

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 2001-02 to 2005-06 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
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
2005-06	120768	111006	111226**	(-) 9542	(-) 7.90

* Figure as per Finance Accounts.

** Figure is provisional.

The actual collections fell short of the budget estimates year after year. Despite this, Government continued to make optimistic projections during presentation of the annual budget. The budget estimate 2005-06 was pitched at Rs.1,20,768 crore, an increase of 11.31 per cent over budget estimates, 20.77 per cent over revised estimate and 21.83 per cent over actuals of 2004-05. The collections fell short of the budget estimates by Rs.9,542 crore or 7.90 per cent in 2005-06.

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 2001-02 to 2005-06 are as follows: -

(Amount in crore of rupees)

Year	Value of output	Central excise receipts	Percentage of central excise receipts to value of production
2001-02	1050239	72555	6.91
2002-03	1158294	82310	7.11
2003-04*	1242849	90774	7.30
2004-05*	1357191	99125	7.30
2005-06*	1479338	111226	7.52

* 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 2005-06 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 1.41 during the years 2001-02 to 2005-06 and the corresponding increase in the central excise receipts was by a factor of 1.53.

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 2001-02 to 2005-06 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	
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
2005-06	111226	12.21	96050	25.29	86.36

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

The above table shows that while central excise receipts had grown only by 53 per cent during the years 2001-02 to 2005-06, growth in modvat/cenvat availed during the relevant period was much more at 102 per cent. Percentage of modvat/cenvat availed to duty paid by cash had decreased from 65.48 to 64.44 during 2002-03 but thereafter increased constantly during the years 2003-04 to 2005-06. This was also reflected in the steep rise in modvat/cenvat credit availed during 2003-04 to 2005-06.

8.4 Cost of collection

The expenditure incurred during the year 2005-06 in collecting central excise duty along with 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	
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
2005-06	111226	12.21	901.02**	9.10	0.81

* 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 2005 and 31 March 2006 are as follows: -

(Amount in crore of rupees)

		As on 31 March 2005				As on 31 March 2006			
		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	792	17330	947.96	10095.27	561	10968	268.88	8188.18
(b)	Pending before								
(i)	Appellate Commissioners	463	4735	50.78	1353.19	432	4024	73.03	757.54
(ii)	Board	4	5	0.01	0.03	8	35	0.92	9.18
(iii)	Government	8	128	0.01	64.21	24	187	6.19	73.15
(iv)	Tribunals	1728	7596	851.50	6491.68	1243	7041	530.65	7874.16
(v)	High Courts	489	1030	366.15	1875.79	465	817	109.34	522.31
(vi)	Supreme Court	88	279	86.80	2143.47	62	132	18.77	488.40
(c)	Pending for coercive recovery measures	2542	5659	617.37	2116.97	4640	8443	1310.15	3336.84
	Total	6114	36762	2920.58	24140.61	7435	31647	2317.93	21249.76

* Figure furnished by the Ministry and relates to 87 commissionerates of central excise.

A total of 39082 cases involving duty of Rs.23567.69 crore were pending finalisation as on 31 March 2006 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 2003-04 and 2005-06 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
2003-04	2223	1846.04	1097.20	563	187.25	58.30	62	0.16
2004-05	1399	1454.92	985.50	186	88.05	98.60	24	0.09
2005-06	870	1667.43	944.00	204	536.58	92.48	40	7.07
Total	4492	4968.39	3026.70	953	811.88	249.38	126	7.32

** Figure furnished by the Ministry and relates to 91 commissionerates of central excise.

The above data reveals that while a total of 4492 cases of fraud/presumptive fraud were detected during the years 2003-06 by the department, involving duty of Rs.4968.39 crore, it raised a demand of Rs.3026.70 crore only and recovered Rs.249.38 crore (8.24 per cent) out

of it. Similarly, out of penalty of Rs.811.88 crore imposed, the department recovered only Rs.7.32 crore (0.90 per cent).

8.7 Commodities contributing major revenue *

Commodities which yielded revenue of more than Rs.1,000 crore during 2005-06 alongwith corresponding figures for 2004-05 are as follows :

(Amount in crore of rupees)					
Sl. No.	Commodity	2004-05 (Actual)	2005-06 (Actual)	Percentage variation of actual over previous year	Percentage share in total collection
1.	Refined diesel oil	14454.83	12751.57	(-) 11.78	12.93
2.	Iron and Steel	7662.86	10723.03	39.93	10.87
3.	Motor spirit	13791.95	8518.32	(-) 38.24	8.64
4.	Cigarettes and cigarillos of tobacco or tobacco substitutes	5994.85	6252.09	4.29	6.34
5.	All other mineral oils and products falling under chapter 27	3842.47	4743.08	23.44	4.81
6.	Cement, clinkers, cement all sorts	4522.65	4739.19	4.79	4.80
7.	Motor cars and other motor vehicles for transport of persons	2652.72	3472.01	30.88	3.52
8.	All other machinery, articles and tools falling under chapter 84	2851.04	3220.22	12.95	3.22
9.	All other motor vehicles falling under chapter 87	2817.10	2485.43	(-) 11.77	2.52
10.	Plastic and articles thereof	2531.12	2476.93	(-) 2.14	2.51
11.	Pharmaceutical products	1616.40	2265.17	40.14	2.30
12.	Articles of iron and steel	2106.57	2088.75	(-) 0.85	2.12
13.	Organic chemicals	2170.66	2026.06	(-) 6.66	2.05
14.	Paper and paper board, articles of paper pulp or paper or paper board	1298.37	1365.03	5.13	1.38
15.	Cane or beet sugar and chemically pure sucrose in solid form	1406.90	1337.22	(-) 4.95	1.36
16.	All other electronic and electrical goods falling under chapter 85	1316.88	1336.39	1.48	1.34
17.	Aluminium and articles thereof	1035.31	1272.92	22.95	1.29
18.	Miscellaneous chemical products	1088.00	1126.32	3.52	1.14

* Figure furnished by the Ministry.

The above table reveals that there was lower collection of revenue during 2005-06 in motor spirit, refined diesel oil, all other motor vehicles falling under chapter 87, organic chemicals, cane or beet sugar and chemically pure sucrose in solid form, plastic and articles thereof and articles of iron and steel to the extent of (-) 38.24, (-) 11.78, (-) 11.77, (-) 6.66, (-) 4.95, (-) 2.14 and (-) 0.85 per cent respectively over previous years.

8.8 Revenue remitted or abandoned**

Amount of central excise duty remitted/abandoned or written off due to various reasons for the years 2004-05 and 2005-06 are shown below:

(Amount in crore of rupees)

		2004-05		2005-06	
		Number of cases	Amount	Number of cases	Amount
	Remitted due to :				
(a)	Fire	13	0.45	17	1.42
(b)	Flood	5	0.62	14	1.02
(c)	Theft	0	0.00	0	0.00
(d)	Other reasons	523	1.78	512	11.11
	Abandoned or written off due to :				
(a)	Assesseees having died leaving behind no assets	19	0.03	57	0.11
(b)	Assesseees untraceable	26	0.17	200	50.13
(c)	Assesseees left India	0	0.00	0	0.00
(d)	Assesseees incapable of payment of duty	132	0.08	44	1.24
(e)	Other reasons	432	2.42	355	0.26
	Total	1150	5.55	1199	65.29

** Figure furnished by the Ministry and relates to 89 commissionerates of central excise.

The above table reveals that the revenue remitted or abandoned had increased sharply from Rs.5.55 crore in 2004-05 to Rs.65.29 crore in 2005-06.

8.9 Refunds*

The amount of duty refunded by the department during 2003-06 because of excess collection is given below:

(Amount in crore of rupees)

		2003-04	2004-05	2005-06
(i)	No. of cases	32966	37872	47313
(ii)	Amount of refunds (other than rebate)	982.25	1283.68	1783.56
(iii)	Interest on refunds			
	(a) No. of cases	43	36	38
	(b) Amount paid	25.17	6.65	7.24

* Figure furnished by the Ministry and relates to 91 commissionerates of central excise.

8.10 Contents

This section contains 124 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, pointing out leakage of revenue of Rs.1,410.39 crore. The concerned Ministries/departments had accepted (till December 2006)

audit observations in 89 paragraphs involving Rs.1,315.73 crore and recovered Rs.25.97 crore. Statutory audit has detected objections in 109 cases where internal audit had already been conducted by the department but it had not detected the irregularity.

8.11 Impact/followup of Audit Reports

During the last five years (including the current years's report), audit had pointed out short levy etc., totalling to Rs.13,663.73 crore in 900 audit paras. Of these, Government had accepted audit observations in 636 audit paras involving Rs.2844.46 crore and had since recovered Rs.198.63 crore. The details are abstracted in the following table.

(Amount in crore of rupees)

Year of Audit Report	Paragraphs included		Paragraphs accepted						Recoveries effected					
			Pre printing		Post printing		Total		Pre printing		Post printing		Total	
	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount
2005-06	124	1410.39	89	1315.73	--	--	89	1315.73	35	25.97	--	--	35	25.97
2004-05	227	7696.94	122	200.40	Nil	Nil	122	200.40	32	20.02	21	8.65	53	28.67
2003-04	217	1897.94	151	814.30	1	0.16	152	814.46	30	27.73	19	12.21	49	39.94
2002-03	166	1445.59	133	287.61	1	0.20	134	287.81	22	32.18	18	14.65	40	46.83
2001-02	166	1212.87	139	226.06	Nil	Nil	139	226.06	30	35.17	16	22.05	46	57.22
Grand Total	900	13663.73	634	2844.10	2	0.36	636	2844.46	149	141.07	74	57.56	223	198.63

CHAPTER IX : MIS-CLASSIFICATION OF DUTY AND EXCISABLE GOODS

The rates of duty leviable on excisable goods are prescribed under various headings in Central Excise Tariff. Similarly duty is classified under various sub heads of account according to its distributive nature among central government, state governments, autonomous bodies etc. Some illustrative cases of incorrect classification of goods/duty resulting in non/short levy of duty or incorrect allocation of duty are given in the following paragraphs:

9.1 Classification error leading to the less allocation of central revenue

Additional excise duty (AED) on motor spirit (MS) and high speed diesel (HSD) and special additional excise duty (SAED) on MS and HSD have been imposed by Government of India through Finance Act 1998, 1999 and 2002, and is retained by the Union Government without being shared with the states.

M/s. Indian Oil Corporation, M/s. Bharat Petroleum Corporation, M/s. Hindustan Petroleum Corporation and M/s. Kochi Refineries in Cochin commissionerate, erroneously classified the remittance of AED/SAED on motor spirit and high speed diesel as AED in lieu of sales tax (duties assigned to states) during the period 2002-03 and 2003-04. AED/SAED erroneously classified amounted to Rs.1197.09 crore during 2002-03 (Rs.718.23 crore) and 2003-04 (Rs.478.86 crore). The incorrect classification of non shareable duties resulted in less allocation/collection of revenue to the Central Government.

On this being pointed out (September 2003), department confirmed (March 2006) the incorrect classification.

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

9.2 Classification of excisable goods

9.2.1 *Di calcium phosphate*

Di-calcium phosphate is classifiable under heading 28352500 in Central Excise Tariff Act, 1985.

M/s. Kerala Chemicals and Proteins Limited in Calicut commissionerate, manufactured di-calcium phosphate and cleared it without payment of duty classifying the product under chapter 23 as residues from food industries. Since product was correctly classifiable under heading 28352500, it resulted in short levy of duty of Rs.72.09 lakh during the period from March 2005 to June 2005.

On this being pointed out (August 2005), the Ministry stated (December 2006) that di-calcium phosphate was classifiable under chapter 23 in view of Gujarat and Mumbai High Court's orders dated 17 March 1999 and 23 August 1999 which had also been upheld by Supreme Court.

Reply is not tenable as Supreme Court's decision is not relevant after amendment of Central Excise Tariff from 28 February 2005 providing specific mention of di-calcium phosphate under heading 28352500, which was not there in the Tariff, earlier.

9.2.2 Pimpom lollypop

Sub-heading 1704.10 of tariff, covers gums, whether or not sugar coated (including chewing gum, bubble gum and the like). Miscellaneous items, not elsewhere specified are classifiable under sub-heading 1704.90.

M/s. Joyco India Limited in Chandigarh I commissionerate, manufactured pimpom lollypop containing bubble gum coated with boiled sugar confectionery, classified the same as miscellaneous items under sub-heading 1704.90 and cleared the same after availing concessional rate of duty at 8 per cent ad valorem under notification dated 1 March 2002, as amended. Bubble gum coated with sugar was correctly classifiable under sub-heading 1704.10 and liable to duty at 16 per cent ad valorem. Incorrect classification of the product resulted in short levy of duty amounting to Rs.59.20 lakh during the period from April 2003 to March 2005.

On the mistake being pointed out (December 2004 and December 2005), department stated (January 2005) that the product was commercially known as lollypops and was classifiable under sub-heading 1704.90.

The contention of the department is not tenable in view of the tariff description of heading 1704.10 which covers "gums whether or not sugar coated (including chewing gum, bubble gum and the like)". In the instant case the product pimpom lollypop was boiled sugar confectionery containing bubble gum so it was correctly classifiable under sub-heading 1704.10. It was further intimated (January 2006) that show cause notice for Rs.64.06 lakh had been issued.

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

9.2.3 Silico-manganese slag

Slag from the manufacture of iron or steel is classifiable under heading 26.19. Other slag falls under heading 26.21. Central Board of Excise and Customs in its circular dated 18 October 2000 also clarified that slag arising in steel plants is classifiable under heading 26.19.

Three ferro alloy units in Durgapur in Bolpur commissionerate, manufactured silico-manganese slag and cleared it without payment of duty availing exemption under a notification dated 1 March 2003, classifying the goods under chapter 72. Scrutiny revealed that such slag was entirely different in nature, use and chemical composition from the slag arising in the course of manufacture of iron and steel products and was correctly classifiable under heading 26.21 as "other slag". This resulted in short levy of Rs.29.63 lakh between April 2003 and December 2004.

On this being pointed out (February 2005), the Ministry admitted the objection and stated (December 2006) that three demand notices for Rs.27.28 lakh had since been issued.

9.3 Other cases

In five other cases of incorrect classification, the Ministry/department had accepted objections involving duty of Rs.0.03 crore and reported recovery of Rs.0.03 crore till December 2006.

CHAPTER X : INCORRECT AVAILMENT 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 Cenvat credit availed but amount not paid on final goods

Rule 6(3) of Cenvat Credit Rules, 2001/2002/2004 stipulates that where a manufacturer availed credit of duty on inputs used by him in the manufacture of both dutiable and exempted goods, he shall pay an amount equivalent to eight per cent (ten per cent with effect from 10 September 2004) of the price of the goods cleared without payment of duty, if he does not maintain separate account for inputs used in exempted products.

10.1.1 M/s. Rashtriya Ispat Nigam Limited, M/s. Sponge Iron India Limited in Visakhapatnam I and Hyderabad III commissionerates respectively and M/s. Tata Sponge Iron Limited, M/s. Orissa Sponge Iron Limited both in Bhubaneswar II commissionerate, engaged in manufacture of iron and steel products, produced electricity in their captive power generation units and utilized it partly in the manufacture of their final products and partly sold it to Transmission Corporation of Andhra Pradesh Limited, residential colony, NESCO etc. The assessee availed cenvat credit on inputs such as water treatment chemicals, greases, lubricants, caustic soda, max treat, maxquat, alum etc., but did not maintain separate accounts. Assessee was liable to pay amount equivalent to eight per cent/ten per cent on the value of electricity sold. Instead assessee reversed proportionate credit on inputs. This led to short payment of Rs 12.27 crore during the period between April 2000 and March 2006.

On this being pointed out (between May 2005 and April 2006), department in two cases stated (June 2005) that in view of a number of Tribunal decisions {2001 (130) ELT 93/2005 (179) ELT 461} reversal of proportionate credit on inputs was in order. Reply in remaining two cases was awaited (May 2006).

Reply of department is not tenable as cenvat rules provide for reversal of proportionate credit only for low sulphur heavy stock, naphtha and furnace oil which are used in generation of electricity meant for sale and not in the case of other inputs for which no separate accounts are maintained. The case laws quoted are not relevant to the cases in question, since the inputs in those cases were either used in job work or were used for manufacture of intermediate goods which in turn were used in non excisable goods and hence Tribunal upheld reversal of proportionate credit only on inputs because cenvat scheme does not envisage availment of credit in these cases. Further, Board in a circular dated 19 August 2002 also clarified that under rule 6 the assessee is left with no option but to reverse 8 per cent if they fail to maintain separate accounts.

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

10.1.2 M/s. Ruchi Soya Industries Limited, in Indore commissionerate, manufactured both dutiable goods (branded refined oil, branded vanspati and acid oil) and exempted goods

(unbranded refined oil, unbranded vanaspati and unbranded acid oil). Assessee availed of cenvat credit on common inputs such as phosphoric acid, caustic soda lye, sulphuric acid, bleaching earth, hydrogen gas, citric acid etc., Similarly, assessee used super kerosene oil being a common input in the manufacture of electricity which was used in the manufacture of both dutiable and exempted products.

Separate accounts of inputs for exempted and dutiable category of excisable goods were not maintained. The cenvat credit on inputs so availed was utilized towards payment of duty in respect of dutiable products. An amount of Rs.5.76 crore equivalent to eight per cent of the value of exempted products cleared was required to be paid during the period March 2003 to April 2003 but was not paid.

On this being pointed out (June 2006), department stated (June 2006) that the matter would be examined.

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

10.1.3 M/s. Indian Oil Corporation Limited in Haldia commissionerate, availed cenvat credit of service tax paid on port services and central excise duty paid on di-tertiary butyl para cresol. Assessee used inputs in the manufacture of dutiable as well as exempted petroleum products, without maintaining separate accounts of use of inputs in manufacture of exempted finished goods. Credit was utilised towards payment of duty on the dutiable final products in March 2005. Since assessee also availed of exemption on final products in which said inputs were used, he was liable to pay Rs.5.85 crore being ten per cent of the value of such exempted products cleared during 1 March 2005 to 11 April 2005.

On this being pointed out (June 2005), the Ministry admitted the objection and reported (November 2006) issue of show cause notice for Rs.5.85 crore in January 2006.

10.1.4 Five assesseees in Hyderabad I, Thane II, Visakhapatnam I and II commissionerates engaged in the manufacture of bulk drugs, formulations, sulphur, paper pulp, paper and paper boards, pipes, tubes, heavy machinery etc. cleared certain final products which were exempt. Separate accounts were not maintained for the inputs used in the manufacture of dutiable and non-dutiable goods. The assesseees did not pay an amount equal to eight per cent/ten per cent of the total price of exempted goods of Rs.20.36 crore which worked out to Rs.1.86 crore for the period between August 2001 and January 2006.

On this being pointed out (between November 2003 and March 2006), the Ministry while admitting objection in all cases, reported (September and December 2006) recovery of duty of Rs.22.35 lakh in March 2006 from assessee in Visakhapatnam I Commissionerate. It, however, stated that the internal audit party had already observed the irregularity in the case of assessee in Visakhapatnam II Commissionerate and draft show cause notice for Rs.1.31 crore covering the period from August 2002 to March 2006 was submitted for issue.

Reply of the Ministry is not tenable as the irregularity persisted from August 2002 and no show cause notice was issued till the issue was pointed out by audit (February 2006), which is still stated to be under issue (December 2006).

10.2 Incorrect availment of cenvat benefits and passing it on to downstream manufacturers

The cenvat provisions envisage availment of credit on inputs if the resultant final products emerging out of manufacturing process are dutiable.

M/s. Kissan Industries Limited and M/s. Aditya Ispat Limited, in Hyderabad-IV commissionerate, procured certain iron and steel items like MS rounds, squares, wire rod coils, sulphuric acid, etc., and subjected them to a process called “prickling” in their factories. They cleared the resultant products ‘bright bars’ without payment of duty on the plea that no new excisable product emerged. The jurisdictional Assistant Commissioner however, held (September 1996) that the process undertaken by the assessee amounted to manufacture and demanded duty but High Court of Andhra Pradesh ruled (December 2000) that the transformation of MS rounds, bars, etc. into bright bars did not amount to manufacture and assessee were permitted to surrender their registration certificates as no duty liability accrued on their end product. In view of this decision, neither cenvat credit was admissible on inputs nor was duty payable on bright bars. However, they continued to avail cenvat credit on inputs and in turn passed on such benefits to the downstream manufacturers by charging duty on the end products.

It was also noticed (February 2006) that another assessee M/s. Venkatesh Steels Private Limited in Visakhapatnam I commissionerate adopted the same modus operandi and passed on unintended benefits to buyers during the period May 2004 to January 2006. During the period between December 2000 and January 2006, the three assessee incorrectly availed cenvat credit and passed on unintended benefit of cenvat credit (duty) to the extent of Rs.5.05 crore to the downstream manufacturers.

On this being pointed out (December 2005), department issued (April 2006) show cause notice to M/s. Kissan Industries Limited for Rs.1.15 crore towards cenvat credit availed during the period from March 2001 to December 2003. Reply of the department in other cases had not been received (April 2006).

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

10.3 Incorrect utilisation of cenvat credit of NCCD

Rule 3(6)(i) of Cenvat Credit Rules, 2002 stipulates that cenvat credit shall not be allowed on such quantity of inputs which are used in the manufacture of exempted goods.

M/s. Recron Synthetics Limited, M/s. Garden Silk Mills Jolwa, M/s. Rajshree Polyfins, Umalla and M/s. Microsynth Fabrics, Silvassa in Allahabad, Surat-I, II and Vapi commissionerates, availed cenvat credit of national calamity contingent duty (NCCD) of Rs.3.00 crore during the period from July 2003 to March 2005 on partially oriented yarn and used it in the manufacture of polyester filament yarn/textured yarn which were exempt from payment of NCCD. Availment of credit was not correct.

On this being pointed out (between August 2004 and March 2006), department stated (between August 2003 and February 2006) that final product was not exempt and that in one case out of Rs.9.24 lakh the assessee had utilised Rs.1.05 lakh towards payment of duty on inputs removed as such and the remaining amount was lying unutilised in their accounts. Reply in the case of M/s. Recron Synthetic Limited had not been received (November 2006).

Reply of the department is not tenable because (i) finished goods viz., polyester filament yarn/textured yarn were exempt from payment of NCCD and (ii) the input credit of NCCD cannot be utilized for payment of other duties in view of specific restrictive clause in Cenvat Credit Rules, 2002.

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

10.4 Premature utilisation of cenvat credit

Rule 3(4) of Cenvat Credit Rules, 2004 provides that while paying duty, the cenvat credit shall be utilised to the extent such credit is available on the last day of month for payment of duty relating to the month. Further, rule 15 of said rules stipulates that, if any person contravenes any of the provisions of these rules in respect of any inputs or capital goods then such person shall be liable to a penalty not exceeding the amount of duty or ten thousand rupees, whichever is greater.

Records of M/s. Prakash Industries Limited Champa, in Raipur commissionerate, engaged in manufacture of iron and steel goods revealed that excise duty of Rs.10.16 crore was payable by 31 March 2005. Out of said amount of duty, Rs.2.37 crore was paid from cenvat credit on 1 April 2005 after availing credit on capital goods on 1 April 2005. The credit availed on 1 April 2005 was not admissible for payment of duty cleared during March 2005. Such utilisation was in contravention of rule 3(4) and tantamounted to removal of final products without payment of duty. Duty was required to be paid through P.L.A. or cash. Besides, penalty upto Rs.2.37 crore was also leviable.

On this pointed out (May 2005), department admitted objection and reported (August 2006) issue of show cause notice.

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

10.5 Cenvat credit not paid back on raw material written off

The Board clarified in February 1995 that where modvat credit is availed on inputs but later on inputs are not used in the manufacture and their value is written off from the stock accounts for any reason, the modvat credit should be reversed. The Board further clarified on 16 July 2002 that credit of duty availed on inputs is to be reversed only in cases where unused inputs are fully written off.

M/s. Bharat Electronics Limited, in Bangalore III commissionerate, availed cenvat credit on different inputs received in their factory. The verification of their annual accounts revealed that during the years 1997-98 to 2003-04, the assessee had written off full value of some raw materials and components declaring them as obsolete or slow moving. The value of written off materials amounted to Rs.10.47 crore on which corresponding credit of Rs.1.61 crore was not paid back.

On this being pointed out (November 1999 and November 2004), department reported (June 2001/July 2005) recovery of credit of Rs.12.71 lakh for the years from 1997-98 to 2000-2001 and issue of another demand of Rs.2.30 crore for the period from 1999-00 to 2003-04.

The Ministry stated (December 2006) that the stock of goods whose value had been written off were physically available for use and hence recovery of credit was not required.

Reply of the Ministry is not tenable as the value of inputs had been written off from profit and loss account and reduced from the stock account, therefore it ceased to be inputs for availing credit under Cenvat Credit Rules, and hence credit was required to be reversed irrespective of the fact of its physical availability for use.

10.6 Incorrect availment of cenvat credit on ineligible goods

10.6.1 As per rule 2(b)/2(a) of Cenvat Credit Rules, 2002/2004, the term 'capital goods' for purpose of allowing credit of duty means (i) all goods falling under chapters 82, 84, 85, 90, chapter heading 68.02 and sub heading 6801.10 of First Schedule, (ii) pollution control equipment, (iii) components, spares and accessories of goods specified at (i) and (ii) above, (iv) moulds and dies, (v) refractories and refractory materials, (vi) tubes, pipes and fittings thereto and (vii) storage tanks. In the case of M/s. Nava Bharat Ferro Alloys Limited, Tribunal held {2004 (174) ELT 375} that (i) HR coils, channels, plates and hard plates are general purpose items having multifarious use and are not covered by the definition of capital goods and (ii) columns of heavy fabricated structures and bracings used as supporting columns of a boiler, etc. are in the nature of construction material and are not eligible for credit as capital goods.

M/s. Hindustan Zinc Limited and seven others in Guntur, Hyderabad I, Raipur and Visakhapatnam-I and II commissionerates availed cenvat credit on items like MS plates, angles, channels, HR sheets, beams, strips, TMT bars, plates, cement, tyres and tubes, etc., even though none of these items conformed to the definition of capital goods. All these items were used either as general purpose items or structural items for which credit was not admissible. Cenvat credit incorrectly availed during the period between September 2003 and January 2006 amounted to Rs.1.62 crore.

On this being pointed out (January 2005 to February 2006), department admitted the objection in six cases and reported (between April 2005 and August 2006) recovery of Rs.0.11 crore in one case and issue of show cause notices in three cases. In two other cases it stated that the structural material was used to give support in foundation of machines without which machine could not be used for manufacture and hence those material were in the nature of spares/accessories. It was further argued that the rules did not consist express provisions for their disallowance.

The reply is not tenable as the cenvat credit on construction material is not admissible as per different judgments of tribunals cited above. Further, these materials are not specified under rule 2(b) of Cenvat Credit Rules 2002. Further, rule 2(e) defines final goods to mean excisable goods manufactured from inputs. Output goods manufactured were either non excisable or exempt from duty and hence cenvat credit availed was recoverable.

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

10.6.2 Explanation-I under rule 2(g)/2(k) of Cenvat Credit Rules, 2002/2004 stipulates that high speed diesel oil (HSD) or motor spirit shall not be treated as an input for any purpose whatsoever.

In the case of M/s. Indian Oil Corporation Limited, Tribunal held that low sulphur high flash (LSHF) is nothing but HSD oil notwithstanding the change in flash point and sulphur content {2000 (118) ELT 389}.

M/s. City Lubricants Private Limited, in Guntur commissionerate, engaged in manufacture of lubricating oils, procured low sulphur high flash high speed diesel oil (LSHF HSD - sub heading 2710.93) and availed credit of duty of Rs.99.12 lakh between the years 2002-03 and 2004-05. Since product was HSD oil (sub heading 2710.93) which was not an eligible input, credit of duty was, therefore, not admissible and required recovery alongwith interest and penalty.

On this being pointed out (February 2006), the Ministry admitted the objection (November 2006).

10.7 Non-payment of duty on non-receipt of material from job workers

Under rule 4(5) (a) of Cenvat Credit Rules, 2002, cenvat credit availed input or capital goods can be sent to a job worker for further processing provided the goods are received back within 180 days and if the inputs or capital goods are not received back within stipulated period, the manufacturer shall pay an amount equivalent to cenvat credit attributable to the inputs or capital goods.

Test check of records of ten assessees in Faridabad, Gurgaon, Hyderabad I, Panchkula and Rohtak commissionerates, revealed that inputs involving duty liability of Rs.1.03 crore sent for job work during 2004-05 and 2005-06 were not received back in the factory within the prescribed period of 180 days. Thus, the manufacturers were required to pay duty equivalent to cenvat credit of Rs.1.03 crore on inputs/capital goods not received.

On this being pointed out (between August 2005 and February 2006), the Ministry while admitting objection in one case intimated (November 2006) recovery of Rs.69.40 lakh. Reply in the remaining cases had not been received (December 2006).

10.8 Simultaneous availment of credit under cenvat scheme and depreciation under Income Tax Act

Under rule 4(4) of Cenvat Credit Rules, 2002, (erstwhile rule 57AC (4) of Central Excise Rules, 1944), cenvat credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods which the manufacturer claims as depreciation under section 32 of the Income Tax Act, 1961.

10.8.1 M/s. Sadashivrao Mandlik K.T. SSK Limited, in Pune II commissionerate, engaged in the manufacture of sugar, availed cenvat credit of Rs.2.23 crore on plant and machinery during the years 2000-01 to 2003-04. Verification of records revealed that the assessee had deducted only Rs.1.25 crore as cenvat credit availed from the capitalized value of the plant and machinery for the purpose of claiming depreciation under the Income Tax Act. Hence, on balance amount of Rs.98.71 lakh (Rs.223.35 lakh – Rs.124.64 lakh) the assessee had availed dual benefit of credit under Cenvat Credit Scheme and depreciation under Income Tax Act. This was not in order.

On this being pointed out (December 2005), department admitted the objection and intimated (February and April 2006) that an inadmissible credit of Rs.124.86 lakh was noticed for the year 2000-01, after due verification.

Department's reply on recovery of duty and reply of the Ministry had not been received (December 2006).

10.8.2 M/s. Sant Jagmitra Sahkari Soot Girni Limited, in Aurangabad commissionerate, engaged in the manufacture of cotton yarn procured capital goods during 2000-01 to 2003-04 and availed fifty per cent credit of duty paid on capital goods in the year in which capital goods were received in the factory. The balance fifty per cent was taken in subsequent years. At the time of finalisation of the accounts for the respective years, the assessee deducted only fifty per cent duty amount instead of hundred per cent from the value of capital goods and claimed depreciation under Income Tax Act. This resulted in incorrect availment of credit of Rs.67.39 lakh.

On this being pointed out (January 2005), the Ministry admitted the audit objection and reported (September 2006) issue of a show cause notice for Rs.67.39 lakh.

10.9 Incorrect passing on cenvat credit to buyers of exempted goods

Rule 6 of Cenvat Credit Rules, 2002/2004, envisages that where an assessee manufactures final products part of which are chargeable to duty and part treated as exempted goods but avails credit of duty on inputs meant for use in both the categories of final products and does not maintain separate accounts, he shall pay an amount equivalent to eight per cent (10 per cent from 10 September 2004) 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 the liability is to be borne by the manufacturer himself.

Tribunal in the case of M/s. Vimal Moulders (India) Limited {2004 (164) ELT 302} held that the amount of 8 per cent paid by manufacturer but collected from customer was to be deposited with Central Government as excess collection of duty as per the provisions of section 11 D of Central Excise Act, 1944.

10.9.1 M/s. Lanco Industries Limited in Tirupathi Commissionerate and M/s. Mishra Dhatu Nigam Limited in Hyderabad-II Commissionerate of Central Excise, engaged in the manufacture of iron or steel products, availed cenvat credit on inputs used in the manufacture of dutiable as well as exempted goods. Since they did not maintain separate inventory for inputs used in exempted goods, they reversed eight/ten per cent of the value of exempted goods during the period between January 2004 and November 2005. The assessee instead of absorbing the said liability themselves, passed on the incidence thereof (between January 2004 and November 2005) to their customers by means of debit notes/supplementary invoices. Though the relevant debit notes/supplementary invoices/purchase orders indicated that these amounts were collected by the assessee as excise duty on the exempted goods cleared, the amount of Rs.78.01 lakh so collected was not recovered by department.

On this being pointed out (December 2005), department in one case stated (September 2006) that the amount was collected as price variation and hence was not recoverable under section 11D. Reply in the second case had not been received.

Reply is not tenable as supplementary invoices clearly indicated collection of amount as excise duty. Reply of the Ministry had not been received (December 2006).

10.9.2 M/s. Bharath Earth Movers Limited, Kolar, in Bangalore I commissionerate, manufacturing both dutiable and exempted goods availed cenvat credit on common inputs but

did not maintain separate accounts. Therefore, the assessee paid an amount equal to eight per cent of the price of the exempted goods from cenvat account and the assessee at the same time collected such amount from the customers between December 2000 and March 2003. The amount of Rs.35 lakh collected was not recovered by department nor was it deposited by the assessee with the Government.

On this being pointed out (August 2003), the Ministry admitted the objection and stated (December 2006) that a show cause notice had been issued.

10.10 Incorrect grant of cenvat credit under DEPB scheme

It has been held in case of ESSAR Steel Limited {2004 (173) ELT 239 (Tri-LB)} by Tribunal, New Delhi that cenvat credit of CVD cannot be availed unless it is paid in cash. Mere debit in the DEPB is not sufficient for cenvat credit.

M/s. MRF Limited, M/s. Brake India Limited and M/s. IFB Limited in Cochin, Chennai II and Goa commissionerates, availed cenvat credit of Rs.97.68 lakh against CVD debited in DEPB between July 2003 and March 2005. Since duty was not paid in cash availment of credit was incorrect and recoverable alongwith interest.

On this being pointed out (July 2004 and November 2005), the Ministry while admitting objection in two cases reported (November and December 2006) recovery of Rs.48.85 lakh from M/s. MRF Limited and confirmation of demand of Rs.32.84 lakh against M/s. Brake India Limited. Reply in the remaining case had not been received (December 2006).

10.11 Incorrect availment of cenvat credit on account of interest

In terms of rule 3 of the Cenvat Credit Rules 2001, credits of only specified duties paid on inputs or capital goods, received in the factory are admissible.

M/s. Kandhari Beverages Limited, in Chandigarh-1 commissionerate, engaged in the manufacture of aerated water was allowed to take credit of Rs.67.59 lakh in December 2001 on account of interest on refund of pre-deposit. Since interest paid on refund of duty pre-deposit was not amongst specified duties, availment of credit was not correct.

On this being pointed out (July 2002 and January 2004), the Ministry stated (September 2006) that the credit was given as per orders dated 23 November 2001 of Punjab and Haryana High Court. However on special leave petition filed by department, Supreme Court shifted the date of commencement of interest from 8 February 1996 to 17 November 1999 and hence interest of Rs.45.33 lakh had been recovered leaving remaining amount unrecovered.

The fact remains that the issue of 'inadmissibility of cenvat credit of interest under Cenvat Credit Rules' was not raised in the petition filed before the Supreme Court by department, therefore the recovery of remaining amount remained undecided.

10.12 Availment of cenvat credit without payment of duty

Rule 12 of Cenvat Credit Rules, 2002 envisages that where the cenvat credit has been taken or utilized wrongly, the same shall be recovered from the manufacturer along with interest.

M/s. Essar Steel Limited, Hazira, in Surat-I commissionerate, imported capital goods in the month of October 2004 and kept them in the 'warehouse'. These goods were exported in

December 2004. However, assessee availed 50 per cent of cenvat credit in January 2005 and remaining 50 per cent in April 2005 on the basis of bill of entry meant for warehouse. Since duty was not paid on the goods, availment of cenvat credit of Rs.61.17 lakh was not correct and was recoverable with interest of Rs.7.95 lakh upto February 2006.

On this being pointed (February 2006), department/the Ministry reported (March/November 2006) recovery of credit of Rs.61.17 lakh in February 2006 and interest of Rs.7.95 lakh in July 2006.

10.13 Credit availed on goods brought for remaking but duty equal to credit taken not paid on clearance

Rule 16 of the Central Excise Rules, 2002 envisages that where any goods on which duty was paid at the time of removal are brought to any factory for being remade, refined, reconditioned or for any other reasons, the assessee shall state the particulars of such receipt in its records and shall be entitled to take cenvat credit. If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the cenvat credit taken.

M/s. Hindalco Industries Limited, in Kolkata-II commissionerate, manufacturing aluminium sheets, availed of cenvat credit on rejected final products (aluminium sheets) received in the factory. The assessee received 501.038 tonne of rejected sheet of value Rs.598.26 lakh during the period between April 2003 and April 2005 and availed cenvat credit of Rs.95.72 lakh. He charged only 65.597 tonne of such rejected goods to re-melting process while the balance quantity of 435.441 tonne (being a major part of about 87 per cent of such rejected/returned goods) was cleared on payment of duty on a scrap value of Rs.70.50 per kilogram. Thus, duty was paid less than the credit availed of on such returned goods during its re-entry into the factory of manufacture. This resulted in short realization of revenue of Rs.46.60 lakh.

On this being pointed out (October 2005), department stated (May 2006) that the assessee had not cleared such rejected goods in the form of scrap and therefore the question of short payment of duty did not arise.

The contention of the department is not acceptable since (1) the returned goods register clearly establishes that 65.597 tonne of returned goods has actually been despatched for reprocessing out of the total receipt of 501.038 tonne of returned goods; (2) department is silent in respect of facts and figures declared by the assessee in the prescribed returned goods register and (3) department could not substantiate its claim that the total scrap cleared by the assessee for conversion/reprocessing did not include such returned goods in the form of scrap.

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

10.14 Other cases

In 307 other cases of grant of modvat/cenvat credit, the Ministry/department had accepted objections involving duty of Rs.17.80 crore and reported recovery of Rs.5.60 crore in 280 cases till December 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 of duty due to incorrect valuation are narrated in the following paragraphs :

11.1 Incorrect adoption of transaction value

Section 4(1)(a) of the Central Excise Act stipulates that when the duty of excise is chargeable on any excisable goods with reference to its value, then such value shall be the 'transaction value'. 'Transaction value' means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing etc., or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

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

11.1.1 Ninety six assesseees in nine commissionerates in Maharashtra state engaged in the manufacture of excisable goods, opted for premature repayment of sales tax deferred liability between 1989-90 and 2004-05 and received discount of Rs.177.11 crore due to premature repayment of sales tax at net present value (NPV). This difference between the actual sales tax collected from customers and the payment made at NPV had become additional income to the assessee. Non-inclusion of this additional income in the assessable value resulted in undervaluation of goods, with consequential short levy of excise duty of Rs.27.79 crore.

On this being pointed out (between July 2005 and May 2006), the Ministry admitted the objection in 31 cases (July and December 2006). Reply in the remaining cases had not been received (December 2006).

11.1.2 M/s. Gas Authority of India Limited, in Raigad commissionerate, supplied its entire production of liquefied petroleum gas to M/s. Hindustan Petroleum Corporation Limited (HPCL) and paid duty on a fixed value of Rs.12,219 per ton which was adopted since 17 March 2002. The value recovered from M/s. HPCL was Rs.93.73 crore whereas value considered for levy of duty was Rs.68.57 crore. The differential duty payable on such additional consideration worked out to Rs.3.32 crore (approximately) during April 2002 to November 2004.

On this being pointed out (November 2004), the Ministry admitted the objection and intimated (September 2006) issue of show cause notice for Rs.5.11 crore covering the period from January 2001 to February 2005.

11.1.3 The Supreme Court in case of M/s. Coromandel Fertilizers Limited{(1984 (IT) ELT 607} held that commission paid, to a selling agent is not deductible from the assessable value, as a 'trade discount' because such a commission is paid to an agent for services rendered by him for procuring orders.

M/s. Escorts Yamaha Motors Limited, in Faridabad commissionerate, manufactured motor cycles and sold these through their authorised dealers. They allowed dealer's margin ranging from Rs.1465 to Rs.1960 per motor cycle which was not included in the assessable value. However, the maximum retail price (MRP) was inclusive of dealer's margin as per agreement with the dealers which comprised, inter alia, aftersale service charges, cost of promotion of sales, publicity and advertising expenses etc. Dealer's margin amounting to Rs.12.20 crore paid during 1999-2000 was not included in the assessable value, which resulted in short levy of duty of Rs.2.93 crore.

On this being pointed out (June 2000), department stated (March 2006) that demand of Rs.9.20 crore relating to the period 1 July 2000 to 30 September 2004 had since been confirmed in February 2006 and penalty under section 11AC imposed. It, however, stated that dealers margin was not includible in assessable value prior to 1 July 2000 as concept of transaction value was not there in section 4.

Reply of department is not tenable as dealers margin was includible in assessable value in terms of Supreme Court's rulings, *ibid*.

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

11.1.4 M/s. Novartis India Limited, in Raigad commissionerate, manufactured rifampicin falling under sub-heading 2941.90 and cleared it to M/s. Li-Taka Pharma Limited, Pune at different values on the same day. The difference between the values was substantial. The concept of transaction value as provided under Section 4(1)(a) of the Central Excise Act, 1944 seeks to accept different values for each removal of goods, but adopting different values on the same product, on the same day to the same customer defies reasonable commercial practices under which 'transaction value' can be accepted as assessable value. Undervaluation during 1 January 2002 to 31 March 2004 on account of adopting different values worked out to Rs.4.96 crore with consequent short levy of duty of Rs.79.36 lakh.

On this being pointed out (January 2005), the Ministry stated (December 2006) that demand of Rs.1.15 crore for the period July 2000 to September 2004 had been confirmed in February 2006 but assessee had gone in appeal.

11.1.5 The Board in its Circular dated 1 July 2002, clarified that advertisement and publicity charges borne by the dealers/buyers for advertising goods of the assessee are to be included in the assessable value, as additional consideration under rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

M/s. Hindustan Motors Limited, Tiruvallur, in Chennai II commissionerate, manufactured motor cars and cleared them to dealers on payment of duty on transaction value. The dealers incurred expenditure on advertisement for the goods and the cost was shared equally between the assessee and the dealers in most cases. The dealers had claimed 50 per cent of the advertisement charges borne by them, which were reimbursed by assessee by issue of credit

notes to them. The advertisement expenses were includible in the assessable value. Non-inclusion thereof resulted in short levy of duty of Rs.13.34 lakh during the year 2004-05.

On this being pointed out (July, August and November 2005), the Ministry admitted (September 2006) the objection and stated that a demand of Rs.57.71 lakh covering period from April 2001 to March 2006 had been confirmed (June 2006) besides imposing penalty and payment of interest.

11.2 Incorrect valuation of goods on cost basis

Rule 8 read with proviso to rule 9 of the Central Excise Valuation (Determination of Price of excisable Goods) Rules, 2000, stipulates that where excisable goods are not sold by the assessee but are consumed by the assessee or on behalf of the assessee by a related person for manufacture of other articles, the assessable value of such goods shall be 115 per cent (110 per cent from 5 August 2003) of the cost of production of manufacture of such goods.

11.2.1 M/s. H.V. Transmission and M/s. Indian Explosives Limited, in Jamshedpur commissionerate, manufactured gear box, parts of gear box explosive goods etc. and cleared them to their sister concerns or consumed captively. Duty was paid by the assessee at the assessable value, arrived at on cost basis. Scrutiny of relevant records, revealed that the assessable value was determined lower than the amount determinable in accordance with the above mentioned provisions read with cost accounting standard (CAS-4). This resulted in short levy of duty of Rs.6.24 crore during the period 2000-02 and 2004-05. In addition, interest was leviable under the provision of Central Excise Act/Rules.

On this being pointed out (January 2004 and September 2005), the Ministry while admitting objection intimated (November and December 2006) recovery of Rs.0.45 crore from M/s. Indian Explosives Limited and confirmation of demand of Rs.4.35 crore with imposing penalty of Rs.0.10 crore against M/s. H.V. Transmission.

11.2.2 M/s. Lloyds Metals, in Nagpur commissionerate, manufactured sponge iron and cleared the entire production to its related company M/s. Lloyds Steel, Wardha during 2000-01 to 2005-06. Duty was paid at transaction value which was lesser than the cost of production. Since costing data was not made available, department was asked (between June 2002 and March 2006) to work out the assessable value on cost basis and to recover differential duty.

The Ministry admitted the objection and stated (December 2006) that demand of Rs.3.17 crore for the period from December 2000 to August 2003 had been confirmed in November 2006.

11.2.3 M/s. Tata Iron and Steel Company Limited, in Thane-II commissionerate, received inputs from their own plant at Jamshedpur on stock transfer basis, for further processing. The value of inputs at Jamshedpur was determined at one hundred ten per cent of cost of production. The assessee had availed cenvat credit paid on such value. After processing the inputs, the assessee cleared the goods for captive consumption in their own other plant located at Borivli adopting value at 110 per cent of cost of production. Audit noticed that while determining the cost of production, the assessee had taken the cost of inputs after deducting the ten per cent value added at Jamshedpur plant. Such deduction was not permissible as per the Cost Accounting Standards circulated by Board vide its Circular dated

13 February 2003. The incorrect reduction led to undervaluation of Rs.11.20 crore during 2003-04 and consequent short levy of duty of Rs.1.72 crore.

On this being pointed out (September 2004), the Ministry admitted (December 2006) the objection.

11.2.4 M/s. Colour Chem Limited, in Thane-I Commissionerate of Central Excise, cleared intermediate finished products, semi-finished products and finished products for captive consumption on stock transfer basis to their Roha unit, on payment of duty. The value adopted for payment of duty was not determined under the provisions of rule 8. Non-determination of correct assessable value resulted in undervaluation of goods of Rs.1.14 crore during the period 2001-02 and 2002-03 and consequent short levy of Rs.18.28 lakh.

On this being pointed out (October 2003), department stated (May 2005) that show cause notice was issued on 4 May 2005 demanding duty of Rs.47.17 lakh for the period April 2000 to April 2004. It added (November 2005) that similar objection was already raised by department in EA 2000 for the period August 2001 to March 2002 and differential duty of Rs.0.45 lakh was recovered in August 2002.

Department's reply is not tenable as show cause notice issued in May 2005 also included the period covered by internal audit (August 2001 to March 2002) and the show cause notice does not speak about adjustment of duty of Rs.0.45 lakh already recovered which indicates the said objection did not have relevance to the point at issue. Further, department has also not communicated reasons for non issue of show cause notice for more than four years.

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

11.3 Other cases

In 31 other cases of valuation of excisable goods, the Ministry/department had accepted objections involving duty of Rs.3.57 crore and reported recovery of Rs.0.87 crore in 20 cases till December 2006.

CHAPTER XII : EXEMPTIONS AND REBATE

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. Where goods are exported, Government is empowered under rule 18 of Central Excise Rules, 2002, for granting rebate of duty paid on excisable goods or on raw materials used in manufacture of excisable goods, by issue of notification. Some of the major cases of incorrect allowance of exemption/rebate, noticed in audit are detailed in the following paragraphs:

12.1 Incorrect grant of exemption

12.1.1 Notification dated 1 March 2002 prescribed concessional rate of basic and additional duty of excise on processed fabrics at 8 per cent and 4 per cent ad valorem (respectively), subject to the condition that they were manufactured from textile fabrics on which appropriate duty of excise, leviable under the Central Excise Tariff Act and Additional Duties of Excise (Goods of Special Importance) Act, 1957, had been paid. The interpretation of the expression "appropriate duty of excise has already been paid" was considered by a constitution bench of the Supreme Court in the case of M/s. Dhiren Chemical Industries {2002 (139) ELT 3}. The Supreme Court held that the word "appropriate" in the context of such exemption notifications means the correct or specified rate of duty and that where an exemption is extended subject to the condition that the "appropriate duty has been paid" on the raw material, then such exemption shall not be available when the raw material is not liable to excise duty or such duty is 'nil'. This aspect was also clarified by the Board on 26 September 2002.

Eight assessees in Ahmedabad I, Indore, Jaipur II and Surat I commissionerates, manufactured processed fabrics from duty free grey fabrics and cleared them on payment of concessional rate of duty availing exemption under notification, *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*. Incorrect adoption of rate of duty resulted in short payment of duty of Rs.24.11 crore during the period from February 2002 to March 2003.

On this being pointed out (between May and October 2005), the Ministry in seven cases stated (December 2006) that fibre/yarn going into making of unprocessed fabrics was not exempt from duty and that the facility of deemed credit on unprocessed fabrics was provided one time without producing documentary evidence to show that the inputs were duty paid. Reply in the remaining case had not been received (December 2006).

Reply is not tenable as 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. In the instant cases unprocessed fabrics were procured at nil rate of duty and were used in the manufacture of processed fabrics.

12.1.2 Government issued two notifications nos.29/2004-CE and 30/2004-CE both dated 9 July 2004 in respect of specified textiles and textile goods of chapter 50 to 63 of Central Excise Tariff Act, 1985. First notification prescribes effective rate of duty of eight or four per cent ad valorem and second one grants full exemption of duty, if cenvat credit on inputs or capital goods is not used.

Further, Board clarified on 28 July 2004 that there is no restriction to the availment of the benefit of both the notifications simultaneously, provided that the manufacturer maintains separate account of inputs, used in dutiable and exempted goods.

M/s. Krishna Spinning and Weaving Mills Private Limited, in Bangalore III commissionerate, engaged in the processing of cotton fabrics, availed benefit of both notifications simultaneously. Assessee also availed cenvat credit on common inputs without maintaining separate records for dutiable and exempted goods. The assessee cleared the goods under second notification without payment of duty from January 2005 onwards and reversed proportionate credit on exempted products cleared only from August 2005 onwards. As the assessee had not maintained separate records for dutiable and exempted goods, exemption availed was not correct and resulted in short levy of duty of Rs.92.88 lakh as at the end of November 2005 which was recoverable with interest of Rs.1.75 lakh.

On this being pointed out (December 2005), department stated (March 2006) that since the assessee had not maintained separate account, recourse was taken under rule 6 of Cenvat Credit Rules and further stated that show cause notice had been issued.

Department's reply is not tenable since separate accounts were not maintained and by availing cenvat credit on inputs, the condition prescribed in notification had not been fulfilled, which was also contradictory to the Board's instructions of 28 July 2004. Further, applicability of rule 6 provisions is not relevant as exemption has been availed under notification dated 9 July 2004 which provides exemption, subject to non availment of cenvat credit.

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

12.1.3 By notification dated 1 March 1997, scientific and technical instruments, apparatus, equipment, etc. and the accessories/spare parts thereof, are exempt from duty when supplied to a public funded research institution, under administrative control of Department of Space or Department of Atomic Energy or Defence Research Development Organization of Government of India, provided a certificate to that effect from an officer not below the rank of a Deputy Secretary to Government of India, in the department concerned, is produced by the manufacturer at the time of clearance of the specified goods.

M/s. Bharat Heavy Plates & Vessels Limited, in Visakhapatnam I commissionerate, manufactured and supplied 42 titanium air bottles worth Rs.1.60 crore to an organization under the control of Department of Space during March 2002, availing exemption under the said notification. In the absence of the proper certificate, the availment of exemption of Rs.25.60 lakh was not correct.

On this being pointed out (November 2003), the Ministry while admitting audit objection stated (September 2006) that demand of Rs.25.60 lakh alongwith interest and imposition of penalty of equal amount was confirmed in October 2004 but assessee had filed an appeal before Commissioner (Appeals) which was pending decision.

12.1.4 Notification dated 16 March 1995 (as amended) exempts duty of excise/additional duty of excise on excisable goods, if manufactured by specified units/institutions and supplied to the Ministry of Defence for official purposes.

M/s. National Engineering Industries Limited, in Jaipur I commissionerate, manufactured roller bearing axle box assembly and cleared the same to M/s. Bharat Earth Movers Limited, Bangalore without payment of duty, availing exemption under notification, *ibid*. Since assessee's name was not included in the list of specified units in the notification, exemption availed was incorrect and resulted in short levy of Rs.22.49 lakh during the period November 2004 to June 2005.

On this being pointed out (January 2006), the Ministry while admitting audit objection stated (September 2006) that the demand for Rs.22.49 lakh had been confirmed and interest and penalty of Rs.22.49 lakh had been imposed.

12.1.5 By notification dated 1 March 2003, watches (chapter 91) of retail sale price not exceeding Rs.500 per piece, attract duty at concessional rate of 8 per cent ad valorem.

M/s. Titan Industries Limited, in Chennai-III commissionerate, manufactured quartz analog watches (chapter 91) and cleared them to institutional customers in bulk on purchase order basis. No retail sale price was affixed on watches cleared in bulk. The assessee, discharged duty under section 4 at the concessional rate of 8 per cent ad valorem availing the benefit of notification, *ibid*. Since retail sale price was not affixed on individual packages of watches cleared in bulk, availment of exemption was incorrect. This resulted in short levy of duty of Rs.31.07 lakh during the period from April 2003 to March 2004.

On this being pointed out (July and September 2004 and July 2005), the Ministry admitted (November 2006) the objection.

12.2 Incorrect grant of rebate

Two notifications, both dated 14 November 2002, allow refund of duty paid in cash, on goods manufactured and cleared on payment of duty from specified area i.e. Jammu and Kashmir.

Another notification dated 6 September 2004, issued under rule 18, grants rebate of duty paid on excisable goods or duty paid on materials used in the manufacture or processing of such goods, on export out of country except Nepal and Bhutan.

During the audit of rebate claims of Maritime Commissioner of Central Excise, Mumbai I, IV and Raigad, it was noticed that 270 rebate claims involving Rs.11.39 crore were sanctioned, between March 2004 and April 2006 which pertained to goods manufactured in Jammu and Kashmir, in terms of notification dated 14 November 2002, *ibid*. The amount of duty paid in cash in these cases amounted to Rs.11.39 crore which was refunded to the manufacturers in Jammu and Kashmir, and hence grant of rebate was incorrect. It was further noticed that though in 32 rebate claims amounting to Rs.1.35 crore, appeals were filed for recovery of rebate as the grant of rebate in such cases was held inadmissible, *vide* orders dated 10 February 2006 of Maritime commissionerate, Raigad, but no action was taken for recovery of rebate of Rs.10.04 crore in remaining 238 cases.

This was pointed out in May 2006; reply of the Ministry/department had not been received (December 2006).

12.3 Other cases

In five other cases of exemptions/rebate, the Ministry/department had accepted objections involving duty of Rs.0.85 crore and reported recovery of Rs.0.31 crore in four cases till December 2006.

CHAPTER XIII : 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 licensee 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 :

13.1 Duty not levied on the stock of petroleum products on the date of debonding

By notification dated 4 September 2004, the Central Government withdrew warehousing facility for removal of petroleum products without payment of duty, from refineries to warehouse or from one warehouse to another warehouse, with effect from the midnight of 5/6 September 2004. Consequently, excise duty was to be paid on the petroleum products lying in stock in the warehouses on the crucial date.

13.1.1 M/s. Bharat Petroleum Corporation Limited, in Cochin commissionerate, did not pay duty of Rs.5.48 crore on stock of 15359.256 tonne of naphtha warehoused on the crucial date. Department also did not take any action to recover duty.

On this being pointed out (October 2004), department stated (December 2005) that demand of duty of Rs.5.48 crore had been confirmed in July 2005 and a penalty of Rs.55 lakh had been imposed, in addition.

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

13.1.2 M/s. Hindustan Petroleum Corporation Limited and M/s. IBP Company Limited, in Haldia commissionerate and M/s. Indian Oil Corporation Limited, in Siliguri commissionerate, received petroleum products in warehouse without payment of duty, as bonded stock. Scrutiny of records in audit revealed that while duty on petroleum products lying in stock as on midnight of 6 September 2004 had been paid, a quantity of 1990.467 kilolitre of petroleum products lying in the supply pipeline connected to the storage tanks was not accounted for in the stock and thus escaped levy of central excise duty of Rs.42.55 lakh.

On this being pointed out (between December 2004 and September 2005), the Ministry while admitting the objection reported (September 2006) recovery of Rs.27.61 lakh from two assesseees and issue of show cause notice to the third assessee (viz. M/s. Indian Oil Corporation Limited, Siliguri).

13.2 Non-payment of duty on due date

Rule 8 of Central Excise Rules, 2002, as amended from 1 March 2003 provides that till such time the amount of duty is outstanding and interest payable thereon is not paid, it shall be

deemed that goods in respect of which the duty and interest are outstanding have been cleared without payment of duty, and where such duty and interest are not paid within a period of one month from the due date, the consequences and penalties as provided in these rules would follow.

13.2.1 M/s. Saurashtra Cement Limited, in Bhavnagar commissionerate did not pay duty and cess amounting to Rs.2.11 crore for the month of November and December 2004 till the end of February 2005. No action was taken by department to issue orders for forfeiture of goods and levy of interest and penalty as per rules.

On this being pointed out (March 2005), department stated (March 2006) that duty of Rs.3.56 crore along with interest of Rs.16.92 lakh had been paid in March 2005. It was further stated that penalty of Rs.75 lakh had also been imposed which was pending recovery as assessee had gone in appeal. However pending appeal, goods of equivalent value had been detained.

The Ministry had admitted (December 2006) the objection.

13.2.2 M/s. IPI Steel Limited, in Bhubaneswar I commissionerate, cleared 1617.82 tonne of iron and steel products valuing Rs.3.47 crore between February 2005 and March 2005. Duty of Rs.47.77 lakh was payable against which the assessee paid duty of Rs.18.76 lakh only through cenvat credit account. Remaining duty of Rs.29.01 lakh was not paid till the date of audit (July 2005). No action was taken by department to recover duty.

On this being pointed out (July 2005), the Ministry admitted the objection and reported (December 2006) recovery of Rs.29.01 lakh.

13.3 Duty not levied on excisable goods found short

Rule 4 of Central Excise Rules, 2002, stipulates that excisable goods on which duty is payable shall not be removed from a factory or warehouse without payment of duty. However, rule 21, *ibid*, provides for remission of duty in cases where it is shown to the satisfaction of Commissioner that the goods have been lost or destroyed by natural causes or by unavoidable accident or became unfit for consumption/ marketing, before their removal.

M/s. Rashtriya Ispat Nigam Limited, in Visakhapatnam I commissionerate, showed a shortage of stock of 8713.895 tonne of iron and steel products comprising of WRM products, rounds, rebars, squares, billets and pig iron on 31 March 2005. There was no evidence on record to show that these goods were lost or destroyed by natural causes, etc., or became unfit for consumption/marketing warranting remission of duty. Neither did the assessee pay duty of Rs.2.48 crore payable on the said goods nor did the department demand the same, even though the shortages to the above extent were to be regarded as clearances without payment of duty.

On this being pointed out (November 2005), the Ministry while admitting the objection stated (December 2006) that show cause notice for Rs.2.97 crore was under issue.

13.4 Non-levy of duty on goods removed for export under bond

Excisable goods may be exported without payment of duty from the factory of a manufacturer under rule 13 of erstwhile Central Excise Rules, 1944 now rule 19 of Central Excise Rules, 2001 and proof of export is required to be submitted within a period of six

months from the date on which excisable goods were cleared for export or within such extended period as department may allow. In the event of failure of proof of export, the assessee shall pay the excise duty payable on such goods alongwith interest.

M/s. Euro Cotspin Limited, in Chandigarh commissionerate, a hundred percent export oriented unit, engaged in the manufacture of cotton yarn and polyester yarn/synthetic yarn, cleared for export polyester yarn/cotton yarn under bond without payment of duty involving excise duty of Rs.60.64 lakh between August 1999 and May 2002. Assessee did not submit proof of export and therefore duty leviable should have been paid.

On this being pointed out (November 2004), department stated (April 2005) that show cause notice for Rs.66.67 lakh had been issued (March 2005).

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

13.5 NCCD not paid on intermediate goods

National calamity contingent duty (NCCD) on partially oriented yarn (POY) of polyesters falling under heading 54.02 had been levied with effect from 1 March 2003.

Ten assessees, in Surat II commissionerate, procured polyester chips for manufacture of POY captively, as well as on job work basis from outside. During the period between August 2003 and July 2004, these assessees sent 51,30,018 kilogram polyester chips to job workers to manufacture POY on their behalf. However, applicable NCCD of Rs.31.81 lakh on POY used for manufacture of textured yarn or for grey fabrics etc., was not paid.

On this being pointed (September 2005), department stated (March 2006) that duty of Rs.31.52 lakh had been recovered from nine assessees and show cause notice for Rs.0.28 lakh had been issued to the tenth assessee.

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

13.6 Other cases

In 55 other cases of non-levy of duty, the Ministry/department had accepted objections involving duty of Rs.6.65 crore and reported recovery of Rs.6.11 crore in 52 cases till December 2006.

CHAPTER XIV : 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 short levied, are mentioned below :

14.1 Non-levy of interest

Section 11AA of the Central Excise Act, 1944, prescribes that where a person chargeable with duty determined under sub-section (2) of section 11A fails to pay such duty within three months from the date of such determination, he shall pay in addition to duty, interest at the specified rate on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty. However, if the duties are determined before 26 May 1995 (viz the date of enactment of Finance Bill, 1995) and any person fails to pay such duty within three months from the said date of enactment, then such person shall be liable to pay interest under this section from the date immediately after three months from such date till the date of payment of such duty. Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, the court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.

14.1.1 Bolpur commissionerate confirmed two demands of Rs.84.73 lakh for the period from 1 September 1985 to 31 December 1986 due to incorrect classification of pitch creosote mixture by M/s. Durgapur Steel Plant, Durgapur, which were also upheld by Appellate Commissioner in 1989 and 1990. Tribunal reversed the decision of Appellate Commissioner in 1997, but the Supreme Court set aside the decision of Tribunal and upheld the departmental appeal for duty liability of Rs.67.85 lakh in January 2004. Accordingly, duty of Rs.67.85 lakh was deposited on 4 March 2004 by the assessee. The amount of interest of Rs.1.15 crore for the period from 26 August 1995 upto 3 March 2004 was not demanded by department.

On this being pointed out (March 2005), the Ministry admitted the objection and stated (November 2006) that demand of Rs.1.15 crore had been confirmed in April 2006.

14.1.2 M/s. Jamuna Auto Industries Limited, Malanpur in Indore commissionerate, engaged in manufacture of parts of motor vehicles, paid duty amounting to Rs.6.46 crore for the period April 2004 to February 2005 after a delay of more than one month from the stipulated date of payment. Neither did the assessee pay interest of Rs.27.91 lakh nor did the department take any action for recovery of interest.

On this being pointed out (June 2005), department intimated (July 2005) that the assessee had paid interest of Rs.27.91 lakh.

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

14.1.3 M/s. Passary Minerals Limited and M/s. Sarvesh Refractories Private Limited in Bhubaneswar II commissionerate, engaged in manufacture of excisable goods, paid duty on the products cleared between June 2003 and November 2004 after delay ranging from 22 days to 150 days. Further, duty of Rs.48.37 lakh on goods cleared during December 2004 and January 2005 was not paid till date of audit (i.e. 21 March 2005). Duty of Rs.48.37 lakh with interest of Rs.23.19 lakh was recoverable which was not recovered. Besides penalty under rule 25 of Central Excise Rules, 2002 was also leviable.

This was pointed out in March 2005 and April 2006; reply of the Ministry/department had not been received (December 2006).

14.1.4 Bhubaneswar I commissionerate, confirmed demand for differential duty of Rs.21.69 lakh against M/s. Tripty Drinks Private Limited on 28 October 1999. Duty was payable due to non inclusion of transport/freight charges and advertisement cost collected from the buyers of the product in the assessable value. Assessee paid duty on 31 August 2002. Since duty was paid after 34 months of determination of duty, assessee was liable to pay interest amounting to Rs.12.66 lakh. Department also did not demand interest.

On this being pointed out (May 2004 and April 2006), the Ministry stated (December 2006) that the interest accrued under section 11AB from the first day of succeeding months in which the duty ought to have been paid. However, the Ministry did not intimate any action taken to quantify and realise interest.

14.2 Short demand of interest

Rule 57 I (5) of the erstwhile Central Excise Rules, 1944 provided that where the credit of duty had been taken wrongly on account of fraud, wilful misstatement etc. with intent to evade payment of duty, the person liable to pay the credit disallowed shall also be liable to pay interest from the first day of the month succeeding the month in which the credit was wrongly taken till the date of payment of such amount.

The Commissioner of Central Excise, Chennai I confirmed (August 2004) a demand of Rs.58.75 lakh on M/s. Indian Oil Corporation (Lube Plant), Tondiarpet, Chennai for offence case booked towards incorrect availment of cenvat credit from August 1997 to April 2001. Penalty equal to duty of Rs.58.75 lakh was also confirmed under rule 57 I (4), *ibid* read with section 11 AC of the Act, besides interest. The assessee paid the duty amount on 31 March 2005. However, interest and penalty were not paid. Audit noticed that department, in its letter dated 1 April 2005, demanded interest of Rs.4.45 lakh instead of Rs.58.58 lakh and thus there was short demand of interest of Rs.54.13 lakh.

On this being pointed out (April 2005), the Ministry admitted the objection and stated (September 2006) that interest of Rs.58.58 lakh had been recovered in March and May 2006 but recovery of penalty had been stayed (February 2006) by Tribunal.

14.3 Short payment of interest

Rule 8 of the Central Excise Rules, 2002, stipulates that if the assessee fails to pay the duty by due date, 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 from the first day after due date till the date of actual payment of the outstanding amount, provided that the amount of interest shall not exceed the amount of duty outstanding.

M/s. Orissa Sponge Iron Limited, Keonjhar, in Bhubaneswar II commissionerate, engaged in manufacture of iron lumps, fines, billets etc. paid duty of Rs.3.40 crore and differential duty of Rs.25.03 lakh relating to the period from December 2004 to February 2005 and April 2002 to May 2004 respectively after due dates. Since duty was paid after delay, assessee was required to pay interest of Rs.19.57 lakh but interest of Rs.3.81 lakh only was deposited. The department did not demand the interest paid short. This resulted in short payment of interest amounting to Rs.15.76 lakh.

On this being pointed out (July 2005), the Ministry admitted the objection and intimated (December 2006) that the assessee had paid interest.

14.4 Non-levy of penalty

Rule 8(3) of Central Excise Rules, 2002 as applicable from 1 April 2003, stipulates that if an assessee fails to pay the amount of duty on excisable goods cleared in a month by due date, he shall be liable to pay the outstanding amount along with interest. It further stipulates that till such time the amount of duty outstanding and interest payable thereon are not paid, it shall be deemed that the goods in respect of which such duty and interest are outstanding have been cleared without payment of duty, and where such duty and interest are not paid within a period of one month from the due date, the consequences and penalties as provided in these rules would follow.

Rule 25 of Central Excise Rules, 2002 stipulates that if any manufacturer removes any excisable goods in contravention of any provisions of these rules, all such goods are liable to confiscation and the manufacturer is liable to pay penalty not exceeding the duty payable on the excisable goods or rupees ten thousand whichever is greater.

Tribunal in case of M/s. Andhra Cements Limited {2005 (190) ELT 463} upheld the imposition of penalty amount equal to 10 per cent of defaulted amount, when the assessee defaulted in payment of central excise duty on the due date.

14.4.1 M/s. Andhra Cements Limited, Durgapuram in Guntur commissionerate and three other manufacturers in Hyderabad III commissionerate, did not pay duty of Rs.13.21 crore by due dates in respect of cement and cement clinkers cleared during the period between April 2004 and December 2004. This was paid by them in instalments between July 2004 and May 2005. Despite the fact that the duty and interest due were paid by the assessee only after the expiry of one month, action was not initiated by the department to levy penalty equivalent to duty defaulted. Penalty not imposed in these cases amounted to Rs.13.21 crore.

On this being pointed out (January, February and November 2005), the Ministry while admitting objection reported (December 2006) payment of defaulted duty of Rs.6.55 crore alongwith interest of Rs.0.75 crore by an assessee and issue of show cause notices to all four assesseees for imposing penalty.

14.4.2 M/s. Sun Earth Ceramics Limited in Raigad commissionerate defaulted several times in payment of duty on due dates between April 2003 and March 2005. Default period for each month was more than a month from due date. The total duty defaulted during the said period amounted to Rs.2.84 crore. Penalty upto Rs.2.84 crore was leviable under the rules but

was not levied. Even in terms of Tribunal ruling in M/s. Andhra Cements Limited penalty worked out to Rs.28.38 lakh.

On this being pointed out (October 2005), the Ministry admitted the objection and intimated (November 2006) issue of two show cause notices seeking to impose penalty (November 2005 and September 2006).

14.4.3 M/s. Prakash Industries Limited, Champa in Raipur commissionerate, manufactured blooms and billets and cleared them between August 2004 and November 2004 on which duty of Rs.72.39 lakh was not paid by the due dates. Duty was paid on 9/10 March 2005. Since duty was paid after a delay ranging from 3 to 6 months assessee was liable to pay interest of Rs.7.74 lakh and penalty of Rs.72.39 lakh under rule 25 ibid.

On this being pointed out (May 2005), department stated (August 2006) that interest of Rs.8.97 lakh had been recovered in October 2005 and matter was under investigation for levy of penalty.

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

14.5 Other cases

In 45 other cases of interest and penalty, the Ministry/department had accepted objections involving duty of Rs.1.04 crore and reported recovery of Rs.0.62 crore in 43 cases till December 2006.

CHAPTER XV : 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 :

15.1 Cess not paid under Textiles Committee Act

Under section 5A(1) of the Textiles Committee Act, 1963 read with notification dated 1 June 1997, issued by the Ministry of Commerce, cess at 0.05 per cent ad valorem is leviable on all textiles (chapters 50 to 63). For this purpose textiles, inter-alia, include fabrics made wholly or partly of cotton, wool, silk, artificial silk or other fabrics. The authority to collect such cess is vested with 'Textile Committee', constituted under the Act, *ibid*.

15.1.1 Test check of records of thirty three assesseees in Gujarat, Himachal Pradesh, Maharashtra and Punjab engaged in the manufacture of textile material, articles and fabrics falling under chapters 51, 52, 54 and 55, revealed that the assesseees did not pay textile cess amounting to Rs.2.65 crore between the period from April 1996 and March 2005. The Committee also did not demand it.

On this being pointed out (between November 1999 and December 2005), the Ministry of Textiles stated (between August and December 2006) that two assesseees had paid cess of Rs.4.92 lakh and the Committee had been pursuing for recovery in twenty two cases. Reply in remaining cases had not been received (December 2006).

15.1.2 In the case of Pasupati Fabrics Limited {2004 (165) ELT 35 (Del)}, Delhi High Court decided that textile cess is leviable on 100 per cent export oriented unit also as no exemption notification was issued under section 5E of Textile Act 1963; hence liability to pay cess cannot be denied.

M/s. Indoworth India Limited, Butibori, a 100 per cent export oriented unit in Maharashtra engaged in the manufacture of textile yarn falling under sub-heading 5107.11 and 5509.41 cleared 1,28,39,175 kilogram of finished goods valued Rs.416.71 crore for export from April 2001 to March 2004. However, no textile cess was paid on these clearances. This resulted in non-payment of textile cess of Rs.20.84 lakh.

This was pointed out in November 2006; reply of Textile Committee/Ministry of Textiles was awaited (December 2006).

15.2 Cess not levied under Industries Act

According to provisions of section 9(1) of Industries (Development and Regulations) Act, 1951 and Cement Cess Rules, 1993 made thereunder, cess at the rate of Re.0.75 per tonne is leviable on cement manufactured and removed from the factory. Rules 3 and 4 of the Rules, *ibid* further stipulate that every manufacturer of cement who is liable to pay cess shall submit to the Development Commissioner for Cement Industry, Government of India, a monthly return relating to stocks of cement produced and removed during the preceding month and

shall remit the amount of cess to the said authority by demand draft by 15th of the following month.

M/s. Sagar Cements Limited and four others in Hyderabad-III commissionerate cleared 34.49 lakh tonne of cement produced in their factories during the period from April 1999 to October 2005 without payment of cess even though the installed capacity of these factories which were operating on rotary kilns was far in excess of 99,000 tonnes per annum. When non-payment of cess by four of these assesseees for earlier periods was pointed out through para 12.1 of the Audit report for the year 2002-03 (Audit Report No.11 of 2004), the Ministry of Commerce & Industry, stated (August 2003) in three cases that the demand of Cement Manufacturers Association for exemption of cess for mini cement plants was under consideration and further stated that in the remaining one case defaulted demands were referred to revenue authorities for recovery under Revenue Recovery Act.

There were no exemption orders/recoveries thereafter and the assesseees continued to default in the payment of the dues in these four cases for subsequent periods also. The amount of cess not paid by the five assesseees amounted to Rs.25.87 lakh.

On this being pointed out (March 2006), the Ministry of Commerce and Industry intimated (October 2006) recovery of cess of Rs.8.26 lakh from an assessee and issue of notices to remaining assesseees.

15.3 Other cases

In 13 other cases of cess, department had accepted the objection involving cess of Rs.12.20 lakh and reported recovery of Rs.10.58 lakh till December 2006.

CHAPTER XVI : MISCELLANEOUS TOPICS OF INTEREST

16.1 Loss of revenue due to delayed action

Short payment or non-payment of duty on excisable goods is to be recovered by issue of show cause notice under section 11A of the Act within a period of six months (one year after 11 May 2000) in normal cases of short levy/non-levy of duty.

Jaipur-I commissionerate, raised a demand of Rs.2.35 crore against M/s. Hindustan Copper Limited, Khetrinagar. The tribunal set aside the demand (February 2004) as it was found time-barred. Audit noticed that the demand related to short levy of duty due to misclassification of excisable goods by the assessee which was also pointed out by audit in August 1997 and September 1998. Department did not take immediate action to issue show cause notice. The show-cause-notice was issued after a delay of more than two years in January 2000. Delay in issue of show cause notice led to setting aside the demand of Rs.2.35 crore, which was a loss of revenue to Government.

On this being pointed out (January 2006), department stated (February 2006) that there appears to be no loss of revenue, as the buyer of the goods would have taken credit of said amount. It was only a notional loss and not a tangible loss.

Reply given by department is not tenable and not relevant, as final product of one manufacturer can be an input for another manufacturer who buys them. Short levy of duty on the part of the former cannot be ignored by assuming that corrective action taken in his case will be neutralized by the latter who will take cenvat credit of the duty. Timely action was required to be taken in the matter to prevent this loss.

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

16.2 Probable fraudulent availment of cenvat credit and duty payment

NCCD on partially oriented yarn of polyesters falling under heading 54.02 has been levied with effect from 1 March 2003.

M/s. Modern Petrofils Limited, in Karjan in Vadodara I commissionerate, manufactured and consumed captively 1,70,65,836 kilograms POY for manufacture of texturised yarn, without payment of NCCD of Rs.1.60 crore during the period from March 2003 to July 2004. Non-payment of NCCD was detected by Director General of Central Excise Intelligence, Vadodara. The assessee on 27 September 2004 reported to them that he had paid NCCD of Rs.1.18 crore on yarn consumed captively between March 2003 and July 2004, on 31 July 2004. Scrutiny of records in audit revealed that payment of Rs.1.01 crore for the period between 21 May 2003 and 31 July 2004 was made from cenvat credit account. Cenvat credit was generated by taking credit on the basis of supplementary invoices issued for captive consumption of yarn without payment of duty. Thus, the amount of Rs.1.01 crore reportedly paid by assessee, was not actually paid and resulted in evasion of duty.

On this being pointed out (October 2004), department stated (February 2005) that a show cause notice had been issued to the assessee. Further development in the case had not been intimated.

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

16.3 Misuse of duty payment facility through cheques

Explanation (b) under rule 8(1) provides that if the assessee chooses to pay the duty by cheque, the date of presentation of the cheque in the designated bank shall be deemed to be the date on which the duty has been paid subject to realisation of the cheque so presented. Obviously, if the cheque presented is not honoured by the designated bank, due to insufficient cash balances in assessee's account, it would amount to clearance of excisable goods without payment of duty and the delayed remittances would attract interest upto the date of realisation. If duty and interest are not paid within a period of one month from the due date, rules provide for levy of penalty.

M/s. Andhra Cements Limited in Guntur commissionerate, engaged in the manufacture of 'cement clinkers' and 'cement' had been paying monthly, excise duty through cheques. The assessee had been issuing cheques on outstation banks against his accounts and presenting the challan containing bank's acknowledgements to the Range Officer as proof of payment of duty. The designated bank adjusted the amounts to Government account as and when the cheques were realized. It was found in audit that in respect of 59 cheques deposited between 5 October 2004 and 22 January 2005 towards duty/interest payments for July, August, September and November 2004 involving Rs.4.08 crore, the duty due was not adjusted to Government account as the assessee did not have sufficient balances in his bank accounts.

On this being pointed out (February 2005), department while confirming the facts, intimated (July 2005 and March 2006) that the duty had been realized in instalments on different dates between March 2005 and January 2006 and that the assessee had also paid interest of Rs.57.44 lakh against the amount of Rs.78.75 lakh payable towards interest due on belated remittances of duty.

By presenting invalid cheques without requisite balances in bank accounts, the assessee sought to evade central excise duties to the extent of Rs.4.08 crore. Department, on their part, did not insist on payment of dues through valid instruments despite the fact that the cheques presented on 59 occasions towards payment of duty were not honoured by the designated bank. By this modus operandi, the assessee derived undue financial accommodation as the dues were adjusted to Government account with delays ranging from 2 to 13 months. Report on recovery of balance amount of interest of Rs.21.31 lakh and penal action taken against assessee had not been received (April 2006).

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

16.4 Non-transfer of amount of duty to Consumer Welfare Fund

Section 11B of Central Excise Act provides for grant of refund if duty relating to refund claim was paid by manufacturer and the incidence of such duty had not been passed on by him to any other person. In case the duty incidence had been passed on to any other person, the amount of refund shall be credited to the consumer welfare fund.

M/s. EPC Industries Limited, in Nasik commissionerate, paid duty of Rs.67.68 lakh as parts of drip irrigation system under protest. The assessee claimed refund of duty so paid when the civil appeal filed by the department in the assessee's case was dismissed by the Supreme

Court {2002(146) ELT A 88}. The refund claim was rejected by adjudicating authority in April 2005 as any evidence for non absorption of duty paid on intermediate products in the final product was not produced. However, the adjudicating authority did not order for transfer of amount of Rs.67.68 lakh to the consumer welfare fund as required under law.

On this being pointed out (August 2005), the Ministry admitted the objection and stated (November 2006) that a corrigendum to the order had been issued rejecting refund claim and ordering credit of amount to consumer welfare fund in October 2005.

16.5 Other cases

In 322 other cases of miscellaneous topics of interest, the Ministry/department had accepted objections involving duty of Rs.4.67 crore and reported recovery of Rs.4.12 crore in 318 cases till December 2006.