CHAPTER II
EXEMPTIONS

Under section 5A(1) of the Central Excise Act, 1944, the Government is empowered to exempt goods attracting excise duty 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. A few illustrative cases of incorrect allowance of exemptions from levy of duty totalling Rs. 80.45 crore are mentioned in the following paragraphs. These observations were communicated to the Ministry through 17 draft audit paragraphs. The Ministry/department has accepted (till December 2009) the audit observations in three draft audit paragraphs with a financial implication of Rs. 85.79 lakh of which Rs. 7.56 lakh has been recovered.

2.1 Exemption on setting up of power plants

2.1.1 A notification dated 1 March 2006 exempts excise duty on all goods supplied against international competitive bidding if goods are exempted from the duties of customs, when imported into India. Further, customs notification dated 1 March 2002 (as amended on 26 May 2006) exempts customs duty and additional customs duty on thermal power plant of a capacity of 700 mega watt (MW) or more, for setting up mega power project in the States of J & K, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or thermal power plant of a capacity of 1000 MW or more, for setting up mega power project in other remaining states. The said customs notification also exempts hydel power plant of a capacity of 350 MW or more for setting up mega power project in the above mentioned nine states or hydel power plant of a capacity of 500 MW or more for setting up of mega power project in other remaining states.

2.1.1.1 M/s BHEL, in Bhopal commissionerate, manufactured thermal and hydel power plants of various capacities. The assessee cleared four thermal power plants of 250 MW each, six plants of 660 MW each and five plants of 500 MW each for setting up mega power projects in the States of Chhattisgarh and Bihar. Similarly, it cleared four plants of 150 MW each for the Kameng Hydro Electro Power Project in the State of Assam, four plants of 130 MW each and eight plants of 200 MW each to Hydro Electric Power Projects in the State of Himachal Pradesh. Each plant was cleared for the projects on different dates between April 2007 and March 2008. The assessee did not pay duty at the time of clearance, availing of the aforesaid exemption. Audit observed that neither the thermal power plants cleared from the factory were of 1000 MW capacity nor were the hydel power plants cleared from the factories of 350 MW (for Assam) or 500 MW (for Himachal Pradesh) as was prescribed in the notification, to be eligible for the exemption from duty. Accordingly, the condition of the customs notification was not satisfied. Therefore, these plants were not eligible for exemption from duties of customs as well as central excise. This resulted in incorrect availing of exemption of Rs. 26.23 crore which was recoverable from the assessee with interest and penalty.

On this being pointed out (March 2009), the department stated (March 2009) that the matter will be examined.

The reply of the Ministry has not been received (December 2009).

2.1.1.2 Similarly, M/s Larsen and Toubro (ECC Division) Pithampur, in Indore commissionerate, engaged in the manufacture of towers and structures, cleared four plants of 250 MW each on different dates between November 2006 and March 2008 for M/s Jindal Power Ltd., Raipur, Chhattisgarh for setting up O.P. Jindal Super Thermal Power Plant, Raigarh. The assessee did not pay duty at the time of clearance availing of exemption under the aforesaid exemption. Audit observed that the thermal power plant cleared from the factory was not of 1000 MW capacity and accordingly the eligibility condition of the customs notification was not satisfied. Accordingly, these plants of 250 MW were not exempt from duties of customs and, therefore, were also not eligible for exemption from excise duty. This resulted in incorrect grant of exemption of Rs. 6.99 crore which was recoverable with interest and penalty.

On this being pointed out (March 2009), the department stated (March 2009) that it was a plant of 1000 MW capacity having four units of 250 MW each which was corroborated by the technical literature of the agency for whom the goods were cleared and accordingly a certificate to this effect was issued by the designated authority.

The reply is not tenable as the project authority certificate clearly states that this is a project having four plants of 250 MW each and as such each plant is below the capacity of 1000 MW and the condition of notification is not satisfied. Further, the reply is also contrary to the department's stand taken in a similar case of M/s Krishna Electrical Industries Ltd., Morena where exemption was disallowed on three plants of 660 MW each for setting up 1000 MW project and demand for duty had been confirmed (order-in-original dated 19 February 2008). Accordingly, the clearance of goods under exemption was incorrect and duty was recoverable.

The reply of the Ministry has not been received (December 2009).

2.1.1.3 M/s Crompton Greaves Ltd., in Bhopal commissionerate, engaged in the manufacture of electric transformers and parts thereof, cleared parts and ancillaries for setting up of three plants of 660 MW capacity each on different dates between June 2007 and November 2008 for Sipat Thermal Power Project in the State of Chhattisgarh. The assessee did not pay duty at the time of the clearance availing of exemption under the aforesaid notification. Audit observed that the thermal power plant cleared from the factory was not of 1000 MW capacity but this project had three different units of 660 MW capacity each and accordingly the eligibility condition of the customs notification was not satisfied. As a result, these plants of 660 MW were not eligible for exemption from duties of customs and were also not eligible for exemption from excise duty. This resulted in incorrect availing of exemption from duty of Rs. 2.70 crore which was recoverable with interest and penalty.

On the matter being pointed out (May 2009), the department stated (May 2009) that it was a thermal power project of 1000 MW capacity and a certificate to this effect was issued by the designated authority.

The reply is not tenable as the project authority certificate clearly states that this is a project having three plants of 660 MW each and as such each plant is below the capacity of 1000 MW and therefore the condition of notification is not satisfied. Further, the reply is also contrary to the department's stand taken in a similar case of M/s Krishna Electricals Industries Ltd., Morena where exemption was disallowed on three plants of 660 MW each for setting up 1000 MW project and demand for duty had been confirmed (order-in-original dated 19 February 2008). Accordingly, the clearance of goods under exemption was incorrect and duty was recoverable.

The reply of the Ministry has not been received (December 2009).

2.1.2 Under a notification dated 1 March 2006, all goods supplied against international competitive bidding, are exempt from excise duty provided that these goods are exempt from the duties of customs and additional duty leviable under section 3 of customs tariff when imported into India. The customs notification dated 10 September 2004 (as amended) provides that the material required for the manufacture of final goods when imported into India are exempt from the whole of customs duty and additional duty of customs leviable thereon provided that the importer has been granted advance licence by the Director General of Foreign Trade and the licence so granted contains the description, value and quantity of materials allowed for import.

M/s GEI Industrial Systems Ltd., Bhopal in Bhopal commissionerate, engaged in the manufacture of heat exchangers/industrial fans and parts thereof cleared one air cooled condenser for construction of 80 MW coal based captive power plant at Gummdipoondi (Tamil Nadu) during the period from September 2008 to March 2009 without payment of duty to M/s Shriram EPC, Chennai who was the main contractor for execution of the work of the power plant. Audit observed that the exemption from duties of customs was availed of, without advance licence as was required under the aforesaid exemption notification. Therefore, the goods were not eligible for exemption from duties of customs. Resultantly, the clearance of goods without payment of excise duty of Rs. 1.03 crore during September 2008 and March 2009 was incorrect. The duty was recoverable with interest.

The matter was pointed out in June 2009 and October 2009 respectively to the department/Ministry, its replies have not been received (December 2009).

2.1.3 A notification dated 8 September 2005 as amended on 30 December 2005 exempts all items of machinery required for initial setting up of a project for the generation of power and using non-conventional materials, from the whole of duty of excise subject to the condition that the manufacturer proves to the satisfaction of the deputy/assistant commissioner of central excise that there is a valid agreement between the producer of power and the purchaser for the sale and purchase of electricity generated using non-conventional materials for a period of not less than ten years from the date of commissioning of the project.

M/s V.A. Tech Hydro India (Pvt.) Ltd. Mandideep, in Bhopal commissionerate, engaged in the manufacture of electric generators and parts thereof, cleared an A.C. generator of 9.8 MW, valuing Rs. 1.08 crore, on 2 September 2006 after availing of excise duty exemption under the aforesaid

notification to M/s South Asian Agro Industries Ltd. for setting up a 9.8 MW biomass fuel based power plant at Khajuri village, district Raipur. The designated authority issued a certificate on 21 June 2006 stating that there was a valid power purchase agreement for a period of ten years. However, the certificate issued was not correct as actual agreement was executed on 30 June 2006. Further scrutiny of agreement executed on 30 June 2006 between M/s South Asian Agro Industries Ltd. (producer of power) and Chhattisgarh State Electricity Board (purchaser) indicated that the agreement was in force only for 3 years from the date of its signing during which the company would start commercial operation, failing which the agreement was to be deemed as cancelled and after commercial operation of the power plant, the same would remain in force up to the financial year 2014-15 i.e. for a period less than 10 years. Since the said agreement was valid up to 31 March 2015 i.e. for a period less than 10 years, the eligibility condition of the said notification was not fulfilled and accordingly the grant of exemption of duty of Rs. 17.62 lakh was incorrect.

On this being pointed out (October 2007), the department stated (February 2008) that the condition number one of the final power purchase agreement which was executed on 23 November 2006 clearly stipulates that after commercial operation of power plant, the agreement will remain in force for a period of 10 years for the purchase or sale of power to the Board.

The reply of the department is not tenable as the goods were cleared on 2 September 2006 without payment of duty in pursuance of agreement dated 30 June 2006 which was valid for less than ten years. Besides, the agreement executed subsequently on 23 November 2006 after clearance of goods can not be applicable retrospectively and accordingly the grant of exemption was incorrect and duty was recoverable from the assessee.

The reply of the Ministry has not been received (December 2009).

2.2 Exemption on textiles and textile goods

2.2.1 A notification (No.29/2004-CE) dated 9 July 2004 prescribes an effective rate of duty of eight or four per cent ad valorem in respect of specified textiles and textile articles of chapter 50 to 63 of the Central Excise Tariff Act, 1985. Another notification (No. 30/2004-CE) dated 9 July 2004 grants full exemption of duty if cenvat credit on inputs or capital goods is not used in respect of the said specified textiles and textile goods. Further, the Board clarified on 28 July 2004 that there was no restriction on the availing of the benefit of both the notifications simultaneously, provided that the manufacturer maintained separate account of inputs used in manufacturing of dutiable and exempted goods.

The Supreme Court in the case of M/s Bombay Dyeing & Mfg. Co. Ltd. {2007 (215) ELT 3 (SC)} held that if cenvat credit is reversed before utilisation, it would amount to not taking of credit.

M/s Janki Corporation Ltd., M/s Bohra Synthetics Pvt. Ltd., and M/s Sona Processors (I) Ltd., in Jaipur II commissionerate, engaged in the processing of man-made fabrics cleared its final products under both the aforesaid notifications during the period from July 2004 to March 2005. Audit noticed

that the assessees were having stock of common inputs (dyes and chemicals) as on 9 July 2004 on which cenvat credit had been availed of. These inputs were subsequently used in manufacture of dutiable as well as exempted goods. Additionally, cenvat credit of inputs used in the manufacture of exempted goods was not reversed before its utilisation. Cenvat credit was subsequently reversed after its utilisation alongwith interest. Accordingly the assessees were not entitled to avail of exemption under the notification No. 30/2004-CE dated 9 July 2004 and were liable to pay duty on the clearances effected. This resulted in non-payment of duty of Rs. 19.73 crore.

On the matter being pointed out (April 2009), the department stated (May 2009) that the factual position was being ascertained.

The reply of the Ministry has not been received (December 2009).

2.2.2 In terms of condition No. 5 below serial number four of a notification dated 1 June 2002, concessional rate of duty on finished goods is applicable if these are manufactured from raw material (textile fabrics) on which appropriate duty of excise leviable under the first Schedule to the Central Excise Tariff Act, 1985 and the Additional Duties of Excise (Goods of Special Importance) Act, 1957 has been paid.

The Supreme Court in the case of C.C.E. Vadodara v/s Dhiren Chemical Industries {2002 (139) ELT 3 (SC)} held (May 2002) that the word "appropriate duty of excise has already been paid" means that the specified duty must have been paid and 'nil rate of duty' is no duty. It, therefore, transpires that whenever an exemption is subject to the condition that 'appropriate duty of excise has already been paid on the inputs', the exemption will not be available 'if the inputs are exempt from excise duty or are chargeable to 'nil' rate of duty'.

M/s Auro Textiles Baddi, in Chandigarh I commissionerate, besides manufacturing processed fabrics (under CETH 52.07) from duty paid grey fabrics, also manufactured finished goods from raw material which were not duty paid. The finished goods manufactured from non-duty paid inputs were cleared at concessional rate under the aforesaid exemption notification. This was not correct and resulted in short payment of duty of Rs. 35.47 lakh during 1 June 2002 to 25 September 2002.

On this being pointed out (January 2004), the department intimated (May 2004) that a show cause notice demanding Rs. 1.48 crore for the period from 26 September 2002 to 28 February 2003 had been issued. Action taken for recovery of duty for the earlier period from 1 June 2002 to 25 September 2002 has not been intimated.

The reply of the Ministry has not been received (December 2009).

2.2.3 By a notification dated 25 March 1986, specified goods, if manufactured in a factory as a job work and used in relation to the manufacture of final products specified in the said notification, are exempt from the whole of the duty leviable thereon. By another notification dated 9 July 2004, polyester filament yarn falling under CETH 54.02 has been excluded from such specified goods.

M/s Beekaylon India Ltd., in Vapi commissionerate, removed polyester filament yarn valuing Rs. 81.92 lakh between 11 July 2004 and 19 July 2004 for job work without payment of duty of Rs. 23.43 lakh. Availing of the exemption was not correct and duty was recoverable in view of the aforesaid notification dated 9 July 2004.

On the matter being pointed out (February 2006), the department stated (September 2006 and April 2008) that the assessee was eligible to remove the said goods for job work without payment of duty under rule 4(5)(a) of the Cenvat Credit Rules, 2004. It further stated that show cause notice demanding Rs. 23.43 lakh had been issued on 20 September 2007 to safeguard the Government revenue.

The reply is not tenable in view of the notification dated 9 July 2004 which amended the general exemption notification dated 25 March 1986. Additionally, this will prevail over the general rule quoted by the department {rule 4(5)(a) of the Cenvat Credit Rules, 2004}, thereby denying the facility of removal of polyester filament yarn without payment of duty to job worker. This also indicates that a contradiction exists between the notification and the Cenvat Credit Rules which needs to be rectified by the Government.

The reply of the Ministry has not been received (December 2009).

2.3 Exemption based on installed capacity

Notification dated 31 July 2001 provides exemption on specified goods cleared from the industrial units in Kutch district of Gujarat. The exemption notification provides exemption to the extent of the original value of plant and machinery installed in the factory on the date of commencement of commercial production. The Ministry clarified on 17 October 2001 that the subsequent investment should be ignored as giving benefit of subsequent investments would not only complicate the scheme but the quantum of benefit available to a unit would also keep changing.

M/s Euro Ceramics Ltd. Bhauchau (Kutch), in Rajkot commissionerate, had original investment of Rs. 24.06 crore in plant and machinery and installed capacity of 3,580 tonne to manufacture vitrified tiles, on the date of commencement of commercial production i.e. on 5 October 2003. Subsequently, the assessee expanded the capacity of plant and machinery by investing Rs. 97.28 crore during the years 2004-05, 2005-06 and 2006-07. The assessee was allowed the benefit on the expanded capacity of 79,971 tonne of vitrified tiles during the year 2005-06 and 2006-07 which was not correct. This resulted in excess grant of exemption of Rs. 10.20 crore.

On the matter being pointed out (March 2008), the department stated (September 2008) that the benefit was rightly allowed as the chartered engineer had certified the addition of fixed assets upto 31 December 2005.

The reply is not tenable because as per the enabling notification, the unit set up till 31 December 2005 was eligible for exemption but the benefit was admissible to the extent of the original value of investment on plant and machinery made on the date of commencement of commercial production (i.e. 5 October 2003).

The reply of the Ministry has not been received (December 2009).

2.4 Exemption on machinery and parts thereof

2.4.1 Under a notification dated 8 January 2004, all items of machinery including instruments, apparatus and appliances, auxiliary equipment and their components/parts required for setting up of water supply plants and pipes needed for delivery of water from its source to the plant and from there to the storage facility, are exempt from duty subject to the condition that a certificate issued by the collector/deputy commissioner/district magistrate of the district in which the project is located, is produced to the deputy commissioner/assistant commissioner of central excise, that such goods were cleared for the intended use, as specified above.

M/s BHEL Bhopal, in Bhopal commissionerate, cleared turbines, generators and parts thereof valuing Rs. 43.63 crore during the period from April 2007 to February 2008 under the said notification to M/s Patel Engineering Ltd. and M/s IVRCL for setting up Nettampad, Kalwakurthi and Koilsagar Lift Irrigation scheme in Mehaboobnagar district of Andhra Pradesh on the basis of exemption certificates issued by the designated authorities. The scrutiny of certificates revealed that the goods sold were not included in the list of items mentioned in the certificates on which exemption was granted. Thus, the exemption of Rs. 7.19 crore availed of on these goods was not correct and duty was recoverable.

On this being pointed out (March 2009), the department stated (March 2009) that the matter was already in its knowledge.

The reply of the department is not tenable as no action has been taken to recover duty even after a period of more than one year of the clearance of goods in question.

The reply of the Ministry has not been received (December 2009).

2.4.2 Under a notification dated 1 March 2002 as amended on 10 September 2004, all goods supplied against international competitive bidding are exempt from the payment of duty subject to the condition that the goods are exempt from duties of customs and the additional duty leviable under the Customs Tariff Act, 1975.

M/s Dresser Rand (I) Pvt. Ltd., in Daman commissionerate, engaged in the manufacture of gas compressors and kits, cleared gas compressor valuing Rs. 6.93 crore between September 2005 and November 2005 to M/s Efficient Engineers (I) Pvt. Ltd. and M/s. Engineers India Ltd., (agencies which were working on behalf of Oil and Natural Gas Corporation) without payment of duty. Audit observed that the assessee had discharged the liability of customs duty on all the imports. The exemption availed of was not, therefore, correct and excise duty of Rs. 1.13 crore was recoverable.

On the matter being pointed out (May 2006), the department stated (December 2006) that the assessee imported inputs and assembled gas compressor kit/package. Under the notification dated 10 September 2004, it was not a pre-requisite that such indigenous manufactured goods should have been manufactured out of imported raw material after availing of the exemption of

customs duty and additional duty of customs but the condition was that the goods should be exempt, which was satisfied as the said goods were exempt under the notification dated 1 March 2002.

The reply is not acceptable as the exemption under the notification dated 1 March 2002 is admissible if the goods are imported by the Oil and Natural Gas Corporation/Oil India Ltd. or its sub-contractor. In the present case, however, the assessee is neither the Oil and Natural Gas Corporation/Oil India Ltd. nor its sub-contractor and hence exemption from duty was not available. Therefore, the goods were imported alongwith other goods on payment of customs duty.

The reply of the Ministry has not been received (December 2009).

2.5 Exemption linked to retail sale price

2.5.1 By a notification dated 1 March 2003, as superseded by notification dated 1 March 2006, and 1 March 2007, vacuum and gas filled bulbs of retail sale price not exceeding Rs. 20 per bulb are exempt from duty, in excess of the duty at the rate of eight per cent ad valorem. The Central Excise Tariff Act, 1985 classifies the vacuum and gas filled bulbs of retail sale price not exceeding Rs. 20 per bulb under the heading 8539.29.10 whereas such bulbs of retail sale price exceeding Rs. 20 per bulb or set of bulbs not sold individually are classifiable under the heading 8539.29.90 and attract duty at the rate of 16 per cent ad valorem.

M/s Surya Roshni Ltd. (Lighting Division) Malanpur, in Indore commissionerate, cleared 1.40 crore sets consisting of three bulbs (2+1 free scheme) in a single package set with the retail sale price of Rs. 24 (100W) and Rs. 22 (60W) per set against actual retail sale price of Rs. 36 and Rs. 33 per set respectively, which was crossed on the sets and also disclosed the fact on the sets that "units not for sale individually". The assessee availed of exemption under the aforesaid notification. Since the retail sale price of multi pack sets of three bulbs were Rs. 24 and Rs. 22 per set and individual sale of bulb was restricted, availing of the exemption by classifying the three bulbs set (a single pack) under heading 8539.29.10 instead of 8539.29.90 was incorrect. This resulted in incorrect grant of exemption of Rs. 1.63 crore during the period from 2005-06 to 2007-08 which was recoverable alongwith interest.

On this being pointed out (November 2008), the department stated (November 2008) that the classification of three bulbs set under heading 8539.29.10 was correct in terms of the Tribunal's decision that specific entry is to be preferred to general entry {Metrowood Engineering Works 1989 (43) ELT 660 (Tri.)}.

The reply of the department is not tenable as the decision cited above is not relevant as a single bulb of retail price not exceeding Rs. 20 is only specifically classifiable under heading 8539.29.10 and not the set of three bulbs. The audit contention is further substantiated by the Board's clarification dated 28 October 2002 that the MRP printed on multi pack will be taken for the purpose of valuation in a situation where the individual items are sold in multi pack with an individual item supplied free. Accordingly, the benefit of exemption was not available.

The reply of the Ministry has not been received (December 2009).

2.5.2 Through a notification dated 1 March 2007, for cement falling under sub-heading 2523.29 in packaged form, where retail sale price of the goods was not required to be declared under the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (SWM Rules), the effective rate of duty was fixed at Rs. 400 per tonne and for cement cleared in packaged form of retail sale price not exceeding Rs. 190 per 50 kg bag, the effective rate of duty was fixed at Rs. 350 per tonne.

Rule 2(p) of SWM Rules 1977, define 'retail package' to mean a package containing any commodity which is produced, distributed, displayed, delivered or stored for sale through retail sales, agencies or other instrumentalities for consumption by an individual or a group of individual. Further, as per rule 2(q) of SWM Rules 1977, 'retail sale' in relation to a commodity, means the sale, distribution or delivery of such commodity through retail agencies or other instrumentalities for consumption by an individual or group of individuals. Furthermore, rule 2A of the aforesaid Rules stipulates that the provisions which necessitate printing of 'Maximum Retail Price' (MRP) on each pack, are not applicable to the packages, which are not intended for retail sale. Accordingly, for goods in packaged form not intended for retail sale, printing of RSP is not required under the SWM Rules, 1977.

The Board had clarified on 31 July 1998 that where affixation of MRP is not statutorily required, such package, even if voluntarily marked with MRP, will be assessed under section 4 only i.e. transaction value and not under section 4A. Further, the Supreme Court, in the case of M/s Jayanti Food Processing (P) Ltd. v/s CCE Rajasthan (Civil appeal no. 2819 of 2002) ruled that for assessing the goods on the basis of MRP, there had to be a 'requirement' under the SWM Act or the Rules made thereunder or any other law, for declaring the MRP on the package. However, if an assessee voluntarily displayed MRP on the pack, that was not relevant for the goods to be assessed based on the declared MRP (under section 4A of the Central Excise Act, 1944).

M/s Manikgarh Cement, in Nagpur commissionerate, engaged in the manufacture of cement classifiable under sub-heading 2523.29 cleared the product to the industrial users/construction companies for its consumption in construction work. During the period from 1 March 2007 to 6 May 2007, the assessee paid duty at Rs. 350 per tonne on the cement cleared to the said buyers on the ground that MRP of Rs. 190 was printed on each bag of cement so cleared. This was not correct as the goods cleared by the assessee were not meant for retail sale but for the consumption of industrial users/construction companies for construction work. The packaged form of the said goods did not fall under the definition of retail package as per the aforesaid provision. Therefore, printing of RSP on the said package was not required under rule 2A of the SWM Rules, 1977 and the transaction involved could not fall within the definition of retail sale in terms of rule 2(q) of the SWM Rules, 1977. Accordingly, the applicable rate of duty was of Rs. 400 per tonne instead of Rs. 350 per tonne for the said clearance of the goods. This resulted in short

payment of duty of Rs. 27.48 lakh on 53,356 tonne of cement cleared during the period from March 2007 to May 2007.

On the matter being pointed out (February 2008), the department stated (January 2009) that the goods were actually sold at Rs. 190 per bag thereby satisfying all the conditions of the notification dated 1 March 2007. The department also stated that the decision of the Supreme Court in the case of M/s Jayanti Food Processing (P) Ltd. and the Board's circular dated 31 July 1998 were not applicable in the instant case as the same were in relation to applicability of section 4A or 4 of the Central Excise Act, which was not the issue here.

The reply of the department is not tenable as the entire sale of the product was made to industrial users and goods were not sold or delivered through retail agencies for consumption by buyers but on contract price on which excise duty and VAT was charged separately. Therefore, these sale did not fall within the definition of retail sale as per rule 2(q) of the SWM Rules, 1977. Further, the proviso to the explanation of the said notification dated 1 March 2007 clarifies that "effective rate of duty for cement falling under sub-headings 2523.29 in packaged form, where the retail sale price of the goods are not required to be declared under the SWM Rules, 1977 shall be determined as is in the case of goods cleared in other than packaged form" i.e. at the rate of Rs. 400 per tonne. The Supreme Court decision in the case of M/s Jayanti Food Processing (P) Ltd. and the Board's clarification of 31 July 1998 are aptly applicable in the instant case as both are in relation to charge of duty with reference to MRP. Moreover, the assessee itself has paid duty at the rate of Rs. 400 per tonne from 7 May 2007.

The reply of the Ministry has not been received (December 2009).

2.6 Exemption on goods produced and consumed within the factory

A notification dated 16 March 1995, stipulates that inputs/capital goods manufactured in a factory and used within the factory of production can be utilised without payment of duty in the manufacture of the final product, provided the final product is cleared on payment of duty, except in specified conditions.

M/s J.K. Paper Ltd., in Bhubaneswar I commissionerate, manufactured and internally consumed 6,523 tonne of base paper for the manufacture of coated paper between December 2004 and June 2005 without payment of duty. The assessee's declaration indicated that the finished product should be at least 6,523 tonne against which the actual output was only 3,722 tonne. 2,801 tonne of excess base paper valuing Rs. 9.71 crore was stated to be utilised in the trial run of the plant and not in the manufacture of dutiable finished goods. Hence, the base paper was not exempt from duty. This resulted in incorrect availing of exemption of duty of Rs. 1.59 crore which was recoverable with interest.

On the matter being pointed out (January 2006), the Ministry stated (December 2009) that the coated paper machine was a second hand machine and during trial run the stabilisation of the plant took a long time incurring

high loss of material. It further stated that in the absence of any evidence regarding clearance of base paper, duty was not recoverable. However, a demand cum show cause notice had been issued in October 2009.

The reply of the Ministry is not tenable as the notification exempts the payment of duty only if input/capital goods manufactured in the factory are utilised for making duty paid final products. The exemption cannot be availed under any other conditions, such as trial run.

2.7 Exemption on goods supplied to the Indian Navy/Coast Guard

A notification dated 16 March 1995 as amended, exempts excise duty on goods supplied for use in the construction of warships of the Indian Navy or Coast Guard subject to the production of prescribed certificate from the appropriate authority, before the clearance of such goods. The said notification further exempts all goods other than cigarettes, if supplied as stores for consumption on board a vessel of the Indian Navy or Coast Guard.

M/s Nicco Corporation Ltd. (Cable Division) and M/s Garden Shipbuilders & Engineers Ltd., in Kolkata III and Kolkata V commissionerates, engaged in the manufacture of power cable and parts of internal combustion engines, cleared its manufactured goods to different shipbuilders at 'nil' rate of duty availing of the exemption under the aforesaid notification. In the first case, the assessee availed of exemption from duty claiming the goods to have been used for the construction of warship by the shipbuilder but failed to satisfy the conditions prescribed by the notification. In the second case, the assessee cleared the goods to different shipbuilders claiming the aforesaid exemption. Since the goods were not cleared to the Indian Coast Guard, exemption of Rs. 18.67 lakh and Rs. 13.05 lakh availed of, during the period from November 2004 to June 2005 and March 2002 to May 2005 was not correct.

On the above being pointed out (August 2005 and October 2006), the department accepted the audit observation in the first case and intimated (August 2008) confirmation of demand of Rs. 36.97 lakh (including penalty). In the second case, it stated (January 2007) that goods were cleared as stores for consumption on board a vessel of the Indian Coast Guard.

The department's reply is not tenable as the goods were not cleared directly to the Indian Coast Guard but to different shipbuilders. The audit observation is in consonance with the Supreme Court's decision in the case of Leader Engineering Works v/s Commissioner of Central Excise {2007 (212) ELT 168 (SC)} upholding the tribunal's order and reiterating that goods not supplied as stores directly to the Indian Navy but through shipbuilders will not be entitled for exemption.

The reply of the Ministry has not been received (December 2009).

2.8 Other cases

In seven other cases of incorrect exemptions involving duty of Rs. 67.12 lakh, the Ministry/department has accepted all the audit observations and reported (till December 2009) recovery of Rs. 7.56 lakh in five cases.