



## Editorspeak

*Viddhi Varta now is going into its third issue. The success of the earlier two issue strongly motivates us and we are now firmly resolved to ensure that this newsletter should become a permanent feature. We would like to thank everyone for the support and encouragement extended.*

*The topical issue "Increased Litigations And Tendency Of Parties To File Writ Petitions Before High Court For Release Of Goods" emphasises the need for independence of the investigating agencies during the course of investigation. We would fail if we do not thank Sh Rakesh Kumar Sharma ADG DRGRI for his valuable contributions towards this article.*

*Our staples News, Recent Decisions and Pot Pourri are ready with recent updates.*

*Your suggestions and comments on the issue are valuable. Any reader who intends to contribute by way of an article or suggestion to improve the newsletter is always welcomed.*

## News

- The Supreme Court has dismissed the review petition filed by Fiat India Private Limited on the issue of valuation under the Central Excise Act, 1944. In the original order the Apex Court had upheld the revenue contention that the valuation of the goods would be on the basis of manufacturing cost plus manufacturing profits in case where the goods are sold by the manufacturer at loss for market penetration. For adopting such value the department is not required to show the flow of any additional consideration.
- CBEC promoted 17 officers to the grade of the Chief Commissioner of Customs and Central Excise and issued transfer and posting order of 22 Chief Commissioners.
- CBEC has issued Notification No. 48/2012-ST amending Service Tax Rules 1994 to amend the ST-1 form for seeking the Registration. In terms of this amendment the registrant has to make the choice of the taxable service.
- In a study conducted by the ADB, it has been shown that a 50% hike in prices of cigarettes by India along with China, the Philippines, Thailand and Vietnam corresponding to a tax increase of about 70%-122% would reduce the number of current and future smokers by nearly 67 million and reduce tobacco deaths by over 27 million.

# INCREASED LITIGATIONS AND TENDENCY OF PARTIES TO FILE WRIT PETITIONS BEFORE HIGH COURT FOR RELEASE OF GOODS

Parties under investigation often approach Hon'ble High Courts and file multiple Writ Petitions under Article 226, with the objective to derail the investigations. It is also observed that in Writs hearings are invariably given on short notice and such writ petition hampers the investigation to reach its logical end. It is felt that such Writs are not maintainable at all especially when no illegality is alleged to have been committed by the department during the investigations. Further, divulging the evidences at initial stage of investigations hampers the investigations, especially in group cases where several parties are involved using the same modus operandi.

2. Parties approach the Hon'ble High Court seeking order for unconditional release of the goods or relaxing the conditions set out in provisional release orders, without exhausting the appellate remedy available under the Customs Act. Hon'ble Supreme Court has in the case of *Raj Kumar Shiv Hare vs. Directorate of Enforcement*, (2010) 4 SCC 772 held that "*Writ petition not to be entertained ignoring when statutory forum created by law for redressal of grievance, particularly in a fiscal statute is available- Statutory provisions get defeated if writ petition allowed to be filed despite existence of efficacious remedy of appeal under the statute*".

3. The role of the courts in the case of the seizure of the goods as per Section 451 of CrPC is only after charge sheet has been filed and the seized goods are made the case property. As the matter did not fall within the realm of either enquiry or trial, therefore, court's attention cannot be drawn to pass any orders regarding the seized goods or changing conditions of provisional release during the investigation stage. Hon'ble High Courts invariably fix the Bank Guarantee amount on the basis of duty rather than value. The

bank guarantee is primarily taken to safeguard fine and penalty which are determined on the basis of the value of the seized goods. In some cases Courts have applied Customs (Provisional Duty Assessment) Regulations, 1963 to reduce bank guarantee amount, although these regulations operate in a different field. Hon'ble Bombay High Court, in the case of *Apollo Cranes Pvt. Ltd. Vs. UOI*, 2012 (275) ELT 148 (Bombay) has held that *powers of adjudicating authority to demand security or to impose conditions cannot be restricted or curtailed by confining the exercise of that power along the lines of conditions imposed in Customs (Provisional Duty Assessment) Regulations, 1963*.

4. Hon'ble Supreme Court has time and again stated that it is risky for the courts to intervene in the matter at the stage of investigation. In the following judgments Supreme Court has emphasized that court has to strike a balance between fair investigation and prevalence of the rule of the law on the one hand and the interest of the accused on the other

- Assistant Collector of Central Excise Vs. Jain Sons Hosiery Industries – 1979 AIR 1889 (1980 SCR (1) 134).
- Crl. Appeal No.1766 of 2009 D. Venkatasubramaniam & Ors. Vs. M.K. Mohan Krishnamachari & another.
- Nirmal Singh Kahlon Vs. State of Punjab and Ors., AIR 2009 SC 984.
- T.T. Antony Vs. State of Kerala &Ors.- Appeal (Crl.) No.689 of 2001.
- State of Haryana &Ors. Vs Ch. Bhajan Lal and Ors.

5. Board may take up the matter with Hon'ble Supreme Court for framing guidelines for entertaining and reducing frivolous litigations in these matters.



## RECENT DECISIONS

### SUPREME COURT



2012-TIOL-115-SC Bhupendra Nath Hazarika Bibekananda Das Vs State Of Assam

State has to be a Model Employer - Promotee Officers Appointed Against Rules Cannot Claim seniority over Genuinely Appointed Direct Recruits: when the infrastructure is founded on total illegal edifice, the endeavour to put forth a claim for counting the previous service to build a pyramid is bound to flounder. State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules.



2012-TIOL-114-SC-CX CCE Vs M/s Connaught Plaza Restaurant Pvt Ltd

'Softserve' served at restaurants/outlets commonly and popularly known as McDonalds, will be classified under tariff sub-heading 2105.00 as 'ice-cream'. Heading 04.04 reads - other dairy produce; edible products of animal origin, not elsewhere specified or included whereas heading 21.05 reads ice-cream and other edible ice.

### Tribunal

2012-TIOL-1631-CESTAT-MAD CCE Vs The India Cements Ltd

CENVAT Credit on Capital goods: As per the provisions of CENVAT Credit Rules, 2004, CENVAT Credit is not admissible on the structural items used for the fabrication of the supporting structures to the Capital Goods. However the CENVAT Credit is admissible in respect of the goods used as input for the manufacture of capital goods and components thereof.

2012-TIOL-1605-CESTAT-BANG M/s Kongovi Electronics Pvt Ltd Vs CC

Section 149 of the Customs Act, 1962, is not the remedy to revive the time barred refund claims. Appellants had paid duty at higher rate at the time of the clearance of the goods. However several years later they realized there mistake and sought to reopen the issue by invoking the provisions of Section 149. Section 149, gives, discretionary powers to the departmental officers for making amendments to documents in certain situations. However this section should not be used for reviving the time barred refund claims.

2012-TIOL-1790-CESTAT-MUM M/s Sonhira SSK Ltd Vs CCE

Applicant filed this application for restoration of stay petition. The applicant filed appeal along with application for waiver of dues on 13.06.2012. The application for waiver of pre-deposit was fixed on 18.06.2012. On that day, none appeared on behalf of the applicants and the application for waiver of dues was adjourned to 06.08.2012 and notice was issued to the applicant in this regard. Since none appeared on the said date the application for stay was dismissed. For seeking appellant produced a copy of the letter dated 4.08.2012, which was sent through Speed Post and as per receipt of the Speed Post, that letter was submitted to the Postal Department on 4.08.2012 at 2.28 p.m. These facts clearly shows that the applicants are interested only in delay the proceedings. Finding that the appellant was only interested in delaying the proceedings, the Restoration application of Stay petition is allowed subject to deposit of cost of Rs.20,000/-

**2012-TIOL-1574-CESTAT-MAD M/s SRF Ltd Vs CCE**

In view of the Supreme Court decision in case of SKF limited, interest is payable on the duty paid on the basis of the supplementary invoices. Since appellant had failed to pay the interest amount even after being aware of the decision of SKF the penalty is correctly imposed on him.

**2012-TIOL-1541-CESTAT-BANG Shri Amitabh Bathla Vs CC**

Undisputedly 150 packages of elastic tapes were found in the container along with the other goods and seized as these elastic tapes were not declared in the Bill of Entry. Instead of satisfactorily explaining the presence of unaccounted goods, the appellants have pretended injured ignorance and have adopted aggressive postures and even sought for cross examination of about 40 persons without giving any valid reasons for such request. The Commissioner's order in confiscating the undeclared goods treating it as a case of smuggling and also confiscating other goods as used for concealing call for no interference.

**2012-TIOL-1531-CESTAT-BANG M/s Bayer Extracts Pvt Ltd Vs CC**

In his statement the Managing Director admitted the fact about procurement of raw materials without bills, manufacture and sale finished goods in retail market without the account of the same in the books of

account. The statement made was also not retracted. Retraction is not admissible in view of the long gap between the date of statement and retraction. Affidavit made for retraction was also not sworn before the authority recording the statement. In view of the evidences available and the statement made the demand of duty is sustained.

### **POT POURRI**

- ❖ In case where the Custom Officer has failed to comply with the direction of High Court the officer has committed the contempt of the High Court. The High Court is fully justified in penalizing the officer with fine of Rs 2000 and imprisonment of three months for contempt. The Act of causing the contempt is also a corrupt practice CBEC should consider prosecuting the officer. AIR 2012 SC 2962 R C Chandel Vs High Court of M P & Ors
- ❖ In the last issue we had carried the article on the Filing of the Appeal before the wrong forum. The department has filed appeal before the High Court in a case of categorization of services. High Court observed in the matter that categorization of services is akin to classification matter and hence the appeal before it is not maintainable. The department should have filed the appeal before the Supreme Court [(2012) 26 STR 301 Kar CST Vs John Flower (I) Ltd].

**सम्पादक मण्डल**

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