Chapter VI

Non-Compliance with Rules and Regulations

6.1 Introduction

We examined the records maintained by the assessees in relation to the payment of Central Excise duty and checked the correctness of duty payment and availing of Cenvat credit. We noticed cases of incorrect availing/utilisation of Cenvat credit, non/short payment of Central Excise duty and other issues involving revenue of ₹ 98.79 crore. We communicated these observations to the Ministry through 26 draft audit paragraphs. The Ministry/Commissionerate accepted (December 2015) the audit observations in 25 draft audit paragraphs and initiated/completed corrective action in 22 cases involving revenue of ₹ 95.94 crore which are listed in Appendix II. The Ministry is yet to respond to one draft paragraphs (December 2015). The objections are covered under three major headings :

Non-payment / Short payment of Central Excise duty

Cenvat credit

Other issues

6.2 Non-payment / Short payment of Central Excise duty

We noticed nine cases where duty was not paid/short paid. Ministry/department admitted observation in eight cases and initiated/taken corrective action in seven cases. These seven cases are detailed in appendix II. Remaining two cases are illustrated in following paragraphs:

6.2.1 Non-levy of duty on additional consideration as Sales Tax remission

As per Section 4(1)(a) of the Central Excise Act, 1944, when the duty of excise is chargeable on any excisable goods with reference to their value, then such value shall be the transaction value. Transaction value means the price actually paid or payable for the goods when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to or on behalf of, the assessee, 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 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 75 per cent 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.

Supreme Court in its judgment dated 28 February 2014 in case of M/s Super Synotex (India) Ltd. (2014-TIOL-19-SC) on similar issue already made it clear that the 75 per cent of Sales Tax retained by the assessee would form part of Assessable value and Excise duty is payable. Board also issued instructions vide F.No.6/8/2014-CX.1 dated 17 September 2014 on similar lines in light of above judgment and instructed that similar cases may be finalized on this ground.

M/s Garodiya Special Steel Ltd. in Raigad Commissionerate, engaged in the manufacture of Steel Bar, Billets, Ingots etc had opted for premature repayment of Sales Tax deferred liability during the year 2010-11 and 2011-12 under the above mentioned scheme. Scrutiny of the financial records of the assessee revealed that he had received discount of ₹ 5.26 crore due to premature prepayment of sales tax liability accrued at Net Present Value (NPV). The difference between the actual sales tax collected from customers and the payment made at NPV was shown as income in the accounts. Non-inclusion of sales tax amount collected but not paid to the Government in the assessable value resulted in undervaluation of goods to the extent of ₹ 5.26 crore with consequential short levy of ₹ 54.18 lakh which was recoverable with interest.

When we pointed this out (August 2012), department did not admit the objection and stated (March 2015) that SCN amounting to ₹ 85.99 lakh was under process of issue. However, department did not furnish reason for not accepting the objection.

Reply is not tenable as similar issues were reported in Audit Report No. 7 of 2015 (para 5.2.3) and Board issued specific instructions dated 17 September 2014 to deal such cases on the basis of Supreme Court judgment cited supra. Further, similar issue in Nasik Commissionerate (refer para 7.3.2.9) has been accepted by the department.

Reply of the Ministry was awaited (December 2015).

6.2.2 Short payment of duty due to adoption of incorrect value by Job Worker

As per Rule 17 of the Central Excise Rules, 2002, removal of goods from Export Oriented Unit (EOU) to Domestic Tariff Area (DTA) shall be made under an invoice and on payment of appropriate duty. Such unit shall maintain proper account relating to production, description of goods, quantity removed, duty paid and each removal made on an invoice. The unit shall also submit monthly Return form ER-2 to the Excise department. Rule 10-A of Central Excise Valuation (determination of price of excisable goods) Rules, 2000, prescribes that for goods manufactured on job work basis on behalf of a person (commonly known as principal manufacturer), the value for payment of excise duty would be based on the sale value at which the principal manufacturer sells the goods, subject to the condition that the buyer and seller are unrelated and the price being the sole consideration for sale. As per Rule 9 of Central Excise Rules, 2002, every person who manufactures or deals in excisable goods shall get himself registered with the Central Excise department and non-compliance would be liable for penal action.

M/s Tamil Nadu Minerals Limited (TAMIN), Chennai (not registered with Central Excise department) entrusted the job work of manufacture of Granite/Skirting slabs and Pillars to M/s PRP Exports, a 100 percent EOU by supplying rough blocks (Non excisable item). After processing the Rough Blocks, M/s PRP Exports cleared the goods (Polished slabs) to TAMIN, by delivering the goods at the agreed place (construction site) through Excise invoice, on payment of excise duty worked out on the agreed processing charges (November 2009 to February 2010). The goods were ultimately sold (November 2009 to January 2011) by TAMIN to M/s East Coast Construction and Industries Limited (ECCIL), Chennai.

On scrutiny of the sale invoices of TAMIN raised on M/s ECCIL, Chennai, audit noticed that TAMIN had realized ₹ 15.66 crore towards sale of said goods on which the duty liability worked out to ₹ 2.42 crore. However, the duty paid for the clearances of the above goods by M/s PRP Exports on behalf of TAMIN was only ₹ 1.21 crore which was worked out on the basis of job charges collected by M/s PRP Exports from TAMIN, which resulted in short levy of duty of ₹ 1.20 crore.

The objection was communicated to the Central Excise Commissionerate, Madurai (September 2011) and also to the Development Commissioner, MEPZ (October 2011). Development Commissioner forwarded (June 2012) a copy of the reply received from M/s PRP Exports, EOU wherein it was stated

that the transaction were over as soon as the goods were delivered to TAMIN through their sale bills and also there were no express or implied terms in the contract with regard to further sale by TAMIN and the transaction value entered in to by TAMIN with the third parties. However, as per terms of agreement TAMIN had entrusted to M/s PRP Exports, the entire activity of manufacture and transport of finished goods to the delivery point and payments are to be made at three stages – 70 per cent on sending bill to TAMIN, 25 per cent on receipt of slabs at construction site and balance after satisfactory laying in the building. As M/s PRP Exports, manufactured and delivered excisable goods on job work basis on behalf of the Principal manufacturer, the value of excisable goods was the transaction value of the said goods sold by TAMIN in terms of valuation rules cited above. Hence, Ms/ PRP Exports is liable to pay the differential duty arising due to incorrect valuation of cleared goods. Further, TAMIN being the person dealing in excisable goods, must have registered with the Central Excise department. Penalty is leviable on TAMIN for failure to obtain registration and non-compliance of central excise rule provisions to ensure procedural formalities as regards valuation of excisable goods by the job worker.

The Assistant commissioner of Central Excise, Madurai, replied (January 2015) that a show cause notice was issued to M/s PRP granites demanding duty of ₹ 3.93 crore without appropriating duty of ₹ 1.21 crore already paid besides appropriate interest and penalty in respect of clearances made to four parties for the period from November 2009 to March 2010, July 2010 to January 2011 and May 2011. In the same SCN, TAMIN was required to show cause why penalty should not be levied for non-registration and/or non disclosing to M/s PRP Exports, the value of finished goods which resulted in short payment of duty.

Audit is of the view that TAMIN evaded Central Excise duty fraudulently by not registering himself with department and making arrangement to clear goods from job worker at reduced price. Issue may be examined in details for earlier period and other clearances made by it.

Ministry re-iterated (October 2015) that SCN for ₹ 3.93 crore was issued to the job worker and ₹ 1.21 crore had already been paid by him. Ministry further stated that the job work done by the assessee was one time activity and not recurrent in nature and there was no similar activity by job worker till closure of unit in August 2012.

6.3 Cenvat credit

We noticed 14 cases of incorrect availing/utilization of Cenvat Credit by the assessees. Ministry/department admitted observation in all cases and initiated/taken corrective action in 13 cases. These 13 cases are detailed in appendix II. Remaining one case where action is under process, is illustrated in following paragraphs :

6.3.1 Non-reversal of input service credit attributable to Trading Activity

As per Rule 2 (e) of Cenvat Credit Rules 2004, "Exempted Service" means taxable service which is exempt from the whole of the Service Tax leviable thereon; or service, on which no Service Tax is leviable under Section 66B of the Finance Act 1994; or taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken. Board, vide Notification No. 3/2011-CE (NT) dated 01 March 2011, clarified that exempted service includes trading. Therefore, trading of goods is exempted service and no Service Tax is payable on this activity. Further, as per Rule 6 (3) of the said Rules, where the manufacturer of goods or the provider of output service, opts not to maintain separate accounts, shall (i) pay an amount equal to six per cent (five percent upto 31.03.2012) of the value of the exempted goods and exempted services or (ii) pay an amount proportionate to credit pertaining to exempted goods as determined under sub-rule (3A).

M/s Aurobindo Pharma Limited (U-I), Medak District under Hyderabad-II Commissionerate, engaged in the manufacture of Bulk Drugs falling under Chapter-29 of Central Excise Tariff Act 1985, used some inputs in manufacture of final products. However, some inputs were sold to outside customers during 2011-12 and 2012-13 which falls under 'Trading Activity'. As Trading Activity is an exempted service, the assessee was required to pay an amount equivalent to five or six per cent (as applicable) of value of exempted service which worked out to ₹ 64.61 lakh, as the assessee did not exercise any option under Rule 6(3) (ii) and did not follow the procedure specified under sub-rule (3A) ibid.

When we pointed this out (November 2013), Ministry admitted the objection (November 2015) and stated that Service Tax of ₹ 31.96 lakh along with interest of ₹ 8.93 lakh was recovered from the assessee and for balance amount, SCN was being issued to the assessee.

6.4 Other issues

We noticed three other observations relating to exemption, interest and cess. Ministry/department admitted observation in all cases and initiated/taken corrective action in two cases. These two cases are detailed in appendix II. Remaining one case where action is under process, is illustrated in following paragraphs :

6.4.1 Non-payment of Cess on Cement

Section 9(1) of the industries (Development and Regulation) Act, 1951 read with Cement Cess Rules, 1993 made there under, stipulates that every manufacturer producing cement in cement plants of capacity not lower than 99,000 tonne per annum based on rotary kiln and 66,000 tonne per annum based on vertical shaft kiln, shall pay cess at the rate of ₹ 0.75 per tonne of cement manufactured and removed from the factory. Rule 3 and Rule 4 of the said rules further stipulate that every manufacturer of cement, who is liable to pay cess shall submit to the Development Commissioner for cement industry, 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 15th of the following month.

M/s Cement Corporation of India, Tandur under the jurisdiction of Hyderabad-I Commissionerate, engaged in the manufacture of cement falling under Chapter-25 Central Excise Tariff Act 1985, was liable to pay cess amounting to ₹ 50.50 lakh on cement cleared during the period from 1999-2000 to 2012-13. However, the assessee paid only ₹ 4.58 lakh which resulted in short payment of cess to the tune of ₹ 45.92 lakh.

When we pointed this out (May 2014), the Ministry of Commerce and Industry intimated (September 2014) that department was instructed to take action for recovery of cess from the assessee.