported issue of SCN.

12.5 Incorrect grant of exemption of NCCD on goods captively consumed

Section 136 of Finance Act, 2001 as amended by Finance Act, 2003, imposed NCCD at the rate of one per cent ad valorem on dumper chassis fitted with engines (sub-heading 8706.49) for motor vehicles of sub-heading 8704.30 (dumpers) with effect from 1 March 2003. Notification dated 16 March 1995, as amended exempts duty of excise leviable under Central Excise Tariff Act, 1985 for goods captively consumed within the factory. Levy of NCCD is not exempt under this notification.

M/s. Tatra Udyog Ltd. Hosur and M/s.Caterpillar (I) Ltd. Tiruvallur in Chennai II and III commissionerates, manufactured dumper chassis falling under sub-heading 8706.49 and captively used them in manufacture of dumpers (sub-heading 8704.30) without payment of NCCD, availing exemption under notification dated 16 March 1995. Availment of exemption of NCCD of Rs.1.39 crore for the period from March 2003 to August 2004 was incorrect.

On this being pointed out (between April 2003 and October 2004), the Ministry accepted (December 2005) the objection in case of M/s. Tatra Udyog Ltd. and issued SCN for Rs.16.10 lakh. In case of M/s. Caterpillar (I) Ltd., it stated that no chassis with engines emerged independently as dumper was manufactured in the assembly line in a continuous process. The assessee manufactured only two chassis on specific request of customer which cannot be taken as criteria for holding that chassis arose in the course of manufacture.

Reply of the Ministry is not tenable as department in its letter dated 14 July 2003 has intimated that the manufacturing process involved, manufacture of chassis, mounting/fabrication of engines, hydraulic system, fabrication of drivers cab, fitting of tyres etc. upto the manufacture of dumpers. Clearance of two chassis alone outside the factory does not disprove the manufacture and captive consumption of chassis within the factory.

12.6 Exemption meant for small scale industries availed of by large scale manufacturers

Notifications dated 1 March 2000/2001/2002, interalia, stipulated that manufacturers whose aggregate value of clearances for home consumption in the preceding financial year did not exceed Rs.3 crore were eligible for concessional rate of duty/full exemption from duty. Value of clearances relating to (i) branded goods manufactured and cleared on behalf of another person on payment of normal rate of duty, (ii) excisable goods which were either exempt or chargeable to nil rate of duty and (iii) excisable goods exported to countries except Nepal and Bhutan, were to be excluded for reckoning the eligibility limit of Rs.3 crore.

Union Budget 2003-04, had recognized that while small scale exemption scheme aimed at providing a distinctive advantage to labour – intensive units, there was possibility of misuse of this facility in certain sectors. Consequently the eligibility limit of Rs.3 crore under general small scale industries scheme was rationalised and the clause relating to exclusion of exempted goods for purpose of computation of total clearances was deleted. Value of clearances pertaining to exempted goods or goods cleared with nil rate of duty was therefore includible for purpose of determining eligibility criterion of Rs.3 crore with effect from 1 April 2003. However, the relevant clauses which provided for exclusion of clearances pertaining to branded and export goods were not deleted and consequently value of those clearances continued to be excluded for purpose of reckoning the eligibility limit of Rs.3 crore even after 1 April 2003.

In case of M/s. Food Specialities Ltd. vs. Government of India, Supreme Court had ruled that where goods are produced with customer's brand name under his quality control, it does not mean that the customer is the manufacturer {1985 (22) ELT 324}. Despite judicial pronouncement providing enough justification and ground for inclusion of value of clearance pertaining to branded goods under the over all ceiling of Rs.3 crore, Government has not so far made suitable amendment in SSI notifications.

Seven assessees in Jalandhar, Ludhiana and Panchkula commissionerates, availed benefits of notification ibid and cleared goods during preceding financial years of value between Rs.3.5 crore and Rs.9.7 crore. The continued retention of exclusion clause relating to branded and export goods thus enabled these large manufacturers to derive benefit of duty exemption which amounted to Rs.62.89 lakh during the years 2003-04 and 2004-05.

On this being pointed out (January 2005), the Ministry stated (November 2005) that the exclusion of export and branded goods from the purview of aggregate clearances of Rs.3 crore was a deliberate policy decision of the government.

The fact remains that this ran contrary to the declared intentions of the Government through budget, which enabled large scale manufacturers to derive such benefit of duty concession.

12.7 Other cases

In 16 other cases of exemptions, the Ministry/department had accepted objections involving duty of Rs.1.98 crore and reported recovery of Rs.0.91 crore in three cases till January 2006.

CHAPTER XIII : CLASSIFICATION OF EXCISABLE GOODS

The rates of duty leviable on excisable goods are prescribed under various headings in Central Excise Tariff. Some illustrative cases of incorrect classification of goods resulting in non/short levy of duty are given in the following paragraphs:

13.1 Sulphur

Heading 28.02 of first schedule to Central Excise Tariff covers sulphur, sulphur sublimed or precipitated and colloidal sulphur. Note 2 to chapter 25 ibid specifies that heading 25.05 covers products which have been washed of impurities without changing structure, ground, powdered etc., by flotation or magnetic separation (except crystallisation) but not those that had been roasted, calcined or subject to process beyond those mentioned in the headings. Further, as per note 1 to chapter 25, sublimed sulphur was not covered by that chapter.

M/s. Chennai Petroleum Corporation Ltd. (CPCL), in Manali I commissionerate, engaged in manufacture of various petroleum products (chapter 27), initially removed hydrogen sulphide in the de-sulphurisation plant. It was then burnt with oxygen in its sulphur recovery unit and sulphur was liberated in vapour form which was condensed and drained into a pit to obtain solid granules of high purity called 'sublimed sulphur'. The sulphur so manufactured by assessee merited classification under heading 28.02 attracting duty at 16 per cent ad valorem. Instead it was classified under heading 25.05 and cleared at nil rate of duty. Non-levy of duty due to misclassification worked out to Rs.52.28 lakh from April 1996 to February 2001.

On this being pointed out (March and May 2001), the department issued SCN (April 2001) for Rs.22.83 lakh from March 2000 to February 2001 but adjudicating authority decided the case in favour of assessee (December 2001). Commissioner of central excise, Chennai I on review of the order-in-original observed that 'sulphur' produced by assessee was classifiable under heading 28.02 and directed (October 2002) the department to file an appeal. As of January 2005, the case was pending in CESTAT. The department had also issued four more SCNs (August 2002, January and November 2003 and September 2004) for duty aggregating Rs.68.64 lakh for the period from July 2001 to July 2004 which was pending adjudication (December 2004). Total non-levy of duty on sulphur for the period from April 1996 to July 2004 amounted to Rs.2.32 crore. Ministry stated (October 2005) that the excise tariff had been amended so as to classify sulphur recovered as by-product in refining crude oil under heading 250300.10 w.e.f 28 February 2005.

Ministry's reply is silent on recovery of duty for the period prior to 28 February 2005.

13.2 Pre fabricated structural insulated panel

Note 11(b) of chapter 39 of Central Excise Tariff, states that heading 39.25 inter alia covers structural elements used in floors, partitions, ceilings or roofs. Further as per note 4 of chapter 94 "pre-fabricated buildings" as expressed under heading 94.06 means buildings which are finished in the factory or put up as elements, cleared together, to be assembled on site, such as housing or work site accommodation, offices, schools, shops, sheds, garages or similar buildings.

M/s. Beardsell Ltd. in Belapur commissionerate, manufactured 'iso wall pre-fabricated structural insulated panels' and classified them under heading 94.06 as pre-fabricated buildings. The panels so manufactured consisted of thermal insulation made of 'expanded polystyrene' (commonly known as thermacole) bonded between two metal sheets. Since expanded polystyrene gave essential character to the structural insulated panel, the goods were aptly classifiable under heading 39.25. Incorrect classification resulted in short levy of duty of Rs.15.34 lakh in 1997-98.

On this being pointed out (February 1999), the Ministry admitted the objection (August 2005) and intimated confirmation of demand of duty for Rs.2.92 crore for the period from November 1996 to October 2003. Demand of Rs.31.56 lakh for December 2003 to July 2004 was reportedly pending adjudication.

13.3 Other cases

In four other cases of incorrect classification, the Ministry/department had accepted objections involving duty of Rs.0.20 crore and reported recovery of Rs.0.10crore in 4 cases till January 2006.

CHAPTER XIV : NON-LEVY OF DUTY

Rules 9 and 49 read with rule 173G of Central Excise Rules, 1944, prescribe that excisable goods shall not be removed from the place of manufacture or storage unless excise duty leviable thereon has been paid. If a manufacturer, producer or licencee of a warehouse, violates these rules or does not account for the goods then besides such goods becoming liable for confiscation, penalty not exceeding duty on such excisable goods or ten thousand rupees, whichever is greater, is also leviable under rule 173Q. Similar provisions exist in rules 4 and 25 of Central Excise Rules, 2002 which came into force from 1 March 2002. Some illustrative cases of non-levy of duty noticed in test check are given in the following paragraphs :

14.1 Duty not paid by due dates

14.1.1 Sub-rule (1) of rule 8 of Central Excise Rules, 2002, stipulates that duty on goods removed from the factory or warehouse during a month shall be paid on fifth of the following month. Further sub-rule (3) envisages that if the assessee fails to do so, he shall be liable to pay the outstanding amount along with interest at the rate of two per cent per month or rupees one thousand per day whichever is higher for the period starting with first day after due date till the date of actual payment of outstanding amount.

M/s. Shree Synthetics Ltd., Ujjain, in Indore commissionerate, manufactured nylon/polyester filament yarn falling under heading 54.02 and removed finished goods from the factory between July 2003 and November 2003, without payment of duty amounting to Rs.3.47 crore by due dates. Duty was recoverable on which interest at the rate of two per cent per month was also leviable. On this being pointed out (July 2004 and February 2005), the Ministry admitted the objection and reported recovery (September 2005) of Rs.65.13 lakh. Report on recovery of remaining amount was awaited.

M/s. Indo Ashahi Glass, Ramgarh, in Ranchi commissionerate, cleared products of glass involving central excise duty of Rs.1.50 crore during the months of September 2003, October 2003 and November 2003 without payment of duty by due dates. This resulted in non-levy of duty of Rs.1.50 crore besides interest of Rs.2.59 lakh leviable under rule 8(3) ibid. On this being pointed out (December 2003); the Ministry admitted the objection and intimated (September 2005) that Rs.1.50 crore besides interest of Rs.9.50 lakh had since been paid by assessee.

M/s. Hotline CPT Ltd., in Indore commissionerate, a manufacturer of cathode ray television colour picture tube (sub-heading 8540.11) did not pay duty of Rs.90.91 lakh for the month of November 2004 by due date and was liable to pay outstanding amount alongwith interest of Rs.1.35 lakh (upto 28 December 2004). On this being pointed out (December 2004), the Ministry admitted the objection and intimated (December 2005) recovery of duty of Rs.90.91 lakh and interest of Rs.2.35 lakh in January 2005.

14.1.2 Rule 173G of Central Excise Rules, 1944, prescribes that duty on goods removed from a factory or warehouse during the first fortnight of the month shall be paid by the 20th of that month and that on goods removed during the second fortnight be paid by the fifth of the

following month. If assessee fails to pay any one instalment beyond period of 30 days from due date or the due date on which full payment of instalments are to be made is violated for the third time in the financial year, whether in succession or otherwise, then manufacturer shall forfeit facility to pay dues in intalments for a period of two months, starting from the date of communication of an order passed by the proper officer in this regard or till such date on which all dues are paid which ever is later and during this period, the manufacturer shall be required to pay excise duty for each consignment by debit account current. Any failure would deem goods to have been cleared without payment of duty and consequences and penalties as provided in central excise rules shall follow.

M/s. Betul Tyre and Tubes Industries Ltd. and M/s. Wear Well Tyre and Tube Industries Pvt. Ltd., Betul, in Bhopal commissionerate, engaged in manufacture of tyre and tubes had not paid full duty on due dates. M/s. Betul Tyre and Tubes Industries Ltd. defaulted in full payment of instalments of duty six times in financial year 2000-01 and eight times in financial year 2001-02. Similarly M/s. Wear Well Tyre and Tube Industries Pvt. Ltd. defaulted five times in financial year 2001-02. The proper officer had not initiated any action to forfeit the facility to pay dues in instalments.

On this being pointed out (August 2001), the department admitted the objection and intimated (February 2004) that facility to pay duty on fortnightly basis had since been withdrawn. Besides, an amount of Rs.87.94 lakh had been recovered from PLA during the months of September 2001 to November 2001.

The Ministry admitted the objection (November 2005).

14.2 Duty not levied on goods lost in transit

The Board in circular dated 23 September 2002 prescribed procedure of accountal of petroleum products movement through pipeline without payment of duty. Accordingly, assessees are required to submit quarterly statements of loss/gain for bonded movement of petroleum products and also, annual statements duly certified by chartered accountant within 60 days from the end of financial year. The department would assess such clearances, product-wise and destination-wise, after condoning prescribed limit of 0.25 per cent of such loss. On shortages in excess of 0.25 per cent, assessment may ordinarily be carried out on highest value and highest rate of duty applicable for the particular product during the period.

M/s. IOCL Haldia, in Haldia commissionerate, transferred petroleum products (chapter 27) under bond without payment of duty through pipeline and prepared periodical reconciliation statements of loss/gain. Scrutiny of such statements with reference to the products despatched through pipelines revealed loss in excess of 0.25 per cent in the case of aviation turbine fuel (ATF) and motor turpentine oil (MTO) during the year 2002-03. Duty was required to be demanded on the quantity lost beyond the condonable limit. But neither did the assessee pay such duty nor did the department demand it. This resulted in non-levy of duty of Rs.1.46 crore during the period April 2002 to March 2003.

On this being pointed out (June 2004), the Ministry stated (December 2005) that transit loss had not been exceeded for all products taken together.

Reply of the Ministry is not tenable since this was in violation of Board's circular dated 23 September 2002. As a result loss of one product was set off against another product which was not in order.

14.3 Duty not levied on excisable goods found short

Rule 10 of Central Excise Rules, 2002, provides that every assessee shall maintain proper records on daily basis, of goods produced or manufactured, quantity removed, assessable value and the amount of duty actually paid. In terms of rule 4, no excisable goods on which duty is payable shall be removed from a factory or warehouse without payment of requisite duties. However, rule 21 ibid provides for remission of duty in cases where it is shown to the satisfaction of commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or become unfit for consumption/marketing before their removal.

14.3.1 M/s. Alloy Steel Plants, Durgapur, in Bolpur commissionerate, manufacturing iron and steel products maintained their production records on estimated basis and at the end of year carried out physical verification. Scrutiny of annual stock verification report vis-à-vis annual account for the year 2001-02 disclosed that shortages in quantity of different products, viz., ingot, slab, bloom, round, bar, channel, forging and plates located during physical verification had been recorded but the assessee adjusted such shortages in the books of account by reducing closing balances of products without assigning any reason. The assessee did not pay any duty on shortages. Such type of adjustment was not permissible under the rules. The department also did not demand any duty. Failure to do so thus resulted in non-levy of duty of Rs.78.48 lakh during the period from April 2000 to March 2002.

On this being pointed out (March 2003), the department admitted the objection and stated (March 2005) that SCN was under issue.

The Ministry stated (September 2005) that shortages were to be dealt with in accordance with Board's instructions of 26 October 1979.

Further development in the case had not been received (January 2006).

14.3.2 Scrutiny of internal physical stock verification reports of M/s. Rashtriya Ispat Nigam Ltd., in Visakhapatnam I commissionerate, revealed (September 2004) that there was shortage of stock of pig iron to the extent of 2669 tonne at the end of March 2004. There was no evidence on record to show that goods were lost or destroyed by natural causes, etc. or became unfit for consumption/marketing warranting remission of duty under rule 21 of Central Excise Rules, 2002. Neither had the assessee paid nor had department demanded duty of Rs.30.60 lakh payable on the said goods. Shortages to this extent were to be regarded as clearances without payment of duty.

On this being pointed out (February 2005), the Ministry admitted the objection and intimated (November 2005) issue of show cause notice for Rs.76.22 lakh in October 2005.

14.4 Non-levy of additional duty

Section 3 of Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 (AED Act, 1978), levies additional excise duty at the rate of 15 per cent of BED chargeable which is to be calculated after excluding any exemption for giving credit or for reduction of duty already paid on raw material used in the production or manufacture of such goods.

14.4.1 M/s. Suryalaxmi Cotton Mills Ltd., Nagardhan, in Nagpur commissionerate, manufactured cotton yarn and used it captively in manufacture of denim fabrics falling under sub-heading 5207.10 without payment of BED and also without levy of AED under

Additional Duties of Excise (Goods of Special Importance) Act, 1957 availing exemption under notification dated 16 March 1995. The assessee did not pay AED leviable under Additional Duties of Excise (Textile and Textile Articles) Act, 1978 on 7490616.16 kilogram of cotton yarn valuing Rs.52.43 crore captively consumed in manufacture of cotton fabric. This resulted in non-levy of AED amounting to Rs.62.92 lakh at the rate of 15 per cent of notional BED of Rs.4.19 crore during April 2003 and March 2004.

14.4.2 M/s. Sanghi Polyesters Ltd. and M/s. Reliance Industries Ltd., in Hyderabad III and Raigad commissionerates, manufactured partially oriented yarn (POY sub-heading 5402.42) and polyester tow and utilized it captively in manufacture of polyester textured yarn (sub-heading 5402.32) and goods falling under chapter 54 or 55 (respectively) without payment of BED by availing exemption under notification dated 16 March 1995, as amended. Assessees did not pay AED which was leviable by working out quantum of BED on POY and polyester tow chargeable but for exemption benefit availed through the above notification. This resulted in non-levy of AED of Rs.32.05 lakh for the period October 1996 to July 2004.

On above cases being pointed (between June 2000 and May 2005), the Ministry stated (November 2005) that notifications dated 16 March 2005 and 23 July 1996 exempted excise duty which were equally applicable on additional duty by virtue of section 3(3) of AED Act, 1978 and tribunal's decision in case of M/s. Nahar Spinning Mills Ltd. {91 – ELT 103}.

Reply of the Ministry is not tenable since these notifications were not relevant for determining additional duty in terms of section 3 of the Act 1978 ibid. Tribunals decision too did not relate to exclusion clause of section 3 of AED Act, 1978, which specifically excludes exemption of central excise while working out AED.

14.5 Non-levy of duty on treated water cleared under brand name

Note 2 to chapter 22, stipulates that in relation to waters including natural and artificial mineral waters of chapter heading 22.01 of Central Excise Tariff Act, 1985, processes such as filtration, purification or any other process or any one or more of these processes to render the product marketable, shall amount to manufacture. Waters, including natural or artificial mineral waters bearing brand name are classifiable under sub-heading 2201.19 and attracted levy of duty at 18 per cent ad valorem upto 28 February 1999 and 16 per cent thereafter. Under chapter note 3 ibid, 'brand name' means a name or mark such as symbol, monogram, signature or invented words or any writing which is a word in relation to product for the purpose of indicating connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person.

M/s. Hindustan Coca Cola Beverages Ltd., in Hyderabad III commissionerate, engaged in manufacture of aerated waters, produced treated water by subjecting ordinary water to various processes such as bleaching, filtration and treatment with activated carbon in order to remove impurities and micro organisms and to make it fit for use as an input in aerated waters. While bulk of the purified water so produced was consumed within the factory, some was cleared to vending machine outlets in canisters embossed with the brand name 'Coca cola' alongwith beverage base for manufacture of soft drinks at vending machine outlets. No duty was paid on branded goods under sub-heading 2201.19 from December 1997 onwards. Department also did not demand duty.

On this being pointed out (November 1998), the Ministry admitted the objection and intimated (December 2005) issue of SCN for Rs.40.64 lakh.

14.6 Other cases

In 168 other cases of non-levy of duty, the Ministry/department had accepted objections involving duty of Rs.2.95 crore and reported recovery of Rs.2.15 crore in 164 cases till January 2006.

CHAPTER XV: NON-LEVY OF INTEREST AND PENALTY

Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty as determined under section 11A, shall, in addition to the duty, be liable to pay interest at the rate of 20 per cent per annum till 11 May 2000, 24 per cent with effect from 12 May 2000, 15 per cent with effect from 13 May 2002 and 13 per cent from 12 September 2003 under relevant sections of Central Excise Act, 1944. Some illustrative cases of interest and penalty not levied or realised are mentioned below:

15.1 Absence of provision for timely recovery of interest on delayed payment

Sections 11AA and 11AB of Central Excise Act, 1944, prescribe payment of interest on delayed payment of duty at the specified rate. Time limit within which the assessee is required to pay interest due, has however not been prescribed.

Commissioner of central excise, Mumbai II in case of M/s. IOCL Trombay installation, had confirmed demand of Rs.24.91 crore vide order in original dated 3 August 1995. Assessee paid the demand in two instalments of Rs.14.94 crore in September 1996 and balance Rs.9.95 crore in October 1996 with Rs.2 lakh being adjusted against refund. Interest leviable on delayed payment of duty worked out to Rs.4.39 crore. Ministry reported (March 2005) that interest of Rs.2.81 crore was recovered in November 1997 and Rs.1.58 crore in March 2001. Thus, recovery of entire interest took more than five years from the date of passing of the order in original.

Demands raised for payment of interest under section 234A, 234B, 234C or any other levy of penalty or fine or any other sum payable under provisions of Income Tax Act, 1961 fall within the ambit of notice of demand under section 156 and non payment or delay or default in payment thereof calls for levy of interest under section 220(2) of the Act ibid. This provision takes care of levy of interest on delayed payment of interest or penalty etc. recoverable from the assessee. There is no such provision in Central Excise Act/Rules.

Absence of provisions thereunder or non provision of mandatory penalty for delayed payment of interest leads to unintended financial accommodation to the assessee which in the instant case was to the extent of Rs.3.80 crore.

The Ministry stated (December 2005) that there is no provision to collect interest on delayed payment of interest and audit's observations have been taken note of.

15.2 Non-levy of interest

15.2.1 As per sub-rule 3 of rule 8 of Central Excise Rules, 2002, effective from 1 April 2003, if any assessee failed to pay amount of duty by due date, he would be liable to pay the outstanding amount along with interest at the rate of two per cent per month or rupees one thousand per day, whichever was higher, for the period starting with the first day after the due date till the date of actual payment of the outstanding amount. However, such interest payable would not exceed the amount of duty that had not been paid within the due date.

M/s. Alloy Steel Plant, Durgapur, in Bolpur commissionerate, manufacturing iron and steel products removed different excisable goods between July 2000 and October 2003 to their sister unit on payment of duty on value worked out at 100 per cent of cost of production whereas such value ought to have been arrived at on 115 per cent upto 4 August 2003 and

110 per cent thereafter under rule 8 of Valuation Rules, 2000. Though assessee paid differential duty payable on such account between 5 November 2003 and 31 March 2004, interest for such delayed payment to the tune of Rs.1.73 crore as per rule ibid was not paid.

On this being pointed out (March 2004), the Ministry admitted the objection in principle (September 2005).

15.2.2 Notification dated 26 June 2001 as amended issued under rule 19 of Central Excise Rules, 2001, stipulates that if excisable goods cleared for export from the factory of production or warehouse under bond without payment of duty are not exported, the exporter shall pay the duty along with interest from the date of removal for export from factory or warehouse till the payment of duty.

M/s. Birla Tyres, Balasore, manufacturer of tyre, tube and flaps in Bhubaneswar I commissionerate, diverted goods meant for export to home consumption during November 1998 to July 1999. The assessee paid duty only after confirmation of demand by adjudicating authority, but interest of Rs.44.44 lakh for the period from 24 December 1998 to 31 December 2003 accrued due to belated payment of duty was neither demanded by the department nor paid by assessee.

On this being pointed out (April 2004), the Ministry admitted the objection (December 2005).

15.3 Non-recovery of interest

15.3.1 Section 112 of Finance Act, 2000 which received assent of President of India on 12 May 2000 stipulates that no credit of duty on HSD shall be deemed to be admissible at any time during the period commencing on and from 16 March 1995 to 12 May 2000 notwithstanding any thing contained in any rule under Central Excise Rules, 1944. It further provides that (i) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for allowing such credit of duty and (ii) no enforcement shall be made by any court, tribunal or other authority of any decree or order allowing such credit. It also provides that recovery shall be made of all the credit of duty availed or utilised within a period of thirty days from 12 May 2000 failing which, in addition to the amount of credit recoverable, interest at the rate of 24 per cent per annum shall be payable till the date of payment.

M/s. India Cement Ltd. and M/s. Suvarna Cements Ltd., in Tirupathi and Hyderabad III commissionerates, availed Modvat credit of Rs.1.90 crore on HSD oil between March 1997 and April 1999 and utilised the amount towards payment of duty on their final product. With passing of retrospective amendment Act validating denial of Modvat credit on HSD oil, the assessees were required to reverse or pay the entire credit by 10 June 2000. It was, however, noticed (November 2000/Janauary 2001) that the assessees did not do so and therefore became liable to pay interest of Rs.35.75 lakh to the end of March 2001 on the credits not so reversed or paid. On further reference (May 2001), the department in the case of first assessee stated (July 2002/April 2004) that though the assessee reversed credit of Rs.1.49 crore in December 2001, interest of Rs.55.79 lakh payable thereon could not be recovered on the interim orders of High Court, Chennai on writ petition filed by assessee. Department reported (December 2004/January 2005) that credit of Rs.40.60 lakh was remitted by second assessee by December 2001 in six instalments and the assessee had so far paid (November/December

2004) an amount of Rs.4 lakh out of Rs.13.12 lakh payable as interest upto end December 2001.

Hence, ineffective action on the part of department in getting the interim Court directions vacated or getting interest amount deposited even after five years led to non-realisation of Rs.55.79 lakh interest in the first case, Rs.9.12 lakh in the second. This also resulted in financial accommodation/blockage of revenue to that extent.

The Ministry stated (December 2005) that in the first case the recovery could not be effected as the matter was pending in the Court. In the second case, the Ministry intimated recovery of interest of Rs.13.12 lakh between January and December 2005.

15.3.2 M/s. Kwality Ice Cream, in Delhi I commissionerate, engaged in manufacture of ice cream/kulfi etc., was issued nine SCNs between August 1995 and December 1998 demanding duty on wholesale prices charged by M/s. Brook Bond Lipton (India) Ltd. for the period from January 1995 to November 1998. Seven SCNs issued upto December 1997 were adjudicated in December 1998 but two for the period December 1997 to November 1998 involving duty of Rs.113.70 lakh were not adjudicated till February 2000. Audit pointed out (March 2000) delay in adjudication of demand and resultant financial accomodation to the assessee.

Department stated (September 2004) that the demand was confirmed in April 2000 for Rs.123 lakh (including Rs.9.30 lakh demanded through SCN issued in April 1999). This was reduced to Rs.75.17 lakh by appellate authority in September 2001 and reduced duty was paid by assessee in October 2001. However, interest of Rs.24.05 lakh payable on account of delay in payment of duty during the period from July 2000 to October 2001 still remained unrealised.

The Ministry admitted the objection (July 2005).

15.3.3 During test check of records of M/s. Siddhartha Tubes Ltd., in Indore commissionerate, it was noticed that two demands for Rs.17.54 lakh on account of disallowing of Modvat credit were confirmed alongwith penalty of Rs.1.75 lakh vide order in original dated 30 July 1998. In compliance thereof, assessee paid the entire amount in June/May 2002. Interest amounting to Rs.19.63 lakh due on belated payment beyond three months was, however, not paid.

On this being pointed out (March 2003 and November 2004), the Ministry while admitting objection stated (August 2005) that Rs.10.20 lakh had been recovered and recovery proceedings for remaining amount were in progress.

15.4 Short payment of interest

M/s. Kothari Products Ltd. in Dibrugarh commissionerate, manufacturing 'pan masala' and 'gutka' paid Rs.94.22 lakh between December 2002 and April 2003 being differential duty from March 2001 to June 2001 arising out of disputed assessable value as confirmed by the tribunal on 12 March 2003. On an appeal preferred by the department, tribunal decided (11 November 2003) that assessee was liable to pay interest from 11 May 2001 on short paid duty at that time till full duty payment was made. Audit scrutiny revealed that assessee paid interest of Rs.9.79 lakh on 16 January 2004 on amount of duty which was short paid after 11 May 2001 but not on the amount which was short paid prior to 11 May 2001. This resulted in short payment of interest of Rs.25.36 lakh for the period from 11 May 2001 to 17 April 2003.

On this being pointed out (December 2004), the Ministry admitted the objection and intimated (November 2005) recovery of Rs.25.36 lakh.

15.5 Non-levy of penalty

Rule 8 of Central Excise/Rules, 2002, prescribes that duty on goods removed from a factory or a warehouse during the first fortnight of the month shall be paid by 20th of that month and that on goods removed from factory or warehouse during the second fortnight of the month be paid by the fifth of the following month. If assessee fails to pay any one instalment within 30 days from due date or instalment by due dates for the third time in a financial year, he shall forfeit facility for a period of two months from the date of communication of orders or till such date on which all dues are paid, whichever is later. During this period assessee is required to pay duty for each clearance through PLA. Failure to do so would attract liability to penalty not exceeding amount of duty leviable or ten thousand rupees, whichever was greater.

M/s. Kailash Auto Builders Ltd., in Bhopal commissionerate, engaged in manufacture of motor vehicle and parts, defaulted in payment of duty on due dates, on twelve occasions in succession between April 2002 and January 2003, delay ranging from three to 111 days. Therefore, facility of fortnightly payment ought to have been forfeited and assessee should have paid duty in cash on consignment basis. Department did not initiate action. Assessee continued to pay duty from Cenvat account and utilised Cenvat credit of Rs.13.60 lakh between June 2002 and January 2003 in contravention of rules. This tantamounted to clearance of goods without payment of duty. Therefore penalty of Rs.13.60 lakh was also leviable.

On this being pointed out (February 2003), the Ministry stated (November 2005) that the adjudicating authority had imposed a penalty of Rs.13.82 lakh but the Appellate Commissioner had set aside the orders in July 2004 as the failure of appellant was found unintentional and committed for the first time.

15.6 Other cases

In 65 other cases of non-levy of interest and penalty, the Ministry/the department had accepted objections involving duty of Rs.1.07 crore and reported recovery of Rs.0.70 crore in 64 cases till January 2006.

CHAPTER XVI: DEMANDS NOT RAISED OR REALISED

Short payment or non-payment of duty on excisable goods is to be recovered by issuing SCN under section 11A to be followed up with its adjudication and recovery proceedings. Period of limitation for issue of SCN is one year (six months upto 11 May 2000) in normal cases of non-levy/short levy of duty. In case of short levy/non-levy due to fraud, collusion etc., limitation period stands extended to five years. Some illustrative cases of demands not raised or realised are given in the following paragraphs: -

16.1 Demands not raised

Section 11A(1) of Central Excise Act, 1944, provides that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or in contravention of provisions of Central Excise Act or Central Excise Rules with intent to evade payment of duty, by such person or agent, demand can be raised within five years.

16.1.1 M/s. Maratha Cement Works, in Nagpur commissionerate, engaged in manufacture of cement availed irregular Cenvat credit of Rs.8.22 crore on capital goods utilised for construction, erection and commissioning of captive thermal power plant during October 2000 and January 2003. Since the power plant was used exclusively in generation of non excisable goods i.e. electricity, Cenvat credit was not admissible. Department issued four SCNs amounting to Rs.2.86 crore between September 2002 and February 2003 covering the period August 2001 to January 2003 for recovery of irregular availment of credit. No action to recover credit of Rs.5.36 crore availed during the period October 2000 to July 2001 was, however, taken by it.

On this being pointed out (November 2003), the Ministry admitted the objection in principle (September 2005).

16.1.2 Section 11D of Central Excise Act, 1944 stipulates that every person liable to pay duty under this Act and who had collected any amount on excisable goods from buyer of the goods representing duty of excise, shall forthwith pay the amount so collected to credit of Central government.

M/s. IOCL Hisar, in Rohtak commissionerate, received furnace oil and light diesel oil on payment of duty at appropriate rate prevalent at the relevant point of time. Material was stored in separate duty paid tanks from where the same was sold and central excise duty collected at higher rate applicable at the time of sale. Extra duty of Rs.18.33 lakh so collected between April 2002 and October 2002 was not remitted to government. Department did not take any action to realise the amount due. On this being pointed out (September 2003), the Ministry admitted the objection and intimated (November 2005) that assessee had deposited the amount.

16.2 Non-realisation of confirmed demand

Section 11 of the Central Excise Act stipulates that the officer empowered by the Board may recover duty and any other sums of any kind payable to the central government under Central Excise Act or Rules by deducting the amount payable to assessee by government or by attachment and sale of excisable goods belonging to person from whom sums are

recoverable. In case amount payable is not so recovered, certificate action may be taken through collector of the district for recovery as arrears of land revenue.

Scrutiny of records of Coochbihar division and Birpara range revealed that demands involving revenue of Rs.36.20 lakh in respect of nine tea estates (three in Coochbihar and six in Birpara) had been confirmed between August 2003 and March 2004 with penalty of Rs.2.84 lakh on non payment of duty on 'tea' packed in container exceeding 20 kilogram and bearing brand name cleared between 2 June 1998 and 23 June 1998. Assessees neither paid the amount nor did department initiate any action to recover the amount as provided in the Act ibid. This resulted in blockage of government revenue of Rs.39.04 lakh as well as interest at applicable rate.

The Ministry stated (December 2005) that the Appellate Commissioner had set aside the orders confirming demand. The Ministry has not intimated about acceptance of the orders of Appellate Commissioner as the duty for the period from 2 June 1998 to 23 June 1998 was not exempted by issue of any statutory notification.

16.3 Other cases

In two other cases of demands, the Ministry/department had accepted objections involving duty of Rs.16.08 lakh till January 2006.

CHAPTER XVII : CESS NOT LEVIED OR DEMANDED

Cess is levied and collected in the same manner as excise duty under provisions of various Acts of Parliament.

Some of the cases in which cess was not levied or demanded are mentioned below:

17.1 Non-levy of cess on textiles

Cess at 0.05 per cent ad valorem is leviable on textiles manufactured in India under section 5A(1) of Textile Committee Act, 1963, and notification issued by the Ministry of Commerce on 1 June 1977. For this purpose, textiles interalia include fabrics made wholly or partly of cotton, wool, silk, artificial silk or other fabric. Authority to collect such cess is vested in 'textile committee' constituted under sub-section (3) of Act, ibid.

17.1.1 Audit revealed that in textile processing units in Ahmedabad I, Daman, Surat I, Vadodara II and Vapi commissionerates, between December 2003 and October 2004, eighteen assessees engaged in manufacture of processed textile fabrics did not pay textile cess amounting to Rs.2.12 crore between 1996-97 and 2003-04.

On this being pointed out (between February 2002 and October 2004), the Ministry of Textiles stated (June 2005) that the committee was closely pursuing the matter to recover the cess on priority.

17.1.2 Fifty three assessees, in Thane I and II commissionerates, engaged in manufacture of textile materials/articles falling under chapters 52,54,55,58 and 60 did not pay cess of Rs.91.13 lakh on products cleared during the years 2002-03 and 2003-04. No action was taken by textile committee for collection of cess from the assessees in accordance with the rules, ibid.

On this being pointed out (December 2004), the Ministry of Textiles stated (September 2005) that the committee was pursuing recovery of cess on priority.

17.2 Non-payment of cess on cement

According to provisions of section 9(1) of Industries (Development and Regulation) Act, 1951 and Cement Cess Rules, 1993 made thereunder, cess at the rate of Rs.0.75 per tonne is leviable on cement manufactured and removed. The authority to collect such cess is vested with the development commissioner of cement industry, Ministry of Industry.

M/s. Shree Digvijay Cement Company Ltd., in Rajkot commissionerate, manufactured and removed 64,59,934 tonne of cement between 1996-97 and 2003-04 but did not pay cess amounting to Rs.48.45 lakh.

On this being pointed out (February 2005), the Ministry of Commerce and Industry stated (June 2005) that the assessee was being pursued for recovery from January 2001.

17.3 Other cases

In one other case of cess, department had accepted the objection involving cess of Rs.2.46 lakh and reported (January 2006) its recovery.

CHAPTER XVIII : MISCELLANEOUS TOPICS OF INTEREST

18.1 Loss of revenue due to inconsistency between Act and notification

Government through Finance Act, 2000 amended section 3(1) of Central Excise Act so as to levy BED as well as "additional custom duty" (CVD) under Customs Tariff Act on goods manufactured by 100 per cent EOU and brought to any other place in India. This amendment was given retrospective effect from 11 May 1982.

Under notification dated 4 January 1995 all excisable goods produced or manufactured by 100 per cent EOU and cleared in DTA were exempt from so much of duty of excise leviable thereon under section 3 of Central Excise Act which was in excess of the amount calculated at the rate of 50 per cent of each of duties of customs which would be leviable under section 12 of Customs Act, 1962. The notification was amended on 16 September 1999 to substitute references to "the duties of customs leviable under section 12 of the Customs Act, 1962" with "the duties of customs leviable under the Customs Act, 1962 or under any other law for the time being in force". This amending notification was effective prospectively. However, section 3(1) of Central Excise Act levied, retrospectively from 11 May 1982 'basic custom duty' as well as 'additional customs duty' on goods manufactured by 100 per cent EOU and brought to any other place in India. Thus, there was an anomaly between the Act and the notification during the period between 11 May 1982 and 15 September 1999.

M/s. Century Denim and M/s. Maral Overseas Ltd. Khargone, both 100 per cent EOUs in Indore commissionerate, engaged in manufacture of cotton yarn, cotton fabric denim, knitted cotton fabrics and garments, cleared their products under DTA on payment of central excise duty in terms of exemption notification. Department demanded CVD and special duty of Rs.1.97 crore for April 1997 to January 1998 from the first assessee and Rs.0.17 crore for March 1997 to August 1999 from the second but the demands were struck down by CEGAT in April 2003 in the first case and by Commissioner Indore on June 2004 in the second as the amended notification was applicable only from 16 September 1999. Had the amendment in notification of 4 January 1995 also been made concurrent with amended section 3(1) of the Act, revenue of Rs.2.14 crore could have been recovered.

On this being pointed out (August 2004), the department stated (September 2004) that it was a policy matter of the Government.

The fact remains that non-amendment of notification retrospectively in line with section 3(1) of Central Excise Act created inconsistency between Act and notification which resulted in revenue becoming irrecoverable.

Reply of the Ministry had not been received (January 2006).

18.2 Non-filing of appeal led to financial accommodation to the assessee

Rule 8 of Central Excise Rules, 2002, prescribes that duty on goods removed from a factory or a warehouse during the first fortnight of the month shall be paid by 20th of that month and that on goods removed from the factory or the warehouse during the second fortnight of the month shall be paid by fifth of the following month. If assessee fails to pay any one instalment within 30 days from the due date or defaults in payment of instalment by the due dates for the third time in a financial year, he shall forfeit the facility for period of two

months starting from date of communication of order or till such date on which all dues are paid, whichever is later. Assessee is required to pay excise duty for such clearance through PLA. In the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and he shall be liable to penalty not exceeding duty leviable or ten thousand rupees whichever is greater.

M/s. ISI Bars Ltd. in Raigad commissionerate, defaulted in payment of instalment for more than 30 days and jurisdictional deputy commissioner passed forfeiture order dated 30 April 2002 forfeiting facility of fortnightly payment of duty directing assessee to remove goods on payment of duty consignment-wise by debiting through account current (PLA) for a period of two months or till such date till all dues were paid. The assessee went in appeal against the said forfeiture order and commissioner (appeals) vide his order in appeal dated 13 May 2002 lifted the embargo and allowed assessee to utilise Cenvat credit account, after ten days of receipt of forfeiture order. As a result the assessee utilised credit of Rs.1.90 crore for payment of duty on fortnightly basis during May 2002 and June 2002. In a similar case of M/s. G.K.W. Ltd. department had appealed to tribunal and won the case. No appeal, however, was filed against the order of commissioner (appeals) in this case.

On this being pointed out (June 2004), the Ministry stated (August 2005) that the order in appeal was accepted by the commissioner in June 2002 and therefore it had attained finality in terms of legal provisions.

Reply is not tenable as provisions of rule 8 were mandatory in nature and therefore the case was fit for appeal. Failure of department in not doing so resulted in financial accommodation to the assessee to the tune of Rs.1.90 crore.

18.3 Unintended availment of benefit

Explanation III given under rule 5 of Hot Air Stenter Independent Textile Processor Annual Capacity Determination Rules, 1998 as amended, stipulates that if processor of specified fabrics has proprietary interest in any other factory primarily and substantially engaged in the spinning of yarn or weaving of fabric, he cannot be treated as an independent processor for the purpose of levy of duty under section 3A of Central Excise Act. Since the term 'proprietary interest' has not been defined in the Act, related provisions in Companies Act, 1956 (section 370 sub section 1B) and in Monopolies and Restrictive Trade Practice Act, 1969 {section 2(g) and explanation thereto} have to be applied for interpretation of this term. As per explanatory note to section 2(g) of MRTP Act, two undertakings shall be deemed to be inter-connected if one owns, manages and controls the other. Ministry of Law clarified on 28 June 2001 that the term 'proprietary interest' means any right, title etc. one has by virtue of being holder of any account of property or establishment. Where proprietary interest in spinning unit or weaving of fabric was proved, such independent processors would discharge duty liability on processed fabrics at ad valorem rate.

M/s. SSM Processing Mills Ltd. Komarapalayam manufacturing processed textile fabrics in Coimbatore commissionerate, paid duty on their products under section 3A i.e. based on capacity of production. Directors of assessee company were also majority directors of another company viz., M/s. TAN India Ltd. a manufacturer of yarn. In terms of provisions cited in para 1 supra, the assessee and other company (manufacturer of yarn) were under the same management and the assessee company had proprietary interest in the other. Therefore,

payment of duty on production capacity basis was not correct and resulted in short payment of duty of Rs.1.44 crore during the period from 16 December 1998 to May 2000.

On this being pointed out (July 2000), the Ministry stated (December 2005) that two companies were separate legal entities and there was no flow back of funds or sharing of profits and hence they did not have any proprietary interest and that the provisions of the Companies Act, and the MRTP Act, could not be applied to section 3A.

The reply is not relevant since the question involved in this case is of "proprietary interest" which has not been defined in the relevant rules. Both companies had four common directors having majority of voting rights. As such, by virtue of legal opinion ibid the assessee did have "proprietary interest" in the other company and were not eligible for availment of facility for payment of duty on basis of capacity of production.

18.4 Escapement of duty by short accountal of production

Rule 53 of Central Excise Rules, 1944 (now rule 10 of Central Excise Rules 2001/2002), envisages that every manufacturer shall maintain proper records, on daily basis, indicating the particulars regarding description of the goods produced or manufactured, opening balance, quantity produced or manufactured, inventory of goods, quantity removed, assessable value, the amount of duty payable and particulars regarding amount of duty actually paid.

Test check of records of M/s. Martin and Harris Laboratories Ltd. Gurgaon, in Delhi III commissionerate, for the period from 1998-99 to 2001-02 revealed that production of medicines viz tablets, capsules and liquids/syrup as shown in excisable records (R.T.12/E.R.1) was less than that as shown in balance sheets for the years ended March 1999 and March 2002. Thus short accountal of production of medicines resulted in escapement of duty of Rs.58.77 lakh.

On this being pointed out (March 2003), the Ministry admitted the objection (September 2005).

18.5 Irregular refund taken as credit in PLA

Section 11B of Central Excise Act, 1944, provides that any person claiming refund of any duty of excise may make an application for refund of such duty to assistant commissioner/deputy commissioner of central excise before expiry of one year from the relevant date in such form and manner as may be prescribed. It further provides that application shall be accompanied by such documentary or other evidence as the applicant may furnish to establish that amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person.

Further, there is no provisions in Central Excise Law to take *suo motu* credit of central excise duty paid/debited by the assessee due to wrong calculations of duty, on invoices issued for clearances during preceding months in PLA/Modvat credit account in the succeeding months.

M/s. Bharat Heavy Electricals Ltd. in Kanpur commissionerate, took *suo motu* credit of Rs.37.22 lakh of their own accord in PLA (April 2000) on ground that excess duty was paid due to oversight and wrong calculation in respect of clearance made through 17 invoices.

This was in contravention of section 11B of the Act and violation of procedures of refund of duty as per rules ibid, which was recoverable alongwith penalty and interest.

On this being pointed out (between December 2000 and September 2004), the Ministry admitted the objection and intimated (November 2005) that demand of Rs.37.63 lakh had been confirmed.

18.6 Other cases

In 353 other cases of miscellaneous topics of interest the Ministry/department had accepted objections involving duty of Rs.4.13 crore and reported recovery of Rs.3.41 crore in 349 cases till January 2006.