



Central Board of Excise & Customs

# विधि - वार्ता

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In-house Monthly Newsletter



## Editorspeak

*The efforts put in by the Directorate of Legal Affairs, to bring out the first issue of Vidhi-Varta has been highly appreciated. The first issue has found wide acceptance and its success motivates us. We are all set to ensure that this in-house monthly newsletter is nurtured through its infancy and acquires the dimensions as the most valued publication for the departmental officers. Our endeavour is to make every issue more informative. We have also been concentrating to ensure correctness and accuracy of the information provided.*

*We would like to thank the Member (L&J) for her support and encouragement in bringing out this issue. The topical issue the impact of "Filing of the Appeals before the wrong forums" emphasises the need to opt for the right forum to file the appeals. The appeal filed before the wrong forum is an error in law and will not be condoned easily.*

*Other sections of Vidhi-Varta, such as News, Recent Decisions and Potpourri will continue in their endeavour to update the readers.*

*Your suggestions and comments on the issue are valuable for us, so please do send them.*

## News

- In Civil Appeal No. 7283/2012, M/s Shree Renuka Sagers Limited Vs CC, Mangalore on 09/11/2012, the Hon'ble Supreme Court directed the Appellant to the deposit entire Duty of Rs. 14.40 Crores & 50% of Penalty Amount which comes to Rs. 7.20 Crores, total Rs. 21.60 Crores. The order of the Tribunal against which the said Civil Appeal was filed is listed in the section of recent decisions.
- An interactive seminar on Anti Dumping Investigations was conducted on 8<sup>th</sup> November 2012, at the New Custom House, New Delhi. The said Seminar was conducted by the representatives of WTO for the senior officers in the department and the Members of the CESTAT.
- CBEC has through the Directorate of Publication and Publicity set up a stall in the International Trade Fair, which commenced from 14<sup>th</sup> November, 2012.
- Shri Bishwajit Bhattacharya ASG has demitted his office on 9<sup>th</sup> November, 2012.
- Hon'ble Finance Minister had a meeting with the Attorney-General Shri G E Vahanvati and other Panel Counsels on 10<sup>th</sup> November 2012 to chalk out the road map for improving the department's representation in the cases before the Apex Court.
- As a result of Bunching of the cases before the AP High Court, 20 cases of renting of property and 18 cases of levy of education cess on the imports made under DEPB scheme have been disposed of.



Release of Vidhi Varta by Hon'ble President CESTAT & Member (L&J) on 26th October, 2012

## Filing of the Appeals before the wrong forums

It is always desirable and in the best interest of appellant to file appeal in proper form, before proper forum (authority or court), duly supported with relevant documents, duly verified, along with the prescribed fees etc., within the prescribed period of Limitation. In case the appeal is not filed properly, relaxations to condone delay or to rectify defects in documents, if provided in law, will depend on the discretion of concerned authority or court.

Statutory provisions in the Central Excise Act, 1944, Customs Act, 1962 and Finance Act, 1994 stipulate for filing of civil appeal against CESTAT's order in the Hon'ble Supreme Court in matters pertaining to valuation and determination of rate of duty for the purpose of assessment. In the matters other than those involving determination of the rate of duty or the valuation of the goods, the appeal against the order of CESTAT lies to the High Court.

In case the appeal that was, as per the provisions of the Act required to be filed in the High Court, is filed in the Supreme Court or vice versa, then the said appeal is said to be filed in the wrong forum. The concerned court will not entertain the appeal as it is filed in the wrong forum and will have to be withdrawn from the said forum for being filed at the correct forum. Such appeals are mostly dismissed as withdrawn. However, the Act does not provide any concession in cases where the appellate remedy was being pursued at the wrong forum. Invariably, by the time the

appeal is dismissed, the period of limitation as prescribed for filing the appeal before the High Court (one hundred and eighty days) or the Supreme Court (Sixty days), as the case may be, would have expired and the appeal before the correct forum is required to be filed with the application for condonation of delay.

The casual manner in which the appeals were filed by the department before the wrong forum has resulted in the dismissal of the departmental appeals only on the ground of delay as there is no provision in law for condoning the delay for the reason of pursuing the appellate remedy at wrong forum. The courts have ruled against the protection available in terms of Section 14 of the Limitation Act for excluding the period spent while pursuing the matter before a wrong forum. In the case of *Neeraj Jhanji v. Commissioner of Customs & Central Excise Customs Appeal No 16 of 2012*, Hon'ble High Court of Allahabad refused to condone the delay on account of the matter being pursued at wrong forum. While dismissing the appeal vide its order dated 6<sup>th</sup> August 2012, High Court observed ***Supreme Court has strongly deprecated such practice of forum shopping.***

Taking note of this, the Board has issued instruction dated 22<sup>nd</sup> September, 2011 from F.No. 390/Misc/100/2010-JC, directing the Commissioners to carefully examine the issue involved in the dispute and decide the correct forum where the appeal should be filed.



## RECENT DECISIONS

### SUPREME COURT



#### 2012-TIOL-107-SC-ST M/s Nagarjuna Constn Co Ltd Vs Government of India

Prior to 1<sup>st</sup> July 2007, the Service Tax on work Contracts was payable on at the applicable rate but the value for the payment of service tax was taken as 33% of the value of work contract. By way of Rule 3(3) introduced from 1<sup>st</sup> July 2007 service providers providing the work contract services were allowed to pay the service tax equivalent to 4% of the value of the work contract. However Rule 3 (3) of the 2007 Rules provided that the assessee who wants to avail of the benefit under Rule 3 of the 2007 Rules must opt to pay service tax in respect of a works contract before payment of service tax in respect of the works contract and the option so exercised is to be applied to the entire works contract and the assessee is not permitted to change the option till the said works contract is completed.

The appellant- assessee had already paid service tax on the basis of classification of works contract which was in force prior to 1<sup>st</sup> July, 2007. It cannot be said that the appellant had exercised a particular option with regard to the mode of payment of tax after 1st July, 2007 with regard to reclassified works contract.

Board had issued Circular No 98/1/2008-ST, dated 4.1.2008 clarifying that rule 3(3) was applicable only in respect of those work contracts for which the option is exercised prior to payment of the service tax. The said rule is not applicable in case were the service tax has already been paid as per the provisions of law as they existed prior to 1<sup>st</sup> July 2007. Supreme Court did not found any thing discriminatory in the said circular.



#### 2012-TIOL-105-SC-CUS M/s Thakker Shipping P Ltd Vs CC

CESTAT has power to condone delay in filing application consequent to Review by Committee of Chief Commissioners: it is competent for the Tribunal to invoke Section 129A(5) where an application under

Section 129D(4) has not been made within the prescribed time and condone the delay in making such application if it is satisfied that there was sufficient cause for not presenting it within that period. While making this pronouncement, the Supreme Court did not approve of the decision of the Larger Bench of Tribunal in case of Commissioner of Central Excise v. Azo Dye Chem - (2002-TIOL-448-CESTAT-DEL-LB).

### HIGH COURT



#### 2012-TIOL-890-HC-AHM-CX MGM Metallisers Ltd Vs Uoi

Search warrant issued in the name of the company registered at particular premises but not undertaking any manufacturing activities at that premises will not be invalid or the search without authorization. If during such search operations certain documents and evidences are recovered, the same can be recovered and taken note of by the departmental officers. In absence of any ground to show that there was personal malafide the contentions with regards to legality of search cannot be upheld.



#### Inox Air Products Ltd Vs CCE 2012-TIOL-856-HC-Mad-CX

Petitioner cannot demand a clarification from the Commissioner in terms of Rule 31 of the Central Excise Rules, 2002. Commissioner/ Chief Commissioner/ Board are not bound to issue the clarifications as and when demanded.



#### Asst Collector, Customs & Central Excise Division Vs M/s Pamwi Specialty And Tissue Paper Ltd 2012-TIOL-854-HC-Mad-CX

As per the provisos of the Central Excise Act, 1944, no prior sanction of Principal Collector/ Chief Commissioner is required before launching a prosecution. The Circular No 15/90-CX.6 dated 9<sup>th</sup> August 1990, is an internal instruction/ circular of the department detailing the steps that may be taken before launching the prosecution.

The complainant department should be given reasonable opportunity by the judicial magistrate for adducing the pre-charge evidence.

## CESTAT

### 2012-TIOL-1542-CESTAT-BANG M/s Shree Renuka Sugars Ltd Vs CC

Appellant imported “raw cane sugar” and claimed the benefit of Notification No 43/2002-Cus and 46/2002-Cus in terms of DFRC scheme. In terms of these notifications, the benefit was available only if the sucrose contents in the imported “raw cane sugar” was more than 98.5%. However as per the internal reports maintained by the assessee company the sucrose content was 98.1% to 98.3%. Also as per the copy of the report available with the customs laboratory and the entries made in the sample register the sucrose contents was only 98.1%. All these evidences clearly prove that test reports were manipulated/ tempered by overwriting to read 98.9% to fraudulently avail the benefit of these notifications.

Thus the duty has been demanded and also the penalty imposed on the company correctly.

### 2012-TIOL-1597-CESTAT-MUM Shiva Steels Rolling Mills Vs CCE

The appellant filed this appeal along with application for waiver of pre-deposit of dues amounting to Rs 6 crores on 6<sup>th</sup> May, 2010. The application for waiver of pre-deposit was adjourned six times at the request of the appellant and on the 7<sup>th</sup> time none appeared on behalf of the appellant in spite of notice nor any request for adjournment was made and thus the application was dismissed. Thereafter, the appellant filed an application for modification of the stay order. The same was adjourned twice on the request of the

appellant and then dismissed when none appeared next time and also no request for adjournment was made. The appellant again filed another application for restoration of the appeal.

Taking the note of all above facts, the Tribunal concluded that the intention of applicant was just to delay the decision of application for waiver of pre-deposit of dues. Accordingly, the Tribunal directed the applicant to deposit Rs 50,000 as cost before the application for restoration is taken up for hearing.

## POT POURRI

- ❖ In terms of the Rule 22 of CESTAT Procedure Rules, 1982 the proceedings before the Tribunal will automatically abet in case the appellant dies or is adjudicated insolvent or if the company is wound up unless the successor interests make an application for continuance of the said proceedings. However recovery proceedings in such case do not abet simultaneously.
- ❖ The negative list of Services has been made operational from 1<sup>st</sup> July 2012, and Accounting code 00441089 for the purpose of payment of service tax under the Negative List approach was prescribed. For the purpose of statistical analysis, service specific accounting codes have been restored. (Circular No 165/16/2012 –ST dtd 20<sup>th</sup> Nov 2012)
- ❖ Normally it is considered safe by the revenue officers to err on revenue side. However in a case before ITAT, ITAT has imposed a cost of Rs 25000 on the revenue. While imposing the cost tribunal stated “The valuable time of the Tribunal has also been lost in adjudicating the issue which is squarely covered by the judgement of the Hon’ble High Court. Therefore, the appeal of the assessee is allowed with costs of Rs.25,000/-.”

### सम्पादक मण्डल

श्रीमती संध्या बालिगा, संरक्षक

सदस्य (एल एण्ड जे) केन्द्रीय उत्पाद एवं सीमा शुल्क बोर्ड

श्री संजीव श्रीवास्तव, आयुक्त

श्री के.पी. सिंह, अपर आयुक्त

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