CHAPTER I
CENTRAL EXCISE RECEIPTS

1.1 Budget estimates, revised budget estimates and actual receipts

The budget estimates, revised estimates and actual receipts of central excise duties during the years 2002-03 to 2006-07 are exhibited in the following table:-

Table no. 1

(Amounts in crore of rupees)

Year	Budget estimates	Revised estimates	Actual receipts*	Difference between actual receipts and budget estimates	Percentage variation
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
2006-07	119000	117266	117613	(-) 1387	(-) 1.17

* Figures as per Finance Accounts.

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

The values of output from the manufacturing sector vis-a-vis receipt of central excise duties through personal ledger account (cash collection) during the years 2002-03 to 2006-07 were as mentioned in the following table:-

Table no. 2

(Amounts in crore of rupees)

Year	Value of output	Central excise receipts	Central excise receipts as a percentage of value of production
2002-03	1158294	82310	7.11
2003-04	*1242849	90774	7.30
2004-05	*1357191	99125	7.30
2005-06	*1479338	111226	7.52
2006-07	*1661297	117613	7.08

* Estimated figure - as actual figure is under preparation in the 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.

Source : Central Statistical Organisation (Government of India).

Thus, the growth in the central excise receipts corresponded to the increase in the value of output by the same factor of 1.43 during the years 2002-03 to 2006-07.

1.3 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 2002-03 to 2006-07 is given below:-

Table no. 3

(Amounts 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	
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
2006-07	117613	5.74	128698	33.99	109.42

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

Thus, while central excise receipts had grown only by 43 per cent during the years 2002-03 to 2006-07, the growth in modvat/cenvat availed during the relevant period was much more at 143 per cent. Percentage of modvat/cenvat availed of to duty paid by cash increased constantly during the years 2002-03 to 2006-07. Modvat/cenvat credit availed of during 2006-07 was more than the duty paid through PLA. One of the reasons for the excessive use of modvat/cenvat credit compared to duty payment by cash would be the misuse of the modvat/cenvat credit scheme. The incorrect use of this facility has been reported in chapter III of this report, in addition to a similar chapter in each years' audit report.

1.4 Cost of collection

The expenditure incurred during the year 2006-07 in collecting central excise duty alongwith the corresponding figures for the preceding four years is given in the following table:-

Table no. 4

(Amounts in crore of rupees)

Year	Receipts from excise duty		Expenditure on collection		Cost of collection as percentage of receipts
	Amount	Percentage increase over the previous year	Amount**	Percentage increase over the previous year	
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
2006-07	117613	5.74	974.49	8.15	0.83

** Figures as per Finance Accounts.

1.5 Outstanding demands*

The number of cases and amounts involved in demands for excise duty outstanding for adjudication/recovery as on 31 March 2006 and 31 March 2007 are mentioned in the following table:-

Table no. 5

(Amounts in crore of rupees)

Pending decision with	As on 31 March 2006				As on 31 March 2007			
	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
Adjudicating officers	165	4797	160.14	2454.96	53	3881	7.55	1801.79
Appellate Commissioners	185	2123	23.73	376.31	125	1662	26.07	356.00
Board	1	5	0.01	4.00	5	72	0.03	65.30
Government	0	28	0.00	1.48	0	2	0.00	1.37
Tribunals	625	3620	302.06	3963.96	524	3621	276.30	7126.88
High Courts	87	341	23.82	304.37	111	384	35.39	134.32
Supreme Court	28	55	13.43	49.57	35	53	16.06	81.91
Pending for coercive recovery measures	1357	3969	247.44	1196.42	1515	3850	510.55	2008.11
Total	**2448**	**14938**	**770.63**	**8351.07**	**2368**	**13525**	**871.95**	**11575.68**

* Figures furnished by the Ministry and relates to 40 commissionerates of central excise.

A total of 15,893 cases involving duty of Rs. 12,447.63 crore were pending as on 31 March 2007 with different authorities. The pendency had increased with the Board from six cases (duty : Rs. 4.01 crore) as on 31 March 2006 to 77 cases (duty : Rs. 65.33 crore) as on 31 March 2007.

1.6 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 2004-05 and 2006-07 is shown below:-

Table no. 6

(Amounts 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
2004-05	611	761.56	517.15	82	26.07	65.67	26	0.69
2005-06	300	471.65	202.34	62	6.01	36.47	11	0.05
2006-07	284	1965.43	1241.66	76	153.97	64.00	10	0.29
Total	**1195**	**3198.64**	**1961.15**	**220**	**186.05**	**166.14**	**47**	**1.03**

** Figures furnished by the Ministry and relate to 40 commissionerates of central excise.

The above table reveals that while a total of 1,195 cases of fraud/presumptive fraud were detected during the years 2004-07 by the department involving duty of Rs. 3,198.64 crore, it raised a demand of Rs. 1,961.15 crore only and recovered Rs. 166.14 crore (8.47 per cent) out of it. Similarly, out of a penalty

of Rs. 186.05 crore that was imposed, the department could recover only Rs. 1.03 crore (0.55 per cent).

1.7 Commodities contributing major revenue*

Commodities which yielded revenue of more than Rs. 1000 crore during 2006-07 alongwith corresponding figures for 2005-06 are mentioned in the following table:-

Table no. 7

(Amounts in crore of rupees)

Sl. No.	Commodity	2005-06 (Actual)	2006-07 (Actual)	Percentage variation of actual over previous year	Percentage share in total collection
1.	Refined diesel oil	21772.92	24671.54	13.31	21.15
2.	Motor spirit	17554.45	18302.96	4.26	15.69
3.	Iron and steel	10723.03	12685.20	18.30	10.87
4.	Cigarettes and cigarillos of tobacco or tobacco substitutes	6988.89	7701.35	10.19	6.60
5.	Cement, clinkers, cement all sorts	4739.19	5149.40	8.66	4.41
6.	All other mineral oils and products falling under chapter 27	4743.08	5050.72	6.49	4.33
7.	All other machinery, articles and tools falling under chapter 84	3220.22	3225.99	0.18	3.28
8.	Motor cars and other motor vehicles for transport of persons	3526.21	3021.63	(-) 14.31	2.59
9.	All other motor vehicles falling under chapter 87	2399.39	2606.09	(-) 16.39	2.23
10.	Articles of iron and steel	2088.75	2432.51	16.46	2.09
11.	Plastic and articles thereof	2476.93	2395.74	(-) 3.28	2.05
12.	Organic chemicals	2026.06	2043.55	0.86	1.75
13.	Pharmaceutical products	2265.17	2007.23	(-) 11.39	1.72
14.	Furnace oil	1755.88	1877.29	6.91	1.61
15.	Aluminium and articles thereof	1272.92	1590.41	24.94	1.36
16.	Paper and paper board, articles of paper pulp or paper or paper board	1365.03	1289.54	(-) 5.53	1.11
17.	All other electronic and electrical goods falling under chapter 85	1336.39	1229.80	(-) 7.98	1.05
18.	Cane or beet sugar and chemically pure sucrose in solid form	1337.22	1225.36	(-) 8.36	1.05
19.	Miscellaneous chemical products	1126.32	1183.52	5.07	1.01

* Figures furnished by the Ministry.

The above table reveals that there was lower collection of revenue during 2006-07 under all other motor vehicles falling under chapter 87, motor cars and other motor vehicles for transport of persons, pharmaceutical products, cane or beet sugar and chemically pure sucrose in solid form, all other electronic and electrical goods falling under chapter 85, paper and paper board, articles of paper pulp or paper or paper board and plastic and articles thereof to the extent of (-) 16.39, (-) 14.31, (-) 11.39, (-) 8.36, (-) 7.98, (-) 5.53 and (-) 3.28 per cent respectively over the previous year.

1.8 Remission of revenue*

Central excise duty remitted/abandoned or written off due to various reasons for the years 2005-06 and 2006-07 is shown in the following table:-

Table no. 8

(Amounts in crore of rupees)

		2005-06		2006-07	
		Number of cases	**Amount**	**Number of cases**	**Amount**
Remitted due to :					
(a)	Fire	5	0.31	6	0.25
(b)	Flood	6	0.02	7	0.24
(c)	Theft	0	0.00	2	3.47
(d)	Other reasons	377	1.69	592	1.44
Written off due to :					
(a)	Assessees having died leaving behind no assets	11	0.02	2	0.02
(b)	Assessees untraceable	163	50.00	50	2.27
(c)	Assessees left India	0	0.00	1	0.01
(d)	Assessees incapable of payment of duty	39	0.60	5	0.00
(e)	Other reasons	261	0.22	83	1.42
Total		**862**	**52.86**	**748**	**9.13**

* Figures furnished by the Ministry and relates to 40 commissionerates of central excise.

1.9 Contents

This section of the report contains 152 paragraphs, 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. 1,195.36 crore. The concerned Ministries/departments have accepted (till November 2007) audit observations in 118 paragraphs involving Rs. 57.30 crore and have recovered Rs. 23.57 crore.

1.10 Impact of audit reports

1.10.1 Revenue impact

During the last five years (including the current year's report), audit had pointed out short levy of central excise duty totalling Rs. 13,646.22 crore through 886 audit paragraphs. Of these, the Government had accepted audit observations in 615 audit paragraphs involving Rs. 2,675.70 crore and had since recovered Rs. 184.58 crore. The details are shown in the following table:-

Table no. 9

(Amounts 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
2002-03	166	1445.59	133	287.61	1	0.20	134	287.81	22	32.18	18	14.65	40	46.83
2003-04	217	1897.94	151	814.30	1	0.16	152	814.46	30	27.73	22	12.89	52	40.62
2004-05	227	7696.94	122	200.40	--	--	122	200.40	32	20.02	55	20.37	87	40.39
2005-06	124	1410.39	89	1315.73	--	--	89	1315.73	35	25.97	13	7.20	48	33.17
2006-07	152	1195.36	118	57.30	--	--	118	57.30	59	23.57	--	--	59	23.57
Grand Total	**886**	**13646.22**	**613**	**2675.34**	**2**	**0.36**	**615**	**2675.70**	**178**	**129.47**	**108**	**55.11**	**286**	**184.58**

1.10.2 Amendment to Act/Rules

During the years 2003 to 2007 (up to May 2007), the Government had amended Act/Rules addressing the concerns raised by audit through audit reports. These changes are briefly mentioned in the following table:-

Table no. 10

Reference of audit report (AR) paragraph	Issue raised in audit	Amendment to Act/Rules etc.
Paragraphs 9.2 of AR no. 11 of 2005 and 11.4 of AR no. 7 of 2006	The anomaly of differential duty liability on same/similar goods manufactured by principal manufacturer vis-a-vis manufactured through job worker; due to adoption of lower transaction value in the latter case.	New rule 10A was inserted in the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 by notification no. 9/2007-CE (NT) dated 1 March 2007. This stipulates payment of duty on transaction value of the same goods adopted by the principal manufacturer.
Paragraphs 5.3 of AR no. 11 of 2004, 6.2.2 of AR no. 11 of 2005 and 10.2 of AR no. 7 of 2006	Non-payment of duty on inputs at the time of clearance.	Rule 8 of the Central Excise Rules, 2002 was amended to define duty to include the amount payable under the Cenvat Credit Rules, 2004 by notification no. 8/2007-CE (NT) dated 1 March 2007.
Paragraph 10.17 of AR no.7 of 2006	Fraudulent credit of cenvat on the basis of fake invoices.	Rule 26 of the Central Excise Rules, 2002 was amended to provide penal action by notification no. 8/2007-CE (NT) dated 1 March 2007.
Paragraph 4.6 of AR no. 11 of 2005	Absence of appropriate provisions in the rules to force lapse of unutilised cenvat credit enabled assessees to get unintended benefit of unutilised credit relating to finished goods which had been declared exempt from a particular date.	Sub-rule (3) under rule 11 of the Cenvat Credit Rules, 2004 had been inserted requiring payment of an amount equal to the credit taken in respect of inputs received for use in the manufacture of final products lying in stock or in process or contained in final products. {Notification no. 10/2007-CE (NT) dated 1 March 2007}.
Paragraphs 5.6 of AR no. 11 of 2004, 6.8 of AR no. 11 of 2005, 10.8 of AR no. 7 of 2006	Non-recovery of cenvat credit on raw materials, the value of which had been written off before putting them in use for manufacture of final goods.	Sub-rule (5B) was inserted under rule 3 of the Cenvat Credit Rules, 2004 by notification no. 26/2007-CE (NT) dated 11 May 2007 enabling recovery of amount equivalent to the credit taken in respect of the inputs or capital goods, the value of which had been written off fully before being put to use.
Paragraphs 4.3 of AR no. 11 of 2004, 8.1 of 11	Non-levy of additional excise duty and special additional excise duty	Ministry issued 37B order on 13 January 2006 deciding not to recover duty.

Reference of audit report (AR) paragraph	Issue raised in audit	Amendment to Act/Rules etc.
of 2005	levied under the Finance Acts, 1999 and 2002 on high speed diesel oil, motor spirit etc. cleared for export.	
Paragraphs 8.2 of AR no. 11 of 2003 and 5.4 of AR no. 11 of 2004	Modvat credit availed on common inputs which were used in manufacture of exempted as well as dutiable goods but amount was not paid on the price of exempted goods.	Rules 57CC and 57 AD of the Central Excise Rules, 1944 and rule 6 of the Cenvat Credit Rules, 2002 was amended retrospectively by section 82 of the Finance Act, 2005 to provide the mechanism for recovery of the amount due from a manufacturer.
Paragraphs 8.1 of AR no. 11 of 2003 and 5.11 of AR no. 11 of 2004	Incorrect availing of cenvat credit on capital goods before putting the capital goods for use in manufacture.	Rule 4(b) of the Cenvat Credit Rules, 2002 was amended by notification no. 23/2004-CE (NT) dated 10 September 2004 so as to omit the word 'use' that appeared with the phrase "possession and use".
Paragraphs 10.1 of AR no. 11 of 2002 and 9.4(i)(b) of AR no. 11 of 2002	Petroleum products cleared without payment of duty for re-warehousing but not re-warehoused or re-warehoused short at the destination and duty thereon not paid.	Warehousing facility to the petroleum products have been dispensed with by notification no. 17/2004-CE (NT) dated 4 September 2004. Duty became leviable at the point of clearance.
Paragraphs 3.3 of AR no. 11 of 2001 and 3.4 of AR no. 11 of 2002	Excess and incorrect grant of deemed modvat credit on inputs which had not suffered duty.	Scheme for granting deemed modvat/cenvat credit notified under notifications dated 29 June 2001 & 1 March 2002, had been discontinued from 1 April 2003.

1.11 Follow-up on audit reports

Public Accounts Committee, in their Ninth Report (Eleventh Lok Sabha) desired that remedial/corrective action taken notes (ATNs) on all paragraphs of the Reports of the Comptroller and Auditor General, duly vetted by audit, be submitted to them within a period of four months from the date of the laying of audit report in Parliament.

Review of outstanding action taken notes on paragraphs relating to central excise in earlier audit reports on indirect taxes revealed that the Ministries had not submitted remedial action taken notes on nineteen paragraphs. The delay in response in these cases ranged from six months to three years. Summarised position of outstanding action taken notes is depicted in the following table:-

Table no. 11

No. of ATNs pending	Related audit paragraph and audit report	Name of the Ministry
4	12.1 of 11 of 2004, 11.3 of 11 of 2005, 17.2 of 7 of 2006 and 15.2 of 7 of 2007	Ministry of Commerce and Industry
7	12.2.1 and 12.2.2 of 11 of 2004, 11.2 of 11 of 2005, 17.1.1 and 17.1.2 of 7 of 2006 and 15.1.1 and 15.1.2 of 7 of 2007	Ministry of Textiles
8	18.1 of 7 of 2006, 9.1, 10.9.2, 10.14, 12.1.5, 12.2, 19.1.4 and 19.1.6 of 7 of 2007	Ministry of Finance

CHAPTER II
MIS-CLASSIFICATION OF DUTY AND EXCISABLE GOODS

The rates of duty leviable on excisable goods are prescribed under various headings in the 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 amounting to Rs. 936.88 crore are given in the following paragraphs.

2.1 Classification error leading to less allocation of central revenue

The additional duty (AED) on motor spirit and high speed diesel was imposed through the Finance Act, 1998 and 1999, respectively. The special additional duty of excise (SAED) on motor spirit and high speed diesel was imposed through the Finance Act, 2002. These AED and SAED were collected solely for the purposes of the Union Government and it was specified in the Acts that proceeds thereof shall not be shared with the States.

M/s BPCL, M/s HPCL, M/s IOCL and M/s IBPL, in Delhi, Mumbai I and II commmissionerates, 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) or basic excise duty during the period 2001-02 to 2003-04. AED/SAED erroneously classified amounted to Rs. 936.14 crore. The incorrect classification of non-sharable duties resulted in less allocation/collection of revenue to the Central Government.

This was pointed out in March and June 2007; reply of the Ministry/department has not been received (November 2007).

2.2 Incorrect classification of excisable goods resulting in short levy of duty

2.2.1 Hair oil

Hair oil is liable to duty under sub-heading 3305.90/3305.99. The Board clarified on 31 August 1995 that if the coconut oil has additives (other than butylated hydroxyanisole) then it merits classification as hair oil under chapter 33 of the Tariff.

M/s Maxcare Laboratories Ltd. in Bhubaneswar I commissionerate, engaged in the manufacture of Dabur brand 'Anmol Coconut Oil', cleared the oil in pouches of 5 ml/containers of 100/200 ml without payment of duty treating the product as non-excisable edible oil. Audit noticed that tertiary butyl hydro quinol (other than butylated hydroxyanisole), was added to the coconut oil and oil had undergone processes which made it a preparation for use on hair as mentioned in chapter note 6 of chapter 33. Therefore, the product was not an

edible oil but hair oil, to be classifiable under chapter 33. Incorrect classification of the product resulted in short levy of duty of Rs. 45.88 lakh during the period April 2004 to March 2005.

On this being pointed out (September 2006), the Ministry stated (November 2007) that the product conformed to the characteristics of 'fixed vegetable oil' and hence was classifiable as an edible oil.

The reply of the Ministry is not tenable as coconut oil packed in small pouches and bottles containing 5 ml, 100 ml or 200 ml is clearly meant for use as hair oil and not edible oil. Audit recommends that the Ministry should amend the Tariff to plug this loophole through which duty is being avoided.

2.2.2 Splicing kit

Plates, sheets or strip, whether or not combined with any textile material, in relation to the manufacture of which no cenvat credit of duty paid on the inputs used has been availed, is classifiable under sub-heading 4005.10 attracting 'nil' rate of duty while the articles of un-vulcanized rubber is classifiable under sub-heading 4006.90 attracting duty at the rate of 16 per cent ad valorem.

Note 9 below chapter 40, stipulates that in heading 40.05, the expression 'plates', 'sheets', and 'strips' apply only to the plates, sheets, strips and to blocks of regular geometric shape, uncut or simply cut to rectangular shape, whether or not having the shape of articles and whether or not printed or otherwise surface worked, but not otherwise cut to shape or further worked.

M/s Phoenix Yule Ltd., Kalyani, in Kolkata III commissionerate, manufactured splicing kit and cleared them at 'nil' rate of duty under sub-heading 4005.10. Audit noticed that such splicing kit was a composite product mainly composed of un-vulcanized rubber strips, un-vulcanized compound rubber solution, polythene sheet, nylon release cloth and silicon release paper. The assessee had marketed the product as a distinct article meant for use by the downstream buyers in joining/repairing conveyor belts and sold in the market as such to be used without the aid of any other support material. Thus, the product merited classification under sub-heading 4006.90. Incorrect classification of the product resulted in non-levy of duty of Rs. 27.72 lakh covering the period from April 2003 to October 2005.

On this being pointed out (April 2005), the Ministry accepted the audit observation and stated (August 2007) that a show cause notice had been issued in August 2006 which was under the process of adjudication.

CHAPTER III
INCORRECT USE OF MODVAT/CENVAT CREDIT

Under modvat/cenvat scheme, credit is allowed for duty paid on 'specified inputs' and 'specified capital goods' used in the manufacture of finished goods. Credit can be utilised towards payment of duty on finished goods subject to the fulfilment of certain conditions. A few cases of incorrect use of modvat/cenvat credit involving duty of Rs. 111.88 crore noticed in test audit, are mentioned in the following paragraphs.

3.1 Exempt products cleared without payment of dues

The Cenvat Credit Rules, 2004 allow a manufacturer or a service provider to avail of credit of duty paid on input services besides inputs used by them in the manufacture of final products or for rendering of output services. However, where an assessee engaged in the manufacture of dutiable and exempted final products takes credit of duty paid on inputs/input services used in both the categories of final products without maintaining separate accounts for inputs/input services used in the exempted products, rule 6(3)(b) requires that the assessee will pay an amount equivalent to eight per cent (ten per cent from 10 September 2004) of the total price of the exempted goods, at the time of their clearance from factory.

3.1.1 M/s IISCO Steel Plant (a unit of SAIL), Burnpur, in Bolpur commissionerate, engaged in the manufacture of excisable products, availed of credit on various inputs and used them directly or indirectly in production of coke and purified coke oven gas. A portion of such products was used internally for the manufacture of dutiable products (pig iron, ingot, etc.) while the other portion was removed for sale which was chargeable to 'nil' rate of duty. Since separate accounts for use in manufacture of dutiable goods and those chargeable to 'nil' duty were not maintained, the assessee was liable to pay Rs. 62.59 crore during the period from 1 April 2000 to 31 March 2006.

On this being pointed out (August 2006), the department stated (June 2007) that inputs like wash oil and sulphuric acid were not directly used in the manufacture of coke and the intention of using them was not to produce coke but to refine coal gas which was a technical necessity and hence cenvat credit was not required to be reversed.

The reply of the department is not tenable because the rules clearly stipulate that if common inputs are used directly or indirectly in or in relation to the manufacture of final products which are dutiable as well as exempt and separate accounts of inputs are not maintained, then an amount equal to 8 or 10 per cent of the value of exempted goods needs to be paid. Technical necessity and intention of use of cenvatable inputs are not the issues raised in audit. Since cenvatable inputs were used in the manufacture of refined coal gas which in turn was used in the manufacture of coke cleared without payment of duty, the assessee was required to pay an amount equal to 8 or 10 per cent on the price of coke removed for sale. Reply of the Ministry has not been received (November 2007).

3.1.2 M/s Nagarjuna Fertilizers and Chemicals Ltd., in Visakhapatnam II commissionerate, engaged in the manufacture of chemicals and fertilisers procured principal raw materials viz., naphtha and natural gas from M/s GAIL (India) Ltd. through pipelines and utilised these for the manufacture of ammonia which was dutiable and urea which was exempt from duty. The assessee paid service tax of Rs. 1.35 crore on such pipeline services and availed of input service credit during the period from August to November 2005. The assessee did not maintain separate account in respect of such common inputs/input services used in the manufacture of exempted products and was, therefore, liable to pay Rs. 11.85 crore being ten per cent of the value of urea cleared without payment of duty during the period from August to November 2005.

On this being pointed out (December 2005), the Ministry stated (November 2007) that the assessee had wrongly availed of credit of Rs. 1.35 crore of service tax in the capacity of a service provider and had utilised Rs. 34.57 lakh for payment of service tax on output services. The department had recovered this amount in cash with interest and had got the unutilised credit of Rs. 1.01 crore reversed. No further amount was hence payable by the assessee.

The reply of the Ministry is not tenable as the recovery of Rs. 34.57 lakh alongwith interest of Rs. 86,000 and reversal (February 2006) of credit of Rs. 1.01 crore by the department was made subsequent to the audit observation. Further, this action of remitting/reversal of credit of service tax as an alternative to payment of ten per cent on exempted goods was not covered by any provision of the Cenvat Credit Rules.

3.1.3 M/s Emcure Pharmaceuticals Ltd., in Pune I commissionerate, engaged in the manufacture of pharmaceutical products, had availed of cenvat credit of service tax paid on input services viz. clearing and forwarding agents, manpower recruitment agency service, courier service, customs house agents etc. These services were used in the manufacture of both exempted and dutiable goods and no separate account was maintained. The assessee was, therefore, liable to pay an amount equal to ten per cent of the price of the exempted goods. The assessee cleared the exempted goods valuing Rs. 36.80 crore during the period from January 2005 to October 2006 on which Rs. 3.68 crore was recoverable.

On this being pointed out (December 2006 and April 2007), the Ministry admitted the audit observation and reported (November 2007) that a show cause notice was being issued.

3.1.4 M/s Rama Phosphates Ltd. (Fertilizer Division), in Indore commissionerate, engaged in the manufacture of dutiable goods (sulphuric acid, hydroflurosilisic acid, detergent powder, etc.) and exempted goods (fertilizer), availed of (June 2005) cenvat credit of service tax on services viz., courier service, clearing and forwarding agent service, advertisement, etc. which were used for dutiable as well as exempted goods. As the manufacturer had not maintained separate accounts, he was required to pay Rs. 80.86 lakh (i.e. ten per cent of price of Rs. 8.09 crore of exempted goods cleared in June 2005). Interest of Rs. 9.64 lakh was also leviable up to May 2006.

On this being pointed out (June 2006), the Ministry admitted the audit observation and stated (October 2007) that a show cause notice had been issued in August 2007.

3.1.5 M/s Hindustan Pulverising Mills and M/s Insecticides (India) Ltd., in Jaipur commissionerate, engaged in the activity of manufacturing dutiable as well as exempted final products, availed of cenvat credit of tax paid on input services and utilised it for payment of duty, without maintaining separate accounts in respect of the input services used in manufacture of exempted final goods. The assessees, were, therefore, required to pay Rs. 59.77 lakh being an amount equal to ten per cent of the total price of exempted goods cleared between December 2004 and March 2006. However, this was not paid.

On this being pointed out (between August 2006 and January 2007), the Ministry admitted the audit observation and stated (October 2007) that show cause notices for Rs. 1.32 crore had been issued to the assessees in August 2007.

3.1.6 M/s Ahlcon Paranteral (India) Ltd., in Jaipur I commissionerate, availed of cenvat credit of excise duty of Rs. 22.52 lakh on furnace oil which was used in the production of dutiable as well as exempted products. Separate accounts were not maintained. Therefore, the assessee was required to pay Rs. 60.90 lakh being an amount equal to ten per cent of the assessable value of Rs. 6.09 crore of exempted goods cleared between July 2005 and March 2006. The assessee, however, reversed the cenvat credit of Rs. 7.80 lakh on a proportionate basis. Reversal of cenvat credit on proportionate basis was not correct as there was no provision in the Cenvat Credit Rules allowing reversal on this basis. This resulted in short payment of duty Rs. 53.10 lakh.

On this being pointed out (January 2007), the Ministry admitted the audit observation and stated (November 2007) that a show cause notice for Rs. 60.90 lakh had been issued in October 2007.

3.1.7 M/s Atul Ltd., in Daman commissionerate, availed of modvat/cenvat credit on inputs and utilised it towards payment of duty on dutiable final products. The assessee was engaged in the manufacture of dutiable as well as exempted goods. The assessee cleared exempted goods valued at Rs. 3.58 crore during the period between April 1999 and July 2000 but had not maintained a separate account of inputs used for exempted goods. However, Rs. 28.63 lakh being an amount equivalent to eight per cent of the value of such exempted final products was not paid as duty.

On this being pointed out (August 2000), the Ministry stated (October 2007) that rule 57CC was not applicable to fuel used for dutiable as well as exempted goods. It further stated that nine show cause notices were issued to the assessee which had been adjudicated on 19 July 2005 resulting in confirmation of the demand of Rs. 1.08 crore alongwith interest and imposition of penalty of Rs. 12.08 crore. However, on appeal by the assessee, the Commissioner (Appeals) had remanded the case for de novo adjudication. Further developments in the case have not been received (November 2007).

3.2 Credit availed of but amount not paid on non-excisable goods

Rule 6(3)(b) of the Cenvat Credit Rules, 2004, provides that if cenvat credit is availed of on common inputs which are used in manufacture of exempted goods as well as in dutiable goods and separate accounts of their use are not maintained, then the manufacturer shall pay an amount equal to 10 per cent of the total price excluding taxes, charged by him at the time of its clearance.

M/s Rashtriya Ispat Nigam Ltd., in Visakhapatnam I commissionerate, produced electricity and utilised it partly in the manufacture of goods and partly sold it to M/s AP Transco. Similarly M/s IISCO steel plant (a unit of SAIL), in Bolpur commissionerate and M/s Auro Textile, Baddi, in Chandigarh commissionerate, produced electricity and sold a part of it to different external consumers namely shops, stores, offices, etc. The assessees availed of cenvat credit on inputs such as water treatment chemicals, greases, lubricants, catalytic ions, sulphuric acid, caustic soda, etc. and also service tax credit on several common input services used for generation of electricity but did not maintain separate accounts. These assessees sold electricity valuing Rs. 21.96 crore, during the period between April 2005 and December 2006 on which Rs. 2.06 crore was required to be paid.

On this being pointed out (February 2007), the Ministry stated (between September and November 2007) that electricity was not an excisable product and hence provisions of rule 6(3)(b) were not applicable for payment of ten per cent on value of electricity sold, but they were required to reverse proportionate credit on such inputs.

Reply of the Ministry is not tenable since rule 6 (3)(a) of Cenvat Credit Rules provides for proportionate reversal of credit in respect of low sulphur heavy stock, naphtha and furnace oil used in generation of electricity and not for the inputs in question. Since assessees had availed of the benefit of credit on common inputs under rule 6(3), they were bound to follow the provisions of rule 6(3)(b) and pay ten per cent of the price of the electricity sold.

3.3 Incorrect transfer of credit by paying duty on exempted goods

Rule 6(1) of the Cenvat Credit Rules, 2004, stipulates that no credit of specified duty shall be allowed on inputs which are used in the manufacture of final products which are exempt or are chargeable to 'nil' rate of duty.

The Board vide their circular dated 4 January 1991 had clarified that an assessee had no option to pay duty on his own volition in case the goods were fully exempted. In case he paid any amount in the name of excise duty, which was not leviable by law, the amount so paid would be in the nature of deposit with the Government.

3.3.1 M/s Neelachal Ispat Nigam Ltd., M/s Tata Sponge Iron Ltd. and M/s Shree Metaliks Ltd., in Bhubaneswar I and II commissionerates, engaged in the manufacture of pig iron and sponge iron, paid duty and availed cenvat credit of Rs. 3.15 crore between April 2004 and November 2005 on iron ore fines and sized iron ores procured from Nuamundi and Joda East Mines of

M/s TISCO and utilised these towards payment of duty on the clearance of final product. As both iron ore fines and sized iron ores were not liable to duty, payment of duty and passing on the credit was in contravention of the above provisions and clarification.

On this being pointed out (January and May 2007), the Ministry stated (November 2007) that since the iron ore concentrate had suffered duty at the supplier's end, cenvat credit was not to be denied to the assessees utilising the concentrates as inputs in the manufacture of pig iron and sponge iron.

The reply of the Ministry is contrary to the provisions of rule 6(1) and the Board's clarification cited above.

3.3.2 M/s Tata Steel Ltd., Joda, in Bhubaneswar II commissionerate, engaged in quarrying of iron ore and converting it into concentrate, availed of cenvat credit of Rs. 1.66 crore during 2005-06 on inputs and capital goods used in extraction of ores and conversion of ores into lumps and fines. Though the goods were exempt, the assessee cleared these on payment of duty. Cenvat credit of Rs. 1.66 crore so availed and its passing on to the down stream manufacturers was in contravention of the provisions of rules and clarification.

On this being pointed out (June 2006), the Ministry stated (November 2007) that there was no revenue implication if duty was paid on exempted goods by availing of cenvat credit paid on inputs and capital goods.

Reply of the Ministry is contrary to the provisions of rule 6(1) of the Cenvat Credit Rules and the Board's clarification dated 4 January 1991. Reply regarding revenue neutrality is also not correct as the credit so passed on can be utilised for payment of duty by the down stream manufacturer in place of payment of duty in cash. Therefore, the modus operandi adopted in such cases was not revenue neutral.

3.3.3 M/s Auro Weaving Mills, Baddi (a unit of multilocational composite mill), in Chandigarh commissionerate, engaged in the manufacture of unprocessed fabrics of cotton, had availed of cenvat credit facility and paid duty on some consignments at the tariff rate of 16 per cent from the cenvat credit account against an effective rate of 8 per cent ad valorem. The duty was paid in excess to pass on the surplus credit available. This was incorrect as the duty paid in excess of the duty leviable was to be treated as a deposit with the Government in terms of the Board's clarification of 4 January 1991. This resulted in incorrect payment of duty and consequential excess transfer of credit of Rs. 1.53 crore to its own processing sister unit (M/s Auro Textiles, Baddi, part of multi-locational composite mill) during January and February 2002.

On this being pointed out (January 2004), the Ministry stated (November 2007) that by virtue of the Tribunal's decisions in Everest Converters {1995 (80) ELT 91}, the benefit of exemption notifications were not required to be compulsorily availed of by the assessee. However, section 5A had been amended with effect from 13 May 2005 requiring the assessees to compulsorily avail of the benefit of an exemption notification.

3.3.4 M/s Universal Cables Ltd., Satna, in Bhopal commissionerate, purchased old coating line machine from its closed unit namely M/s Universal

Cables Ltd., Goa and availed of cenvat credit of Rs. 47.05 lakh on 20 and 21 September 2004. Records revealed that the duty of Rs. 47.05 lakh was paid from cenvat credit on these capital goods valuing Rs. 82.74 lakh by Goa unit as against an applicable duty of Rs. 13.24 lakh (i.e. 16 per cent ad valorem) payable thereon at the time of clearance. Duty paid in excess of Rs. 33.81 lakh with the intention to pass on the surplus credit was incorrect in terms of the Board's clarification and needed to be recovered. The excess cenvat credit so availed of was passed on to down stream manufacturers.

On this being pointed out (January 2006), the Ministry stated (November 2007) that the duty of Rs. 47.05 lakh was paid equivalent to the credit availed of in terms of rule 3(3) of the Cenvat Credit Rules, 2002.

The reply of the Ministry is not tenable as the capital goods were old and used goods and hence the provisions of rule 3(3) of the Cenvat Credit Rules relating to removal of goods 'as such' were not applicable. The excess credit availed of amounting to Rs. 33.81 lakh needs to be recovered.

3.4 Non-recovery of cenvat credit on inputs/capital goods written off

The Board clarified on 22 February 1995 that where modvat credit was availed of on the inputs but was not used subsequently in the manufacture and its value was written off from stock account for any reason, it should be reversed. It further clarified on 16 July 2002 that modvat/cenvat credit of duty availed of on inputs/capital goods which were subsequently written off being obsolete or unfit for use was also required to be reversed.

3.4.1 M/s Bharath Earth Movers Ltd., in Bangalore I commissionerate, engaged in the manufacture of earth moving equipment and parts, availed of cenvat credit of duty paid on inputs received in its factory. During the period upto March 2002 and during the years from 2002-03 to 2003-04, the assessee had written off inputs valued at Rs. 16.33 crore in their annual accounts, declaring these as obsolete. The corresponding credit of duty of Rs. 2.40 crore on such inputs was, however, not paid back/reversed.

On this being pointed out (September 2004), the Ministry stated (October 2007) that the Tribunal had repeatedly held that cenvat credit was not to be disallowed when the inputs were physically available. In order to overcome the judicial pronouncements, a new rule 3 (5B) had been inserted on 11 May 2007 requiring the assessees to pay amounts equivalent to the credit taken. However, action taken to recover the amount has not been reported (November 2007).

3.4.2 M/s Spack Automotives Ltd. and M/s Motherson Sumi Systems Ltd., in Noida commissionerate, had written off capital goods including moulds and dies valuing Rs. 32.88 lakh and Rs. 3.81 crore during the years between 1999-2000 and 2001-02. The credits amounting to Rs. 5.26 lakh and Rs. 60.95 lakh respectively already availed of thereon was not paid back. Total amount of Rs. 66.21 lakh was thus recoverable with interest.

On this being pointed out (April 2004), the Ministry while accepting the audit observations, reported (November 2007) that the demands for Rs. 66.21 lakh

had been confirmed, but the assessees had preferred appeals with CESTAT which were pending.

3.5 Credit incorrectly availed of on inputs used in exempted/non-excisable goods

Cenvat credit of duty paid on inputs which are used in the manufacture of exempted or non-excisable final products, is not admissible under the Cenvat Credit Rules.

3.5.1 M/s Hindustan Petroleum Corporation Ltd., in Visakhapatnam I commissionerate, engaged in the manufacture and marketing of petroleum products, procured HR plates and steel plates for use in fabrication of storage tanks in their refinery premises and availed of cenvat credit thereon under capital goods account. Since storage tanks were not excisable goods, credit was not admissible on the components used in their fabrication. Hence credit of Rs. 1.45 crore availed during the period from February 2006 to January 2007 was recoverable.

On this being pointed out (May 2007), the Ministry admitted the audit observation and reported (October 2007) issue of show cause notice to the assessee.

3.5.2 M/s Coromandel Fertilizers Ltd., in Visakhapatnam I commissionerate, engaged in the manufacture of complex fertilizers, procured low sulphur heavy stock (LSHS) and used them in production of electricity. The assessee also availed of cenvat credit thereon. Verification of records revealed that the assessee utilised 95 per cent of the electricity so produced in their captive generation unit for the manufacture of fertilizers which were exempt from duty while the remaining 5 per cent was consumed for the manufacture of other dutiable byproducts. The assessee incorrectly availed of cenvat credit of Rs. 1.14 crore on 6,339.978 tonne of LSHS used in power generation of which 6,022.979 tonne was consumed exclusively in the manufacture of exempted goods during the period from June 2004 to May 2005.

On this being pointed out (April 2007), the Ministry accepted (October 2007) the audit observation.

3.6 Dual benefit by taking credit on inputs and collecting duty on exempted final products

Rule 6 of the Cenvat Credit Rules, 2002/2004, envisages that where an assessee manufactures final products, part of which are chargeable to duty and part of which are exempt but avails of 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 (ten per cent from 8 October 2004) of the price charged for the exempted goods. The amount so payable is in lieu of cenvat credit availed of on inputs used in the manufacture of exempted goods and hence the liability is to be borne by the manufacturer himself.

The Ministry had also clarified on 9 September 2002 that where a manufacturer debits an amount equal to eight per cent in terms of rule 6 of the Cenvat Credit Rules, 2002 and collects it from the buyers, then the amount so collected should be deposited to the credit of the Government.

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

M/s Fouress Engineering (India) Ltd., M/s Bharat Heavy Electricals Ltd., M/s Crompton Greaves Ltd. (Stamping Division) and M/s Mather and Platt Pumps Ltd., in Bangalore II, Bhopal, Mumbai III and Pune I commissionerates respectively, had availed of cenvat credit on inputs used in the manufacture of both dutiable as well as exempted goods and did not maintain separate inventory for inputs used in the exempted goods. The assessees cleared exempted goods and paid duty of eight/ten per cent of the value of the exempted goods. However, Rs. 1.89 crore recovered as excise duty from the customers during the period between November 2002 and March 2006 was irregularly retained instead of being deposited with the Government.

On this being pointed out (between January 2006 and February 2007), the Ministry in the case of M/s Fouress Engineering (India) Ltd. stated (July 2007) that the CESTAT in various cases had held that once the assessee had paid eight per cent of the value of exempted goods, there was no law prohibiting the assessee from collection of such amount from the buyers. It stated (November 2007) that M/s Bharat Heavy Electricals Ltd. and M/s Mather and Platt Pumps Ltd. had not collected the amount as excise duty but as equivalent to cenvat reversal and hence provisions of section 11D were not applicable. In the case of M/s Crompton Greaves Ltd., the Ministry admitted the audit observation and intimated (October 2007) that the demand of Rs. one crore had been confirmed.

Reply of the Ministry is not tenable as it is contrary to its own clarification dated 9 September 2002. Also, the absence of appropriate provisions in the Act leads to unjust enrichment of the assessees by allowing encashment of credit, thereby defeating the very purpose of denial of cenvat credit. Additionally, the Ministry has not taken appropriate action to make the law explicitly clear and to resolve the anomalous situation which has cropped up due to conflicting decisions of the CESTAT on the same issue.

3.7 Incorrect grant of cenvat credit of education cess

Rule 3 of the Cenvat Credit Rules, 2004, provides that cenvat credit of education cess paid on inputs or input services can be utilised for the payment of education cess on final products/output services.

M/s Mahindra and Mahindra Ltd., in Nagpur commissionerate, manufactured tractors and cleared these without the payment of duty availing of exemption. Though the assessee had not availed of the cenvat credit of basic excise duty paid on the inputs, he had availed of the cenvat credit of education cess paid on inputs and utilised it for the payment of automobile cess leviable on the final goods. The utilisation of credit for automobile cess of Rs. 1.12 crore

during the period April 2005 to June 2006 was incorrect and recoverable with interest.

On this being pointed out (August 2006 and March 2007), the Ministry admitted the audit observation and stated (October 2007) that a show cause notice for Rs. 2.75 crore for the period from 9 July 2004 to 31 March 2007 had been issued to the assessee.

3.8 Incorrect utilisation of cenvat credit of NCCD

Rule 3(6)(i) of the Cenvat Credit Rules, 2002, stipulates that credit of national calamity contingent duty (NCCD) can be utilised only towards the payment of NCCD leviable on the final products manufactured. Further, rule 6(1) of the Rules prohibits credit on inputs which are used in the manufacture of exempted goods.

Polyester texturised yarn/other texturised yarn manufactured from partially oriented yarn of polyester (POY) is exempt from payment of NCCD from 17 May 2003.

M/s Bhilosa Tex-N-Twist Private Ltd., Silvassa and M/s Welspun Syntex Ltd., Silvassa, in Vapi commissionerate, availed of cenvat credit of NCCD for Rs. 73.35 lakh during the period from April 2004 to November 2006 on partially oriented yarn and used it in the manufacture of polyester filament yarn/texturised yarn, which was exempt from payment of NCCD. Cenvat credit availed of was, therefore, incorrect.

On this being pointed out (November 2005 and December 2006), the Ministry stated (November 2007) that the final product was leviable to basic and special excise duty and, therefore, it could not be considered as exempted goods. Further, restriction was not on availing of credit but on utilising the credit of NCCD.

The reply of the Ministry is not tenable as credit of NCCD was utilised for payment of other duties payable on finished goods which was in violation of the provisions of rule 3(6)(i). Hence, cenvat credit was recoverable with interest.

3.9 Non-recovery of credit on destroyed goods

The Tribunal in the case of M/s Mafatlal Industries Ltd. {2003 (154) ELT 543} held that the credit of duty taken on inputs in finished goods burnt/damaged in fire is to be demanded even if the remission of duty on such finished goods is allowed.

M/s Himachal Futuristic Communications Ltd., Solan and M/s Birla Textiles Ltd., Baddi, in Chandigarh commissionerate, engaged in the manufacture of telecommunication equipment and synthetic yarn, had fire accidents in the factories premises. There were losses of inputs and semi-finished goods/finished goods manufactured from inputs on which cenvat credit had been taken. These assessees did not pay back the proportionate credit on the inputs involved either in stock or contained in the semi-finished/finished goods damaged in the fire. The omission not only resulted in loss of revenue

aggregating Rs. 31.46 lakh during the year 2001-02 but also in financial accommodation by way of interest of Rs. 23.59 lakh from April 2002 to March 2007.

On this being pointed out (February 2003 and January 2004), the Ministry stated (November 2007) that sub-rule (5C) had been inserted in rule 3 of the Cenvat Credit Rules, 2004 on 3 September 2007, requiring reversal of credit taken on the inputs used in the manufacture of such goods. It was further reported that demands of Rs. 37.37 lakh and Rs. 4.13 lakh against M/s Himachal Futuristic Communication Ltd. and M/s Birla Textile Mills had been confirmed. However, on an appeal by M/s Himachal Futuristic Communication, the Commissioner (Appeals) had decided (June 2006) the case in favour of the assessee and the department had filed an appeal before CESTAT against the decision of the Commissioner (Appeals), which was pending.

3.10 Credit incorrectly availed of on capital goods used in the manufacture of exempted goods

Rule 6(4) of the Cenvat Credit Rules, 2002, envisages that credit shall not be allowed on capital goods which are used exclusively for the manufacture of exempted goods, other than the final products which are exempt from whole of the duty of excise leviable under any notifications where exemption is granted based on the value or quantity of clearances made in a financial year.

M/s Secure Meters Ltd., in Chandigarh commissionerate, engaged in the manufacture of electronic energy meters, undertook substantial expansion of plant and machinery and also took cenvat credit of duty paid on capital goods between April 2003 and April 2004. Since the machinery was exclusively used for manufacture of goods which were exempt from duty, credit of Rs. 43.00 lakh availed of/utilised was not correct and was recoverable with interest.

On this being pointed out (February 2005), the Ministry stated (November 2007) that the credit taken on capital goods during the year 2003-04 was admissible as the assessee had cleared goods under the exemption from 15 September 2004.

The reply of the Ministry is not tenable as the capital goods brought during the year 2003-04 for expansion of the plant and machinery were actually used for manufacture of exempted goods only. Therefore, cenvat credit availed of was in violation of the provisions of rule 6(4) of the Cenvat Credit Rules.

3.11 Other cases

In 388 other cases of incorrect use of modvat/cenvat credit, the Ministry/department have accepted audit observations involving duty of Rs. 12.33 crore and reported recovery of Rs. 9.75 crore in 371 cases till November 2007.

CHAPTER IV
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. Some illustrative cases of incorrect allowance of exemptions involving short levy of duty of Rs. 98.24 crore are mentioned in the following paragraphs.

4.1 Ambiguous notification resulting in unintended benefit to the assessees

Notification dated 1 March 2002 prescribed concessional rate of basic and additional duties of excise on processed fabrics at 8 per cent and 4 per cent ad valorem respectively, subject to the condition that these 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. A constitution bench of the Supreme Court considered the expression "appropriate duty of excise has already been paid" in the case of M/s Dhiren Chemical Industries {2002 (139) ELT 3}. It 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.

M/s Raymond Ltd., Sausar, in Bhopal commissionerate, manufactured processed fabrics from duty free grey fabrics and cleared them on concessional rate of duty availing of exemption under the above notification. Since grey fabrics were fully exempt from duty, concessional rate of duty on finished goods was not admissible in terms of the Supreme Court decision. This resulted in short levy of duty of Rs. 43.04 crore during the period from March 2002 to February 2003. Duty was recoverable with interest and penalty.

On this being pointed out (July 2007), the Ministry stated (November 2007) that the Tribunal in the case of M/s Simplex Mills Company Ltd. had held that concessional rate of duty was applicable in a case where the fabrics had been manufactured in a continuous process from the spinning stage and accordingly textile fabrics should be deemed to be 'duty paid'.

The reply of the Ministry is not tenable as the CEGAT, North Regional Bench, while interpreting a similar provision in case of M/s Machine Builders {1996 (83) ELT 576} had held 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 might not be possible for them to produce duty paying documents. Further, similar ambiguity had also prevailed under notification dated 3 September

1996 as replaced on 29 June 2001 and 1 March 2002 which was highlighted through paragraphs 3.4 and 6.4 of Audit Reports No. 11 of 2002 and 2003 respectively. This notification was subsequently withdrawn by the Government.

4.2 Exemption availed of in violation of the provisions of the notification

The Government issued two notifications no. 29/2004-CE and 30/2004-CE both dated 9 July 2004 in respect of textiles and textile goods of chapters 50 to 63. While the former prescribes effective rate of duty of four per cent or eight per cent ad valorem, the latter grants full exemption of duty subject to condition that cenvat credit on inputs has not been taken.

The Board had clarified on 28 July 2004 that there was no restriction on availing of benefit of both the notifications simultaneously, provided that the manufacturer maintained separate books of accounts of inputs used for dutiable and exempted goods. The Board further clarified on 1 February 2007 that non-availing of credit on inputs is a pre-condition for availing of exemption under the notification dated 9 July 2004. Reversal of credit on a later date would not suffice to make these goods eligible for this exemption.

4.2.1 M/s Raymond Ltd. (Textile Division) Sausar, in Bhopal commissionerate, engaged in the manufacture of textile products, availed of cenvat credit on inputs in July 2004 and also cleared the goods without payment of duty availing of exemption under the notification no. 30/2004-CE. As the assessee had not fulfilled the condition prescribed in the notification regarding non-availing of cenvat credit, the exemption amounting to Rs. 19.90 crore availed of during the period from July 2004 to November 2004, was incorrect and was, therefore, recoverable with interest of Rs. 8.07 crore (till June 2007) and penalty of Rs. 19.90 crore.

On this being pointed out (July 2007), the Ministry stated (October 2007) that the asssessee had paid Rs. 6.76 crore on 20 July 2004 to discharge credit liability on inputs and hence the condition of the notification was satisfied. It further stated that show cause notice demanding duty of Rs. 19.90 crore had been issued in October 2007. Further progress in the case has not been received (November 2007).

4.2.2 M/s Nahar Spinning Mills, Mandideep, in Bhopal commissionerate, and M/s Indorama Exports (a division of M/s Indorama Textiles Ltd.), in Indore commissionerate, engaged in the manufacture of yarn falling under chapters 52 and 55, availed of the benefit of both the above notifications simultaneously. The first assessee availed of cenvat credit on raw material (like staple fibre and paper cone) during July 2004 to December 2006 and the second assessee availed of cenvat credit on synthetic staple fibre of polyester, packing material, furnace oil, service tax etc. during the period from March 2006 to August 2006. They used inputs in production and cleared the final goods under the notification no. 30/2004-CE without payment of duty. Assessees also did not maintain separate accounts of common inputs as prescribed by the Board. Availing of exemption of duty of Rs. 5.72 crore

during the period between July 2004 and December 2006 was incorrect and was recoverable with interest besides levying penalty under rule 25.

On this being pointed out (November 2006 and March 2007), the Ministry stated (November 2007) that the exemption was extended correctly as credit attributable to exempted finished goods had been reversed before utilisation and such reversal was to be treated as if the credit was not taken.

The reply of the Ministry is not tenable as not availing of credit on inputs is a pre-condition for the admissibility of exemption and if the manufacturers avail of the input credit, the exemption would not be permissible. In case the intention of the Government is to extend the benefit of exemption in such a situation, the notification is required to be amended appropriately.

4.2.3 Notification dated 1 March 2002 exempted goods falling under sub-heading 8413.13 from the duty which is in excess of four per cent subject to the condition that no credit of duty paid on inputs or capital goods exclusively used in the manufacture of these goods has been taken.

M/s Shakti Pumps, Pithampur, in Indore commissionerate, manufactured submersible pumps and cleared these on payment of duty at the rate of four per cent ad valorem under the above notification dated 1 March 2002, between November 2002 and February 2003. The assessee also availed of cenvat credit of Rs. 60,000 in November and December 2002 on inputs used in such final products. Since the assessee had availed of cenvat credit on inputs, the benefit of the exemption was not admissible. This resulted in short payment of duty of Rs. 46.17 lakh which was recoverable with interest.

On this being pointed out (May 2003), the Ministry admitted (October 2007) the audit observation.

4.3 Incorrect availing of small scale industries (SSI) exemption

The notification dated 1 March 2002, as amended, provides option to the manufacturers either to avail modvat/cenvat credit on inputs and pay normal rate of duty on the finished goods (i.e. not to avail exemption) or to avail of no credit and claim exemption from the payment of duty on clearances upto a specified value during a financial year. Further, the manufacturers whose aggregate value of clearances of specified goods from one or more factories exceeds rupees three crore (rupees four crore from 1 April 2005) in the preceding financial year, are not eligible for exemption.

The Supreme Court, in the case of M/s Ramesh Foods Products {2004 (174) ELT 310 (SC)}, held that the manufacturer could not be allowed to avail of simultaneously modvat for some products and full exemption for others under the small scale exemption scheme.

M/s Gripp Tools Manufacturing Company Ltd., in Belapur commissionerate, engaged in the manufacture of tools of his own brand as well as similar tools bearing the brand name of others, availed of cenvat credit on inputs used in the manufacture of branded tools of others and paid duty on such goods. Simultaneously, the assessee also availed of the benefit of SSI exemption for his own goods and no duty was paid upto the specified value of clearances in a financial year. Although, in view of the Supreme Court's judgement quoted

above, the assessee was not eligible for exemption on his own branded tools, yet benefit of the exemption of Rs. 43.34 lakh was incorrectly allowed during the period April 2002 to September 2005.

On this being pointed out (April 2006), the Ministry stated (October 2007) that the Supreme Court judgement was not applicable in this case as the decision related to interpretation of notification no. 175/86-CE.

The reply of the Ministry is not tenable as the Supreme Court judgement is equally applicable in this case as the conditions of notification no. 175/86-CE including that relating to the goods bearing the brand name of others were similar to those specified under notification no. 8/2002-CE. Therefore, once the benefit of credit is taken, the benefit of exemption should not be available.

4.4 Other cases

In eight other cases of exemptions, the Ministry/department have accepted audit observations involving the duty of Rs. 42.92 lakh and reported recovery of Rs. 2.36 lakh in five cases till November 2007.

CHAPTER V
NON-LEVY OF DUTY

Rules 9 and 49 read with rule 173G of the Central Excise Rules, 1944, prescribe that goods attracting excise duty shall not be removed, from the place of manufacture or storage, unless excise duty leviable thereon has been paid. If a manufacturer, producer or licencee of a warehouse, violates these rules or does not account for the goods, then besides such goods becoming liable for confiscation, penalty not exceeding the 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 the Central Excise Rules, 2002 which came into force from 1 March 2002. Some cases of non-levy of duty totalling Rs. 20.39 crore noticed in test check are described in the following paragraphs.

5.1 Duty not levied on excisable goods found short

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

5.1.1 During the physical verification of the records of M/s Steel Authority of India Ltd. (Rourkela Steel Plant), in Bhubaneswar II commissionerate, finished products, viz. cold rolled non oriented/cold rolled grain oriented sheets (CRNO/CRGO) weighing 10,907.672 tonne and valued at Rs. 36.32 crore were found short in the stock, as at the end of March 2003. The assessee could neither show any record in support of payment of central excise duty nor reconcile the discrepancy. This led to escaping of duty of Rs. 5.81 crore which was recoverable with interest and penalty, as per the rules.

On this being pointed out (December 2003), the Ministry stated (August 2004) that the shortages were only 1,916.783 tonne as the closing balance figure of CRNO/CRGO included 3,078 tonne of special quality cold rolled coils, 10,358 tonne of non-silicon coils and 386 tonne of non-silicon sheets.

Further verification of the assessee's records revealed that the Ministry's reply is not tenable as the assessee had maintained separate records for production and clearance of CRGO/CRNO, non-silicon coils and non-silicon sheets. It was also seen from the monthly returns filed by the assessee that CRNO/CRGO, non-silicon coil and non-silicon sheets were distinctly shown with separate production and clearance figures with 'nil' closing balance in respect of non-silicon coil and non-silicon sheets. Duty was accordingly recoverable from the assessee for 10,907.672 tonne.

Further response from the Ministry has not been received (November 2007).

5.1.2 M/s Rashtriya Ispat Nigam Ltd., in Visakhapatnam I commissionerate, found shortage of stock of 11,103.889 tonne of wire rods, rebars, rounds, angles, channels, squares, billets, beams and pig iron during physical verification as at the end of 31 March 2006. There was no evidence on record to show that these goods were lost or destroyed by natural causes etc. or had become unfit for consumption/marketing warranting remission of duty. Neither did the assessee pay the applicable duty of Rs. 2.70 crore, nor did the department demand it even though the above shortages were to be regarded as clearances without payment of duty.

On this being pointed out (February 2007), the Ministry admitted the audit observation and stated (October 2007) that a show cause notice had been issued.

5.1.3 M/s Dow Agro Sciences India Private Ltd. and M/s Kalyani Carpenter Special Steel Ltd. in Pune II and III commissionerates, noticed the shortages of goods valuing Rs. 2.07 crore during the period between April 2004 and March 2006. The shortages so noticed were adjusted in the accounts. However, the duty of Rs. 37.20 lakh on the goods found short was not levied.

On this being pointed out (October 2006), the Ministry admitted the audit observation and intimated (September 2007) recovery of Rs. 10.37 lakh from the first assessee and issue of a show cause notice to the second assessee.

5.2 Improper action by the department on default in payment of duty

5.2.1 Rule 8 of the Central Excise Rules, 2002, stipulates that the duty on goods removed from the factory during the first fortnight of the month shall be paid by the 20th of that month and the duty on the goods removed during the second fortnight of the month shall be paid by the 5th day of the following month. If the assessee defaults in payment of any one instalment and the liability is discharged beyond a period of thirty days from the due date in a financial year, or in payment of instalment by due date is violated for the third time in a financial year, whether in succession or otherwise, then the assessee will forfeit the facility to pay dues in instalments for a period of two months, starting from the date of communication of the order passed by the proper authority in this regard, or till such date on which all dues are paid, whichever is later. Further, during this period the assessee shall be required to pay excise duty for each consignment by debit to the account current and in the event of any failure, it will be deemed that such goods have been cleared without payment of duty and the consequences and penalties, as provided in these rules, will be applicable. The penalty leviable under rule 25 would not exceed the amount of duty leviable or ten thousand rupees, whichever is greater.

Indore commissionerate forfeited the facility of fortnightly payment of duty of M/s Design Auto Systems Ltd. (Unit II), Pithampur vide an order dated 26 June 2002 for default in payment of duty for the fortnights ending 15 April 2002, 30 April 2002, 15 May 2002 and 31 May 2002. This order was served on the assessee on 1 July 2002. During the same financial year, the facility of payment was again forfeited vide order dated 5 February 2003 for default in

payment of duty for the fortnights ending 31 October 2002, 30 November 2002, 15 December 2002 and 31 December 2002. The assessee was, therefore, required to pay duty in cash for each consignment, till all dues were cleared. Though the dues were not paid till 31 March 2006, yet the assessee availed of the said facility of payment of duty and utilised cenvat credit of Rs. 4.93 crore between 2 July 2002 and 31 March 2006. This was in violation of the law and tantamounted to clearance of goods without payment of duty. No action was taken by the department to recover the duty in cash. Additionally, applicable interest and penalty of Rs. 4.93 crore were also leviable.

On this being pointed out (May 2006), the Ministry stated (November 2007) that the amount of interest of Rs. 4.75 lakh was paid by the assessee on 10 November 2005 and that the rule referred to payment of all dues which meant duty and not interest, hence the party was entitled to utilise cenvat credit.

The reply of the Ministry is not relevant as the interest was paid in compliance of the orders of Commissioner (Appeals), Indore of June 2004 which pertained to the period October to December 2001, January 2003 and August 2003 to February 2004; and not for the period covered in audit.

5.2.2 M/s HTL, Guindy, in Chennai IV commissionerate, defaulted payment of duty in January, February and April 2004. The full duty liability of Rs. 0.95 crore for January 2004 was discharged in March 2004 after a delay of more than a month. For February 2004, the delay involved was 21 days. Out of Rs. 2.59 crore due for the month of April 2004, Rs. 1 crore was paid after a delay of one month in June 2004 and the balance amount was not paid till June 2004 (time of audit). Further, interest of Rs. 9.22 lakh payable for the delay in payment of duty for January, February and April 2004 was also not paid. No action was taken for recovery of interest and levy of penalty.

On this being pointed out (June 2004 and December 2005), the department reported (between March 2005 and October 2006) recovery of duty of Rs. 1.59 crore relating to April 2004 in July and August 2004; duty of Rs. 1.64 crore relating to June 2004 in August and September 2004 and interest of Rs. 21.27 lakh for the delay in payment of duty for the months of January, February, April, June and August 2004 in December 2004.

The Ministry admitted the audit observation and stated (October 2007) that a penalty of Rs. 5.18 core had been imposed on the assessee.

5.2.3 Rule 173G(1)(e) of the Central Excise Rules, 1944 stipulates that when the facility of fortnightly payment is withdrawn, the assessee is required to pay duty for each consignment by debit to account current for two months. In the event of failure to do so, the goods would be treated as cleared without payment of duty and consequences and penalties as provided in the rules, will be applicable.

Indore commissionerate, withdrew on 31 October 2001 the facility of fortnightly payment of duty of M/s Jamuna Auto Industries Private Ltd., Malanpur for default of more than 30 days in payment of duty. The forfeiture orders were received by the assessee on 14 November 2001. Despite this, the assessee continued to utilise the facility of fortnightly payment of duty and

paid a duty of Rs. 25.30 lakh on 16 November 2001 from cenvat credit. The department did not take any action on the violation of its orders for which duty of Rs. 25.30 lakh was required to be paid in cash alongwith interest and penalty.

On this being pointed out (July 2005), the Ministry stated (October 2007) that the duty was correctly paid on 16 November 2001 from the cenvat credit account as there was no bar under rule 173G(1)(e) for payment of duty from this account.

The reply of the Ministry is not tenable as duty was required to be paid in cash and not by cenvat credit during the currency of forfeiture orders of the department and the provisions of rule 173G(1)(e) are explicitly clear in this regard.

5.3 Duty not levied on waste and scrap

In terms of rule 3(5A) of the Cenvat Credit Rules, 2004, if capital goods are cleared as waste and scrap, the manufacturer shall pay an amount, equal to the duty leviable on the transaction value of such goods.

5.3.1 M/s IOCL (RD), Haldia, in Haldia commissionerate, availed of cenvat credit on capital goods like pipes, tubes etc. The cut pieces of such capital goods were cleared as scrap without payment of duty. This resulted in non-levy of duty of Rs. 44.90 lakh during the period between 16 May 2005 and 31 March 2006.

On this being pointed out (July 2006), the Ministry admitted the audit observation and stated (October 2007) that show cause notice for Rs. 89.92 lakh for the period from 16 May 2005 to 31 March 2007 had been issued.

5.3.2 M/s Gujarat Ambuja Cements Ltd. and M/s Crompton Greaves Ltd. in Chandigarh and Mumbai III commissionerates, availed of modvat/cenvat credit on steel sheets, angles, bars, rods for fabrication of steel structures/machinery at the erection stage of plant and on paper/paper board for use in manufacture of final products (respectively). Waste/scrap of steel obtained during erection/operation stage of plant and waste of paper/paper board generated during the manufacture of final products were cleared without payment of duty. This resulted in duty amounting to Rs. 38.26 lakh during the period between April 1994 and March 2006, not being levied.

On this being pointed out (between June 1996 and June 2006), the Ministry admitted the audit observation in the case of M/s Crompton Greaves Ltd. and intimated (July 2007) recovery of Rs. 14.29 lakh alongwith interest. Reply in the other case has not been received (November 2007).

5.4 Other cases

In 481 other cases of non-levy of duty, the Ministry/department have accepted the audit observations involving duty of Rs. 5.54 crore and reported recovery of Rs. 4.66 crore in 477 cases till November 2007.

CHAPTER VI
VALUATION OF EXCISABLE GOODS

Ad valorem rates of duty are charged on a wide range of commodities attracting excise duty. Valuation of such goods is governed by section 4 of the Central Excise Act, 1944, read with the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Valuation of the excisable goods (introduced with effect from 14 May 1997) with reference to the retail sale price is governed by section 4A of the above Act. Some cases of short levy of duty due to incorrect valuation involving revenue of Rs. 18.96 crore, are illustrated in the following paragraphs.

6.1 Undervaluation due to non-inclusion of additional consideration

6.1.1 Section 4(1)(a) of the Central Excise Act, 1944 stipulates that when excise duty is chargeable on any excisable goods with reference to its value, then such value shall be the 'transaction value'. Transaction value 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 in which the assessee was allowed to collect sales tax from the buyer, retain it and repay it to the Government after a prescribed period. The Government of Maharashtra amended the provisions of Sales Tax Act and issued a notification in November 2002 providing further incentive for premature repayment of sales tax liability.

Ten assessees in Aurangabad (1), Nagpur (4), Pune I (1), Pune III (1), Raigad (2) and Thane (1) commissionerates, engaged in the manufacture of various excisable goods, opted for premature repayment of sales tax deferred liability during the year 2004-05 and received a total discount of Rs. 21.07 crore due to premature repayment of sales tax liability accrued at 'Net Present Value'. The difference between the actual sales tax collected from customers and the payment made at the 'Net Present Value' was retained by the assessees which was additional income to the assessees. Non-inclusion of this additional income in the assessable value resulted in short levy of duty of Rs. 3.41 crore.

The Ministry admitted the audit observation and intimated (September and October 2007) that show cause notices demanding duty of Rs. 91.34 lakh had been issued in six cases. In the remaining cases, it stated that the show cause notices were being issued.

6.1.2 M/s MPR Refractories Ltd. and M/s Raasi Refractories Ltd., in Hyderabad I and III commissionerates, respectively, manufactured and cleared 'steel teeming ladle refractories' to Visakhapatnam Steel Plant, Bhilai Steel Plant and other steel companies. The terms of purchase orders included performance guarantee clause which entitled the assessees to get, in addition to the agreed price per unit, bonus amounts for such of those refractories which achieved additional life period. Accordingly, the assessees received performance incentive bonus of Rs. 3.25 crore during the period between

April 2003 and March 2007 from the buyers over and above the invoice prices on which duty was paid. However, the assessees did not pay duty of Rs. 52.69 lakh on this additional amount even though the said bonus amount had a direct nexus to the goods sold. Duty was, therefore, recoverable alongwith interest.

On this being pointed out (April 2007), the Ministry while admitting the audit observations intimated (November 2007) that show cause notice for Rs. 74.34 lakh had been issued to M/s MPR Refractories Ltd. and show cause notice to M/s Raasi Refractories Ltd. was being issued.

6.2 Undervaluation on account of incorrect determination of cost of excisable goods

Rule 8 read with proviso to rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 envisages 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 one hundred and fifteen per cent (one hundred and ten per cent from 6 August 2003) of the cost of production of manufacture of such goods. Further, the Board had clarified on 30 June 2000 that the value of goods consumed captively should be determined on cost construction method only.

6.2.1 M/s H.V. Axles Ltd., in Jamshedpur commissionerate, engaged in manufacture of axles, cleared goods to its sister concern. Duty was paid on assessable value arrived at on 'cost basis'. The assessable value determined was lower than the amount determinable in accordance with the above mentioned provisions of rule 8 read with general principles of costing i.e. Cost Accounting Standard - 4. This resulted in undervaluation of Rs. 21.54 crore with consequential short levy of duty of Rs. 3.45 crore during the period from April 2001 to March 2002 which was recoverable with interest of Rs. 2.26 crore (upto December 2006).

On this being pointed out (January and December 2004), the Ministry admitted the audit observation and intimated (October 2007) confirmation of a demand of Rs. 2.34 crore alongwith interest in February 2007.

6.2.2 M/s Maradia Chemicals Ltd., Sayla and M/s Gujarat State Fertilizers and Chemicals Ltd., Vadodara, in Bhavnagar and Vadodara I commissionerates, engaged in the manufacture of fertilizers, chemicals etc. cleared hydrocholoric acid and caprolactum to their sister units for further use in production of excisable goods. The assessees paid duty on the value which was lower than the value determinable on cost basis. This resulted in short levy of duty of Rs. 58.11 lakh during the period from June 2001 to September 2004.

On this being pointed out (March 2002 and December 2005), the Ministry admitted the audit observations and stated (October 2007) that the demand of Rs. 11 lakh had since been confirmed (November 2005) against the first assessee and duty of Rs. 47.11 lakh had been recovered from the second assessee in addition to issue of show cause notice demanding interest of Rs. 7.75 lakh.

6.2.3 M/s Mafatlal Industries Ltd., Navsari and M/s Atul Ltd., Valsad, in Daman commissionerate, engaged in the manufacture of fabrics and chemicals respectively, cleared manufactured goods to their sister units on payment of duty on the assessable value arrived at on cost basis. While arriving at assessable value, profit margin at 15 per cent (upto 5 August 2003 and thereafter 10 per cent) of the cost of production was not included. This resulted in undervaluation of goods by Rs. 3.91 crore with consequential short levy of duty of Rs. 41.58 lakh during the years 2003-04 and 2004-05.

On this being pointed out (February and March 2006), the Ministry accepted the audit observations and intimated (October 2007) recovery of Rs. 6.34 lakh from M/s Atul Ltd. and confirmation of demand of Rs. 35.18 lakh against M/s Mafatlal Industries Ltd.

6.3 Incorrect adoption of assessable value of excisable goods

Assessable value of excisable goods shall be the 'transaction value' charged at the time of sale if the buyer of goods is not related and the price is the sole consideration for sale. When excisable goods are cleared to related person, the assessable value shall be determined as provided for under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

Section 4(3)(b)(i) of the Central Excise Act stipulates that 'person' shall be deemed to be related person, if they are inter-connected undertakings or they have interest in the business of each other.

6.3.1 M/s IOC Ltd. (Refinery Division), in Haldia commissionerate, transferred their stock of aviation turbine fuel (ATF) to different depots on payment of duty on a value declared in the invoices. Test check of invoices revealed that in respect of transfer of stock of 7856.094 kilolitres to Port Blair depot, the declared value was only Re. 1.00 per kilolitre and duty was also paid on this value while the normal ex-depot (Port Blair) price of ATF during the material period of time was Rs. 23,824.65 per kilolitre. The incorrect adoption of value resulted in short levy of duty of Rs. 1.50 crore during the period between 29 November 2004 and 29 January 2005.

On this being pointed out (June 2005), the Ministry admitted the audit observation and intimated (September 2007) that the short levy on the basis of the actual assessable value was Rs. 1.40 crore which had been recovered.

6.3.2 M/s Vashisti Detergents Ltd., in Pune II commissionerate, cleared goods like soap noodles, fatty acid, glycerin, etc. to M/s Hindustan Lever Ltd. (HLL) for captive consumption in the latter's plant. The value adopted was lower than the cost of production. Scrutiny of records revealed that the assessee had declared M/s HLL as a related person in the tax audit report prepared under section 44AB of the Income Tax Act, 1961. Since M/s HLL was not an independent buyer, the value was required to be adopted at 115 per cent of the cost of production. Incorrect adoption of value resulted in short levy of duty of Rs. 30.27 lakh during July 2000 to February 2002.

On this being pointed out (July 2003), the Ministry stated (November 2007) that the value had been adopted correctly as the goods had been sold by the

assessee on principal to principal basis to M/s HLL and the assessee and M/s HLL were not related person.

The reply of the Ministry is not tenable as the scrutiny of the show cause notice issued (March 2005) for Rs. 30.27 lakh indicates that the assessee had confirmed that M/s HLL had substantial interest in the business of the assessee. Moreover, for the subsequent periods i.e. February 2002 to August 2002 and September 2002 to February 2003, the assessee had re-determined the assessable value based on 115 per cent of cost of production and had paid differential duty of Rs. 6.81 lakh and Rs. 19.08 lakh respectively in line with the recommendation of audit.

6.3.3 M/s Karam Chand Appliances Private Ltd. (Unit I), in Chandigarh commissionerate, manufactured electrothermic appliances and cleared some consignments in bulk to its units II and III for captive consumption on payment of duty on invoice value of Rs. 12.40 per piece. Scrutiny of records revealed that the assessable value adopted for payment of duty was less than the value arrived at on the basis of cost data for the relevant period. It was further seen that the assessee had cleared the product for sale at retail sale price of Rs. 36 per piece and had paid duty on an assessable value of Rs. 21.60 per piece which was determined by deducting permissible abatement of forty per cent from the retail sale price. Adoption of assessable value lower than the cost of production resulted in short levy of duty of Rs. 14.59 lakh during January 2001 to August 2001.

On this being pointed out (March 2002 and January 2005), the Ministry reported (October 2007) that the show cause notice issued in October 2005 demanding a duty of Rs. 77.65 lakh for the period from October 2000 to March 2002 was pending.

6.4 Incorrect valuation of samples meant for free distribution

The Board clarified on 25 April 2005 that the valuation of the samples which are distributed free, as part of marketing strategy or as gifts or donations should be determined under rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Rule 4 stipulates that the value of excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment.

M/s Ranbaxy Laboratories Ltd. in Pune III, M/s Time Pharma and M/s Lyka Labs Ltd. in Thane II and M/s Sun Pharmaceuticals Industries in Vapi commissionerates, cleared physicians samples. Contrary to the above provisions of the rules, while the former assessee paid duty at a mutually agreed price, the other paid duty on the value arrived at on cost basis. This resulted in short levy of duty of Rs. 1.01 crore during the period between April 2005 and July 2006.

On this being pointed out (February 2007), the Ministry while admitting the audit observations reported (July and November 2007) that Rs. 43.18 lakh had been recovered from three assessees and show cause notice for Rs. 1.62 crore was being issued to the fourth assessee viz. M/s Sun Pharmaceuticals Industries.

6.5 Undervaluation of duty due to incorrect allowance of deduction

Under section 4(1) of the Central Excise Act, the assessable value of excisable goods is normally the 'transaction value'. The Board had clarified on 30 June 2000 that cash discount or prompt payment discount would not form part of the 'transaction value' unless such discount had actually been passed on to the buyer of the goods.

M/s JMT Auto Ltd., in Jamshedpur commissionerate, engaged in the manufacture of motor vehicle parts and accessories, cleared goods to M/s Tata Motor Ltd., Jamshedpur by paying duty on purchase order value after reducing 1.9 per cent towards bill discounting charges from the contract price. The bill discounting charges were payable by the buyer to the bank on the basis of agreement between them. Since the deduction made from the contract price was paid by the buyer to the banker as bank charges, on behalf of the assessee, it was an inadmissible deduction from the assessable value being not in the nature of cash discount/prompt payment discount and not having been passed on to the customer. This resulted in short levy of duty of Rs. 97.08 lakh during March and May 2004.

On this being pointed out (July 2006), the Ministry admitted the audit observation and stated (November 2007) that show cause notice was being issued.

6.6 Other cases

In 47 other cases of incorrect valuation of excisable goods, the Ministry/department have accepted audit observations involving short payment of duty of Rs. 4.68 crore and have reported recovery of Rs. five crore in 43 cases till November 2007.

CHAPTER VII
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 the relevant sections of the Central Excise Act, 1944. Some illustrative cases of non-levy of interest and penalty involving revenue of Rs. 4.89 crore are mentioned in the following paragraphs.

7.1 Non-levy of interest on differential duty paid

Section 11AB of the Central Excise Act, 1944, enunciates that where any duty of excise has not been levied or paid or has been short levied or short paid, the person who is liable to pay duty, shall, in addition to the duty, be liable to pay interest from the first day of the month succeeding the month in which the duty ought to have been paid.

The Ministry clarified on 14 March 2006, that interest under section 11 AB of the said Act is chargeable from the date of original clearance in cases wherein supplementary invoices are raised due to upward revision of the price of the goods.

7.1.1 M/s Bharat Heavy Electricals Ltd., in Trichy commissionerate, engaged in the manufacture of boilers, steam generators, pressure vessels and heat exchangers, paid differential duty between May 2003 and March 2004 on account of price escalation of the component parts supplied to the Atomic Power Project, Tarapore for which the original invoices were raised between January 1999 and January 2004. The assessee paid the differential excise duty but did not pay the interest of Rs. 1.88 crore applicable thereon.

On this being pointed out (March 2005 and April 2007)), the Ministry admitted the audit observation and stated (August 2007) that out of 27 transactions, 21 transactions were under provisional assessment and interest liability would be taken care of at the time of the final assessment. In respect of 6 transactions, which were non-provisional in nature, interest amounting to Rs. 28.35 lakh had since been confirmed. However, the assessee had preferred an appeal with CESTAT against the confirmation order.

7.1.2 M/s Ashok Leyland Ltd., Unit I, Hosur, in Chennai III commissionerate, engaged in manufacture of parts of motor vehicles, cleared their goods to the Vehicle Factory, Jabalpur. The assessee paid the differential duty of Rs. 3.43 crore and Rs. 4. 01 crore during the years 2004-05 and 2005-06, respectively on account of rate differences and price escalation for the sales made during the period from February 2003 to December 2005. It, however, did not pay interest of Rs. 40.90 lakh on the differential duty paid.

On this being pointed out (November 2005 and November 2006), the Ministry admitted the audit observation and stated (July 2007) that a show cause notice had been issued.

7.1.3 M/s Neel Metal Products Ltd. and M/s Apex Auto Ltd., in Gurgaon and Jamshedpur commissionerates respectively, engaged in the manufacture of various goods attracting excise duty, cleared on payment of duty to various buyers and subsequently issued supplementary invoices on account of price escalation in respect of clearances effected during the years 2003-04 and 2004-05. Though payment of differential duty amounting to Rs. 2.43 crore was made but interest payable was neither paid by the assessees nor was it demanded by the department. This resulted in non-payment of interest of Rs. 29.06 lakh.

On this being pointed out (May and July 2006), the Ministry admitted the audit observations and stated (October and November 2007) that action to realise the interest was being taken.

7.2 Non-recovery of interest on duty short paid

Section 11 AA of the Central Excise Act, 1944, stipulates that where a person chargeable with duty determined under sub-section (2) of section 11 A, fails to pay such duty within three months from the date of such determination, he shall pay interest at the prescribed rate on such duty from the date immediately after the expiry of the said period of three months till the date of actual payment of duty.

M/s Dabur (India) Ltd., Baddi, M/s Auro Weaving Mills, Baddi and M/s Auro Spinning Mills, Baddi, in Chandigarh commissionerate, engaged in the manufacture of tamarind paste, un-processed cotton fabrics and cotton yarn, deposited Rs. 1.06 crore on account of amount of duty short paid after delays ranging between 6 months to 35 months. However, applicable interest aggregating to Rs. 28.06 lakh was neither paid by assessees nor was it demanded by the department on the clearances made during the period between December 1999 and March 2003.

On this being pointed out (January 2004), the Ministry while accepting the audit observation reported (November 2007) that the order of the department confirming demand of duty of Rs. 32.79 lakh against M/s Dabur (India) Ltd. was set aside by the Commissioner (Appeals) and the department has filed an appeal before CESTAT which was pending. It was further stated that the action to recover interest payable after 11 May 2001 in the case of other two assessees was being taken.

7.3 Non-payment of interest on cenvat credit availed of in excess

Rule 12 of the Cenvat Credit Rules, 2002, envisages that where the cenvat credit has been taken or utilised wrongly, the same alongwith the interest shall be recovered from the manufacturers and the provisions of section 11A and 11AB of the Central Excise Act shall also apply.

M/s Kandhari Beverages Private Ltd., in Chandigarh commissionerate, engaged in the manufacture of aerated water, took excess credit of

Rs. 45.33 lakh on account of interest in the modvat credit account on 27 December 2001. Although the excess credit taken on interest was debited by the assessee on 8 March 2005 in their cenvat account, yet interest amounting to Rs. 21.54 lakh leviable on the excess credit taken and utilised from 27 December 2001 to 7 March 2005 was not demanded by the department.

On this being pointed out (January 2006), the Ministry stated (November 2007) that rule 12 of the Cenvat Credit Rules, 2002 was not applicable as the amount of Rs. 45.33 lakh debited by the assessee was on account of interest on pre-deposit allowed as credit by the Punjab and Haryana High Court which was later on disallowed by the Supreme Court.

The reply of the Ministry is not tenable as audit had pointed out non-levy of interest on excess utilisation of credit which in the departmental records were also exhibited as cenvat credit and not interest. The excess credit taken due to error in computation of interest (allowed as cenvat credit) was already recovered on 8 March 2005. Since cenvat credit was taken and utilised, the provision of rule 12 of the Cenvat Credit Rules were applicable for levying of interest.

7.4 Non-levy of penalty

Rule 8(3) of the Central Excise Rules, 2002, as effective from April 2003, states that if an assessee fails to pay the duty by the due date, he shall be liable to pay the outstanding amount alongwith interest at the rate of two per cent per month or rupees one thousand per day, whichever is higher, for the period starting with the first day after due date till the date of actual payment of the outstanding amount.

The rule further provides that till such time the amount of duty outstanding and the amount of interest thereon are not paid, it shall be deemed that the goods in question 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 the penalties as provided in these rules shall follow.

Rules 25 and 26 of the Central Excise Rules, 2002, stipulate that if any manufacturer removes any goods attracting excise duty in contravention of any provision of these rules, all such goods are liable to confiscation and the manufacturer is liable to pay penalty not exceeding the duty on the excisable goods or rupees ten thousand, whichever is greater.

M/s Fedders Lloyd Corporation Ltd., Nahan, in Chandigarh commissionerate, engaged in the manufacture of air conditioners and control panels for rail coaches defaulted in payment of duty of Rs. 21.11 lakh from 37 days to 137 days between the period from April to June 2003 and September to December 2003. Even the interest leviable thereon was also paid short by Rs. 1.81 lakh and the liability had not been fully discharged till February 2004. For the aforesaid contraventions, no rectificatory action was initiated by the department by invoking penalty provisions.

On this being pointed out (March 2004), the Ministry while admitting the audit observation, reported (November 2007) that the assessee had paid the

entire amount including the amount of interest of Rs. 1.81 lakh and a show cause notice had been issued for taking penal action.

7.5 Other cases

In 62 other cases of non-levy of interest and penalty, the Ministry/department have accepted audit observations involving duty of Rs. 1.50 crore and reported recovery of Rs. 1.25 crore in 59 cases till November 2007.

CHAPTER VIII
CESS NOT COLLECTED

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

Some of the cases in which cess totalling Rs. 4.12 crore was not collected or demanded, are mentioned in the following paragraphs.

8.1 Cess on textiles and textile machinery not collected

Under section 5A(1) of the Textiles Committee Act, 1963 and the notification issued by the Ministry of Commerce on 1 June 1977, cess at the rate of 0.05 per cent ad valorem is leviable on textiles and textile machinery manufactured in India. The authority to collect such cess is vested with the 'Textiles Committee' constituted under sub-section (3) of the Act.

Test check of records of 48 assessees engaged in the manufacture of textile materials/articles, in the states of Andhra Pradesh, Gujarat, Haryana and Karnataka, revealed that they did not pay textile cess of Rs. 3.89 crore on clearance of textile materials/articles during the period between April 1999 and February 2007. It was further noticed that an assessee in Daman did not pay textile cess of Rs. 2.59 lakh on clearance of textile machinery during the period between 2001-02 and 2005-06. These errors resulted in non-collection of cess amounting to Rs. 3.92 crore.

On this being pointed out (between December 2005 and January 2007), the committee intimated recovery of Rs. 10.32 lakh from three assessees and issue of demand notices to thirty six assessees. Reply in the remaining cases had not been received (November 2007).

Reply of the Ministry of Textiles has not been received (November 2007).

8.2 Cess on cement not levied

Rule 2(f) of the Cement Cess Rules, 1993 read with the Ministry of Industry (Department of Industrial Development) Standing Orders 125 (E) dated 24 February 1993, prescribes 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 based on vertical shaft kiln, is to pay a cess of seventy five paise on every tonne of cement manufactured and removed.

M/s Jaypee Cement (Blending Unit), in Allahabad commissionerate, manufactured and removed 19,20,286 tonne of 'portland pozzolane cement' between 2002-03 and 2005-06 but did not pay the applicable cess amounting to Rs. 14.40 lakh.

On this being pointed out (January 2007), the Ministry of Commerce and Industry stated (March and November 2007) that the assessee had been asked to deposit the cess.

8.3 Other cases

In 12 other cases of cess not levied, the Ministry/department have accepted objections involving duty of Rs. 5.76 lakh and reported recovery of Rs. 5.76 lakh in 12 cases till November 2007.