The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2007 and Notifications/Circulars issued up to 31.10.2007 which are relevant for May 2008 examinations.

PAPER – 8 : INDIRECT TAXES

Answer to question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part "A" and one question from Part "B".

PART – A

Question 1

(a) Briefly explain any two of the following with reference to the Central Excise Rules, 2002:

(i) Assessee

(ii) Daily stock account

(iii) Large tax payer (2 x 2 =4 Marks)

(b) M/s. Khan Ltd. is a small scale unit manufacturing plastic name plates for motor vehicles as per specifications provided to them by their customers, who are vehicle manufacturers. For purposes of classification under the first schedule to the Central Excise Tariff Act, 1985 the assessee has claimed that the plastic name plates are "parts and accessories of motor vehicles". The Central Excise Department has proposed classification as "other plastic products" in respect of these plastic name plates. The department's view is that the motor vehicle is complete without the affixation of name plates and cannot be treated as a part of the motor vehicle. Write a brief note on whether the stand taken by the department is correct in law. (4 Marks)

(c) Discuss briefly the validity of the following statements with reference to the CENVAT Credit Rules, 2004:

(i) Basic excise duty credit can be utilized for payment of basic excise duty and education cess and secondary and higher education cess.

(ii) CENVAT credit on inputs lying in stock or in process or contained in the final product shall be reversed when the final product is subsequently exempted unconditionally in terms of an exemption notification issued under section 5A of the Central Excise Act, 1944. (3 x 2 = 6 Marks)

(d) State briefly whether the following circumstances would constitute "manufacture" for purposes of section 2(f) of the Central Excise Act, 1944:

(i) Both inputs and the final product fall under the same tariff heading under the first schedule to the Central Excise Tariff Act, 1985 (Tariff Act.)

(ii) Inputs and final product fall under different tariff headings of the Tariff Act.

(3 x 2 = 6 Marks)

Answer

(a) (i) Rule 2(c) of Central Excise Rules, 2002, states that 'assessee' means any person who is liable for payment of duty assessed or a producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored and includes an authorized agent of such person.

(ii) As per Rule 10 of the Central Excise Rules, 2002, there is a specific requirement about maintenance of 'Daily Stock Account'. Such account should be maintained on daily basis, in a legible manner, indicating the particulars regarding:

(a) description of the goods produced or manufactured,

(b) opening balance, quantity produced or manufactured,

(c) inventory of goods,

(d) quantity removed,

(e) assessable value,

(f) the amount of duty payable; and

(g) particulars regarding amount of duty actually paid [Rule 10(1)]

The first page and last page of such account books shall be duly authenticated by the producer or manufacturer or his authorized agent [Rule 10(2)]. All such records shall be preserved for a period of five years immediately after the financial year to which such records pertain [Rule 10(3)].

(iii) As per Rule 2(ea) of the Central Excise Rules, 'large taxpayer' means a person who

(a) has one or more registered premises under the Central Excise Act, 1944; or

(b) has one or more registered premises under Chapter V of the Finance Act, 1994;

and is an assessee under the Income-tax Act, 1961, who holds a Permanent Account Number issued under section 139A of the said Act, and satisfies the conditions and observes the procedures as notified by the Central Government in this regard.

The following persons have been notified to be eligible to opt as large taxpayer:

(i) Any person engaged in the manufacture or production of goods, except the goods falling under chapter 24 or pan masala falling under chapter 21 of the First schedule of the Central Excise Tariff Act, 1985, or

(ii) a provider of taxable service,

who has paid during the financial year 2004-05 or during the financial year preceding the year of filing of application for large tax payer-

(a) duties of excise of more than Rs.500 lakhs in cash or through account current; or

(b) service tax of more than Rs.500 lakhs in cash or through account current; or

(c) advance tax of more than Rs.1000 lakhs, under the Income Tax Act, 1961,

and is presently assessed to income tax or corporate tax under the Income Tax Act, 1961, under the jurisdiction of Chief Commissioner of Income Tax – I, Bangalore (other than revenue district of Tumkur) and Chief Commissioner of Income Tax – II, Bangalore (other than district of Kolar).

(b) No, the stand taken by the Department is not valid in law. The plastic nameplates should be classified as parts and accessories of motor vehicles on following grounds:

(i) name plates are solely and exclusively used for motor vehicles.

(ii) classification as parts and accessories of motor vehicles is more specific while the classification as other plastic products is residuary and more general in nature.

The Department has examined only whether the name plates can be considered 'parts' of motor vehicles, it has not at all considered whether these name plates can be considered 'accessories' of motor vehicle – An 'accessory' by its very definition is something supplementary or subordinate in nature and need not be essential for the actual functioning of the product.

In a similar case of Pragati Silicons Pvt. Ltd. v. CCEx. Delhi (2007) 211 ELT 534 (SC), the Apex Court applying the test laid down in the case of Mehra Bros. v. Joint Commercial Officer (1991) 51 ELT 173 (SC) has held that name plates add to convenient use of motor vehicle and give an identity to it. They add effectiveness and value to vehicle and are at very least accessories of vehicles. Thus, even if there was any difficulty in the inclusion of the name plates as 'parts' of the motor vehicles, they would most certainly have been covered by the broader term 'accessory' as car seat covers and upholstery etc.

(c) (i) Correct. There is no restriction in the said rules on utilization of CENVAT credit of basic excise duty (BED) for payment of education cess (EC) and secondary and higher education cess (SHEC). Rule 3(4) of the said rules provides that credit of BED can be utilized for payment of any duty of excise on any final product. Since EC and SHEC are 'duties of excise' as per statutory provisions hence, credit of BED can be utilized for payment of cesses.

(ii) Correct. As per Rule 11(3) of CENVAT Credit Rules, 2004, as inserted w.e.f. 1.3.2007, when final product has been exempted absolutely under section 5A of the Central Excise Act, CENVAT credit on inputs, lying in stock or in process or contained in final product shall be reversed. The balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product or for payment of service tax on any output service.

(d) (i) 'Manufacture' is bringing into being goods known in the market having distinctive name, character or use and separate and identifiable function. Once a new commodity having a definite and distinct commercial identity in market is produced and the same has been specified in the tariff, it is exigible to duty. It is irrelevant

whether the new article falls into the same tariff heading as the duty paid raw material from which it is manufactured or belongs to a separate tariff heading.

It was held in CCEx. v. Kapri International (P) Ltd. (2002) 142 ELT 10 (SC) that if manufacture takes place, the commodity is dutiable even if the raw material and the resultant product fall under the same tariff heading. It was followed recently in CCEx., Jaipur v. Mahavir Aluminium Ltd. (2007) 212 ELT 3 (SC), wherein it was held that converting aluminium ingots (7601.10 – old entry) into aluminium billets (7601.10 – old entry) is 'manufacture', because they have separate, distinct and identifiable marketability and saleability.

(ii) As held in CCEx. v. Markfed Vanaspati (2003) 153 ELT 491 (SC), mere change in tariff does not mean there is 'manufacture'. It was again confirmed in CCEx. v. S R Tissues (2005) 186 ELT 385 (SC) that just because raw material and finished product fall in different tariff headings it cannot be presumed that process of obtaining finished product from such raw material automatically constitutes 'manufacture'.

Therefore, manufacturing is not only about a process and a product but it is about a new identity that must emerge out of the given process. Mere mention of process in tariff entry is not sufficient, it must be specifically stated that a particular process 'amounts to manufacture' – Shyam Oil Cake Ltd. v. CCEx. (2005) 174 ELT 145 (SC – 3 members bench).

Question 2

(a) Explain briefly, with reference to rule 21 of the Central Excise Rules, 2002 relating to remission of duty, the following:

(i) Can remission of duty be granted on goods cleared from the factory after payment of duty, but which were destroyed by fire in transit?

(ii) Upon grant of remission of duty, the CENVAT credit on inputs used in final product has to be reversed. (2 x 2 = 4 Marks)

(b) A unit availing small scale exemption in terms of Notification No. 8/2003-C.E. dated 1.3.2003 as amended, found that it has exceeded the exemption limit by Rs.20 lakh during the year 2006-07. Accordingly, appropriate duty was paid after obtaining registration and in accordance with the prescribed procedure.

In the year 2007-08, the unit estimates that the aggregate value of clearances for the purpose of the aforesaid notification would be Rs.140 lakh. Write a brief note on the steps to be adopted for the purpose of due compliance with the requirements of the aforesaid notification and the requirements of the Central Excise Act, 1944 and the rules made thereunder. (5 Marks)

(c) Write a note on the valuation of goods on the basis of retail sale price under section 4A of the Central Excise Act, 1944. (6 Marks)

Answer

(a) (i) Remission of duty is granted when the goods are lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption, at any time before removal.

Hence, in this case remission of duty cannot be granted under rule 21 of the Central Excise Rules, 2002 as goods have already been cleared from the factory after payment of duty.

(ii) As per sub-rule (5C) of rule 3 of CENVAT Credit Rules, 2004 inserted vide Notification No. 33/2007 CE (NT) dated 07.09.2007, where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of the Central Excise Rules, 2002, the CENVAT credit taken on the inputs used in the manufacture or production of said goods shall be reversed.

(b) The SSI exemption limit till the year 2006-07 was Rs.100 lakh. Since the turnover of the unit exceeded the exemption limit by Rs.20 lakh during the yaer 2006-07 hence, the turnover of the unit in the year 2006-07 must have been Rs.120 lakh.

Though in the year 2007-08, the unit expects clearance of Rs.140 lakh, it can still avail full exemption up to Rs.140 lakh as with effect from 01.04.2007, the exemption limit under the SSI scheme has been increased from Rs.100 lakh to Rs.150 lakh vide Notification No. 8/2007 CE dated 01.03.2007. However, the unit can avail full exemption up to the turnover of Rs.150 lakh only if it does not avail CENVAT credit on inputs being used by it. If it avails CENVAT credit, it will have to pay normal duty on all clearances.

The unit will be required to submit a declaration in prescribed form as its turnover is expected to be more than the 'specified turnover' of Rs.90 lakh.

As per the second proviso to rule 12(1) of the Central Excise Rules, 2002, SSI unit availing concession on the basis of annual turnover has to file a return of production and removal of goods on quarterly basis within 20 days from the close of quarter in the form ER-3.

(c) The provisions of section 4A are as follows:

(a) Excisable goods are valued on the basis of retail sale price when they are packaged and it is required under Standard of Weights and Measures Act, 1976 or Rules or under any other law to declare on such packages the retail sale price thereof. The Government may notify the products for the purpose of this section.

(b) The assessable value shall be deemed to be the retail sale price declared on the package less amount of abatement. Abatements can be given by the Central Government through notifications after taking into account the amount of duties and taxes payable on such goods.

(c) The retail sale price has been defined to mean the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer inclusive of all taxes and expenses and price is the sole consideration for such sale.

However, if the provisions of the Act, rules or other law as referred to in (a) above require the retail sale price to exclude any taxes, local or otherwise, the retail sale price shall be construed accordingly.

(d) Where there is more than one retail sale price, the maximum of such retail sale price will be deemed to be the retail sale price for the purpose of this section.

(e) Where different retail sale prices are declared on different packages for different areas, each such retail price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates.

(f) The excisable goods shall be confiscated and the retail sale price will be ascertained in the manner prescribed by the Central Government if the manufacturer:

- ♦ tampers, alters or obliterates the retail sale price declared on the package of goods after their removal, or
- ♦ removes such goods without declaring the retail sale price on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in (a) above.

(g) If the retail sale price declared on the package of goods at the time of removal is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price.

Question 3

(a) With reference to the Central Excise Act, 1944 and the rules made thereunder, write a brief note on the circumstances when personal penalty could be imposed on a director of a company or a partner of a firm or an employee or a transporter. (4 Marks)

(b) M/s MM & Co., a machinery manufacturer, effected clearances from its factory with effect from 1.4.2006 by payment of duty under protest and had also filed an appeal against the order for payment of duty. On 15.5.2006, one of its customers M/s BB & Co. purchased the machines from M/s MM & Co. On 23.5.2007, the appeal filed by M/s MM & Co. was decided in favour of M/s MM & Co. Pursuant to the said order in the appeal filed by M/s MM & Co., its customer M/s BB & Co. filed a refund claim on 1.6.2007 claiming refund of duty suffered by M/s BB & Co. This claim for refund of duty was rejected by the department on the ground of 'unjust enrichment' as well as on the ground of 'limitation'. Explain briefly with reference to section 11B of the Central Excise Act, 1944 whether the action of the department is correct in law. (5 Marks)

(c) Explain briefly the following with reference to the provisions of the Central Excise Rules, 2002 and relevant notification issued thereunder with regard to e-payment of duty:

(i) The threshold limit for mandatory e-payment of duty;

(ii) How and in what manner the time of payment would be reckoned under the e-

payment system?

(iii) The due dates for payment of duty under the e-payment scheme in respect of an assessee. (2 x 3 = 6 Marks)

Answer

(a) As per rule 26(1) any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reasons to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or Rs.2,000 whichever is greater. Section 9(1)(bbb) of the Central Excise Act also contemplates punishment for such dealings by any person. Thus a director, partner, employee or transporter or trader will be personally liable to penalty if he is personally involved in clandestine removal etc.

Further, penalty can be imposed on such persons if they issue any duty invoice without delivery of the goods or abet in making such invoice [Rule 26(2)(i)].

Penalty is also imposable on such persons if they issue any other document or abet in making such document on the basis of which, user of such document takes any ineligible benefit such as CENVAT credit or refund [Rule 26(2)(ii)].

(b) Section 11B provides that every claim of refund shall be made within 1 year from the relevant date. Though the time limit is not applicable when duty is paid under protest [Second proviso to section 11B(1)], such benefit is available only to the manufacturer, who has paid duty under protest and not to the purchaser as decided in the case of Allied Photographics 2004 (166) ELT 3 (SC). The Apex Court, in the said case, explained that the claim of refund by the manufacturer and the buyer are different. Under section 4, every payment by manufacturer, whether under protest or otherwise, is on its own account. It cannot be said that after the buyer has borne the incidence of duty, it has stepped into the shoes of manufacturer. Thus, the benefit of no limitation period in case of protest cannot be extended to the buyer.

Thus, in the given question, since the refund claim filed by M/s. BB & Co., the purchaser, was not within a period of one year from the date of purchase, being 15.05.2006, the same is barred by period of limitation. Thus, the Department's action is correct in law.

(c) (i) With effect from 01.04.2007, a third proviso has been inserted in rule 8(1) of Central Excise Rules, 2002 vide Notification No. 8/2007 CE (NT) dated 01.03.2007 to make e-payment mandatory for payment of duty by all assessees who have paid excise duty of Rs.50 lakhs or more in cash during the preceding financial year. For others, it is optional.

(ii) This a 24 x 7 facility. Payment can be made anytime from anywhere. All payments effected upto 8 p.m. will be accounted for the day as that day's receipt.

Payments effected after 8 p.m. will be accounted as the next working day's receipt.

(iii) For payment of excise duty by electronic means, the due date will be 6th of the succeeding month. For assessees availing SSI exemption, the due date will be 16th

of the following month [Notification No.34/2007-CE (NT) dated 11.09.2007]. For the month of March, the due date will remain unchanged i.e., 31st March.

Question 4

(a) State briefly the procedure to be adopted for clearance of 'prototypes' which are sent for trial or development test from the factory in terms of the Central Excise Rules, 2002. (2 Marks)

(b) Will omission on the part of the assessee to provide correct information constitute 'suppression of facts' for purpose of the proviso to section 11A of the Central Excise Act, 1944. Write a brief note with reasons. (3 Marks)

(c) Briefly examine the provisions relating to 'Settlement Commission' under the Central Excise Act, 1944 with particular reference to the changes brought in by the Finance Act, 2007. (5 Marks)

(d) M/s Smart Ltd. manufactures certain excisable goods that are exempt from duty in terms of a notification, provided CENVAT credit of duty paid on input is not taken by the manufacturer. M/s Smart Ltd. had taken the credit of duty paid on inputs, but reversed the same before its utilization. The department denied the benefit of exemption on the ground that once the credit is taken it is immaterial whether the same is reversed before or after utilisation of such credit. State briefly whether the action of the department is correct under the Central Excise Act and rules made thereunder with reference to decided case law, if any. (5 Marks)

Answer

(a) As per CBEC's Central Excise Manual of Supplementary Instructions 2005, if a prototype is to be sent out for trial purpose by actually putting them to effective use after conducting certain test to ensure that it meets with certain standard/specific norm, clearance has to be made on payment of duty. Its subsequent return to the factory is regulated in terms of rule 21 of the Central Excise Rules, 2002.

Rule 16C prescribing a special procedure for removal of excisable good for carrying out certain processes does not apply to 'prototypes'.

(b) Omission on the part of the assessee to provide correct information does not constitute suppression of facts as the expression 'suppression of facts' used in the proviso to section 11A of Central Excise Act is accompanied by very strong words as 'fraud' and 'collusion' and, therefore, has to be construed strictly. Suppression means failure to disclose full information with intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression.

Supreme Court in the case of Continental Foundation Joint Venture v. CCEx. (2007) 216 ELT 177 (SC) elaborated that mere omission to give correct information is not suppression of facts unless it was deliberate to evade the payment of duty.

(c) The various amendments made by the Finance Act, 2007 in the provisions relating to Settlement Commission tend to curtail the scope of Settlement Commission. The

amendments are discussed in brief as under:

(i) Application only if the case if pending

Prior to 01.06.2007, an application for settlement could be filed even when original adjudicating authority had passed an order and the appeal was pending before a Central Excise Officer or the Central Government.

However, as per amended section 31(c), application can be made only when a 'case' is pending before adjudicating authority on the date of application. The Commission can also not be approached when the matter is remanded for fresh adjudication.

(ii) Amendment of section 32E putting certain restrictions

No application can be made if proper records are not maintained in daily stock register or when there is clandestine removal of goods. The additional amount of duty accepted by the applicant as payable shall be more than Rs.3 lakhs (the limit was Rs.2 lakhs upto 01.06.07). The appellant is required to pay duty admitted to be payable by him along with interest.

(iii) Application for settlement only once in life time

Section 32-O of the Central Excise Act (amended w.e.f. 01.06.07) provides that application for settlement can be made only once during the life time of the applicant.

(iv) Commission debarred from re-opening completed proceedings

Section 32H empowered the Settlement Commission to re-open completed proceedings. However, the Finance Act, 2007 has disempowered the Commission to reopen the proceedings in cases where applications are made on or after 01.06.2007.

(v) Commission debarred from granting immunity from prosecution for any offence under Indian Penal Code or any Central Act other than Central Excise Act

Section 32K empowered Settlement Commission to grant immunity from prosecution and penalty. However, with effect from 01.06.2007, the immunity can be granted only in respect of prosecution under the Central Excise Act. Further, with effect from 01.06.2007, the Commission shall also not have the power to grant immunity from payment of interest as provided under this Act.

Note: The Finance Act, 2007 has made few other amendments also in the provisions relating to the Settlement Commission. All such amendments are given in point no. 5 of the Final Course Supplementary Study Paper 2007.

(d) The case is similar to CCEx. v. Bombay Dyeing & Mfg. Co. Ltd. (2007) 215 ELT 3 (SC), wherein it was held by the Apex Court that since the entry for credit was reversed before utilizing the same, it would amount to not taking of credit.

Hence, in view of this decision, M/s Smart Ltd. is entitled to claim the benefit of exemption notification and thus the Department's action is not correct.

Question 5

(a) State briefly the provisions of the Central Excise Act, 1944 relating to arrest of a person.

(3 Marks)

(b) Write short notes on the following:

(i) Desk review under Excise Audit, 2000.

(ii) Duty drawback under section 37 of the Central Excise Act, 1944.

(3 x 2 = 6 Marks)

(c) Based on the following particulars, arrive at the CENVAT credit available on clearance of goods to Domestic Tariff Area (DTA) from an Export Oriented Unit (EOU):

Assessable value	Rs. 20 lakhs
Basic customs duty	10%
Excise duty	16%
Education cess	2%
Secondary and Higher Education cess	1%
VAT payable under State VAT law	4%

(6 Marks)

Answer

(a) Any Central Excise Officer not below the rank of Inspector may arrest any person whom he has reason to believe to be liable to punishment under the provisions of the Central Excise Act or rules made thereunder. Such arrest can be made only with the prior approval of the Commissioner of Central Excise [Section 13 of Central Excise Act].

As per section 19 of the Act, every person arrested under the Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station. The arrest should be made as per the provisions of the Code of Criminal Procedure [Section 18 of the Central Excise Act].

(b) (i) Desk Review is the first step in Excise Audit, 2000. Upon assignment of an audit, the auditor is required to be sufficiently prepared before the visit to the unit. For this purpose, the auditor reviews all the information available about the unit, its operations, and reasons for selection for audit and possible issues that can be identified at desk review stage. Perusal of assesse's profile, annual report, trial balance, cost audit report and income-tax audit report is involved in desk review.

Department has also decided to take help of practicing chartered/cost accountants in desk review of Excise Audit 2000.

(ii) Under duty drawback scheme, excise and customs duties paid on inputs is given back to the exporters of finished products. Section 37 of Central Excise Act, 1944 empowers the Central Government to make rules to carry into effect the purpose of

the Act.

The Central Government, in exercise of powers conferred by section 37 of the Central Excise Act, 1944, section 75 of the Customs Act, 1962 and section 93A read with section 94 of the Finance Act, 1994 has made the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

Under these rules, drawback is allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government.

The All Industry Rates of Drawback are given separately i.e., when CENVAT credit has been availed of and when such credit facility has not been availed of.

(c) As per Notification No. 23/2003 CE dated 31.3.2003, 75% of basic customs duty is exempt in case of clearance of goods by an EOU to DTA. The amount of CENVAT credit can be calculated as under:

		Rs.
(i)	Assessable value	20,00,000
(ii)	Customs duty 25% of 10% of Rs.20,00,000	50,000
(iii)	Additional duty (CVD) @ 16% of (Rs.20,00,000 + Rs.50,000)	3,28,000
(iv)	Education cess @ 2% of Rs.3,28,000	6,560
(v)	S & H education cess @ 1% of Rs.3,28,000	3,280
(vi)	Special CVD (as VAT is payable)	NIL

As per rule 3 of CENVAT Credit Rules, 2004, the amount of CENVAT credit will be as under:

	Rs.
Additional duty of customs (CVD)	3,28,000
Education cess	6,560
S & H education cess	3,280
Total amount of credit	3,37,840

The credit can also be computed by using the formula provided in rule 3(7) of the CENVAT Credit Rules, 2004. The said rule gives the following formula for availing credit when goods are cleared by EOU to DTA after 1.3.2006:

Credit available = Assessable value × [(1+ BCD/400) × CVD/100]

= 20,00,000 x [(1 + 10/400) x 16/100]

= 20,00,000 x 1.025 x 0.16

= Rs.3,28,000

Add: education cess @ 2% = Rs.6,560

Add: secondary and higher education cess @ 1%	= Rs.3,280
Total credit available	= Rs.3,37,840

PART - B

Question 6

(a) Explain briefly with reference to the provisions of the Customs Act, 1962 the following :

(i) Appointment of officers of customs

(ii) Tariff value (2 x 2 = 4 Marks)

(b) M/s Hind IT Co. imported laptops with Hard Disc Drives (HDD) preloaded with operating software like Windows XP, XP home etc. The department has claimed that the said laptop along with the operating software was classifiable and assessable as a single unit. It is the claim of the assessee that the software loaded HDD should be classified and assessed separately as an exemption is available as per notification issued under section 25(1) of the Customs Act, 1962. Decide with a brief note whether the action proposed by the department is correct in law. (4 Marks)

(c) Write a note on "Project Imports" under the Customs Tariff Act, 1975 enumerating the eligible projects and the minimum investment criteria, if any. (6 Marks)

(d) XYZ Industries Ltd., has imported certain equipment from Japan at an FOB cost of 2,00,000 Yen (Japanese). The other expenses incurred by M/s. XYZ Industries in this connection are as follows:

(i)	Freight from Japan to India Port	20,000 Yen
(ii)	Insurance paid to Insurer in India	Rs.10,000
(iii)	Designing charges paid to Consultancy firm in Japan	30,000 Yen
(iv)	M/s. XYZ Industries had expended Rs.1,00,000 in India for certain development activities with respect to the imported equipment	
(v)	XYZ Industries had incurred road transport cost from Mumbai port to their factory in Karnataka	Rs. 30,000
(vi)	The Central Board of Excise and Customs had notified for purpose of section 14(3)* of the Customs Act, 1962 exchange rate of 1 Yen = Rs.0.3948. The inter bank rate was 1 Yen = Rs.0.40	
(viii)	M/s XYZ Industries had effected payment to the Bank based on exchange rate 1 Yen = Rs. 0.4150	
(viii)	The commission payable to the agent in India was 5% of FOB cost of the equipment in Indian Rupees	

FOB cost of the equipment in Indian Rupees

Arrive at the assessable value for purposes of customs duty under the Customs Act, 1962 providing brief notes wherever required with appropriate assumptions. (6 Marks)

*Note: In the amended section 14, the provisions relating to exchange rate are covered under explanation to section 14.

Answer

(a) (i) Section 4(1) of the Customs Act, 1962 empowers the Central Board of Excise and Customs (CBEC) to appoint such persons as it thinks fit to be officers of customs.

Without prejudice to the provisions of sub-section (1), the Board may authorize a Chief Commissioner of Customs or a Commissioner of Customs or a Joint or Assistant Commissioner of Customs or Deputy Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs. [Section 4(2) of the Customs Act, 1962].

(ii) As per section 2(40) of the Customs Act, 'tariff value' in relation to any goods, means the tariff value fixed in respect thereof under sub-section (2) of section 14.

As per section 14(2) of the Act, notwithstanding anything contained in section 14(1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(b) The action proposed by the Department is correct in law. The facts of the case are similar to CCus. v. Hewlett Packard India Sales (P) Ltd. (2007) 215 ELT 484 (SC).

In this case, the Supreme Court observed that the pre-loaded operating system recorded in HDD in the laptop (item of import) forms an integral part of the laptop as the laptop cannot work without the operating system. A laptop without an operating system is like an empty building. Hence, laptop should be treated as one single unit and assessed accordingly.

However, if the operating system had been imported as packaged software like an accessory, then the benefit of exemption notification would have been available on it.

(c) Setting up of a project in India may require a number of machines and equipments to be imported. This importation may spread over a period of time and thus assigning values and paying heavy customs duty on imported machineries make the initial project a cumbersome and costly process. Hence, concept of 'project import' has been introduced under heading 9801 of Customs Tariff to cover all machinery, instruments, apparatus and appliances, components or raw materials for initial setting up of a unit or substantial expansion of the existing project. The spare parts, raw material and consumables stores upto 10% of value of goods can be imported.

The eligible projects are:

(i) Industrial plant

(ii) Irrigation project

(iii) Power project

(iv) Mining project

(v) Oil & other mineral exploration project

(vi) Other projects as notified by the Central Government

Earlier, there was a condition that investment in plant and machinery should be at least Rs.5 crore. This condition has been waived with effect from 22.01.2007.

(d)

	Yen
FOB value	2,00,000.00
Add: Ocean freight	20,000.00
Add: Designing charges paid in Japan	30,000.00
Total	2,50,000.00
Total value in Indian rupees	
2,50,000 × 0.3948	Rs.98,700.00
(Rate of 1 yen = Rs.0.3948)	
Add: Insurance	Rs.10,000.00
Add: Agent's commission at 5% FOB value	Rs.3,948.00
(5% of 2,00,000 Yen x 0.3948)	
Total CIF price	Rs.1,12,648.00
Add: Landing charges @ 1%	Rs.1,126.48
(1% of 1,12,648)	
Assessable value for the purposes of customs duty	Rs.1,13,774.48
Rounded off	Rs.1,13,774.00

Notes:

(i) Rule 10(1)(b)(iv) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 inter alia provides that value of development work undertaken elsewhere than in India is includible in the value of the imported goods. Thus, development charges paid for work done in India have not been included for the purposes of arriving at the assessable value.

(ii) As per rule 10(2)(a) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the cost of transport of the imported goods up to the place of

importation is includible for the purpose of valuation. Thus, transport cost from Mumbai port (place of importation) to the factory in Karnataka has not been considered for the purpose of customs valuation.

(iii) Insurance has been assumed to be in respect of the cost of the equipment till the place of importation and is thus, includible [Rule 10(2)(c) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

(iv) As per rule 10(1)(a)(i) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, buying commission is not includible in the value of the imported goods. Since the agent's commission does not represent buying commission, hence, it is includible.

(v) Landing charges have been considered as per clause (ii) of the proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(vi) The rate of exchange notified by the CBEC has been considered [Clause (a) of the explanation to section 14 of the Customs Act, 1962].

Question 7

(a) Explain briefly with reference to the provisions of the Customs Act, 1962 whether the owner of the warehoused goods has the right to relinquish his title to such goods after the expiration of the warehousing period or the extended warehousing period, as the case may be, and also state whether any charges shall become payable upon such relinquishment. (5 Marks)

(b) State briefly any five illustrative cases under the Customs, Central Excise Duties and Service Tax Drawback Rules, 2006 (sic: 1995) where the All Industry Drawback rates will not apply.

(5 Marks)

(c) State briefly the provisions of the Customs Act, 1962 relating to payment of interest in case of provisional assessment. (5 Marks)

Answer

(a) Yes, the owner of the warehoused goods has the right to relinquish his title to such goods after the expiration of warehousing period/extended warehousing period.

Proviso to section 68 of the Customs Act, 1962, provides that the owner of the warehoused goods can relinquish his title to such goods any time before an order for clearance of goods for home consumption has been made in respect of such goods. Similar view was expressed in the case of CCus. v. i2 Technologies Software (P) Ltd. 2007 (217) ELT 176 (Kar.)

However, the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

On relinquishment of title to such goods, the owner of goods will be required to pay rent,

interest, other charges and penalties that may be payable. However, duty will not be payable on relinquishment.

(b) Notification No. 68/2007 Cus. (NT) dated 16.07.2007 mentions that All Industry Drawback Rates do not apply to export of a commodity or product if such commodity or product is -

(i) manufactured partly or wholly in a customs bonded warehouse.

(ii) manufactured or exported in discharge of export obligation against an Advance Licence or Advance Authorisation Scheme (however, excise portion of duty drawback rate is allowable).

(iii) manufactured or exported by a hundred percent export oriented undertaking.

(iv) manufactured or exported by a unit situated in free trade zone or export processing zone or special economic zone.

(v) manufactured or exported by availing the rebate of excise duty on inputs under rule 18 of the Central Excise Rules, 2002.

(vi) manufactured or exported without payment of duty under rule 19(2) of the Central Excise Rules, 2002.

(vii) manufactured or exported under duty entitlement pass book scheme.

(c) Section 18 of the Customs Act, 1962 provides for provisional assessment. Duty is paid in two stages in case of provisional assessment; firstly, at the time of provisional assessment and another at the stage of finalization of assessment. Section 18(3) of the Customs Act provides that –

(i) the importer or exporter shall be liable to pay interest, if differential amount is found to be payable.

(ii) the interest shall be payable at the rate prescribed under section 28AB of the Customs Act, 1962 (presently 13%).

(iii) the interest shall be payable from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

Similarly, section 18(4) of the Customs Act, 1962 provides that –

(i) if any amount is refundable after final assessment (subject to doctrine of unjust enrichment), interest shall be payable to the assessee.

(ii) interest shall be payable at the rate specified (6% presently) under section 27A of the Customs Act, 1962.

(iii) interest shall be granted if refund is not made within 3 months from the date of final assessment of duty.

Question 8

(a) State briefly with reference to the provisions of section 27 of the Customs Act, 1962 whether the principle of "unjust enrichment" will apply in the following cases:

(i) refund of wrongly encashed bank guarantee

(ii) refund of excess interest paid by the assessee

(iii) refund of duty on car imported for personal use. (2 x 3 = 6 Marks)

(b) The Committee of Commissioners of Customs is empowered under the Customs Act, 1962 to direct the filing of an appeal before the Appellate Tribunal in certain cases while in certain others, it may direct an application to be filed before the Appellate Tribunal for determination of such points arising out of the decision or order as may be specified by the said committee. Write a brief note on the powers of the Committee of Commissioners of Customs bringing out the difference in the exercise of such powers. (4 Marks)

*Note: The power to direct an application to be filed before the Appellate Tribunal for determination of such points arising out of the decision or order as may be specified by the Committee vests with the Committee of Chief Commissioner.

(c) State in brief the provisions under the Customs Act, 1962 that seek to prohibit the import of goods infringing intellectual property rights (IPR). (5 Marks)

Answer

(a) The bar of unjust enrichment applies in case of refund of customs duty under section 27(2) of the Customs Act, 1962. In the given cases, the applicability of the doctrine has been examined as under –

(i) The provisions of section 27(2) apply when an assessee claims refund of duty, hence, bar of unjust enrichment will not apply to refund of wrongly encashed bank guarantee. An amount secured by bank guarantee cannot be held to be paid to the Revenue as duty. Hence, the Revenue will have to pay back the amount of bank guarantee (encashed wrongly), if the case is finally decided in favour of assessee – Oswal Agro Mills Ltd. v. ACCE (1994) 70 ELT 48 (SC).

(ii) The bar of unjust enrichment will apply in case of excess interest paid by the assessee as the words used under section 27(1) and 27(2) are "duty and interest, if any, paid on such duty". The payment of interest is inextricably laced with payment of duty. Thus, the excess amount of interest paid by the assessee will be refunded to him only if he does not pass on the incidence of such interest to any other person.

(iii) The principle of unjust enrichment will not apply to refund of duty on car imported for personal use, as clause (b) of the proviso to sub-section (2) of section 27 of the Customs Act, 1962 stipulates that in case of imports made by an individual for his personal use, the refund should not be credited to consumer welfare fund, but shall be paid to the applicant.

(b) Under section 129A(2) of the Customs Act, 1962, the Committee of Commissioners of Customs may direct the proper officer to file appeal on its behalf to the Appellate Tribunal against the order of Commissioner (Appeals), if it is of the opinion that the order is not legal or proper.

Under section 129D(1) of the Customs Act, 1962, the Committee of Chief Commissioners of Customs may, of its own motion, call for and examine the record of any proceedings in which a Commissioner of Customs has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Customs in its order.

Therefore, difference in two cases mentioned above is that in the former case the Department has to file a regular appeal with the Tribunal while in the latter case a review application is filed with the Tribunal. It may also be noted here that the review application is treated as appeal filed against the decision or order of the adjudicating authority vide section 129D(4) of the Customs Act, 1962.

Further, in the former case an appeal has to be filed within three months as specified in section 129A(3) of the Customs Act, 1962 while in the latter case application for review can be filed within four months; three months for the Committee of Chief Commissioner of Customs to issue order for review and further one month to the Commissioner to file an application .

(c) The Government of India has an international obligation to protect Intellectual Property Rights (IPR) at the stage of import in terms of an agreement arrived at the WTO. Under clauses (n), (o) and (u) of the Customs Act, 1962 the Government has been empowered to prohibit, absolutely or conditionally, import or export of goods for the purpose of patent protection, trade marks or copyrights or for prevention of deceptive practices. Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 have been notified for this purpose vide Notification No. 47/2007 Cus. (NT) dated 08.05.2007.

Further, Notification No. 49/2007 Cus. (NT) dated 08.05.2007 has also been issued to prohibit the import of the goods described therein.

PART – C

Question 9

(a) State briefly whether the following services under the Finance Act, 1994, relating to service tax, are taxable services. (Answer any three):

(i) Services provided in the State of Rajasthan by a person having a place of business in the State of Jammu and Kashmir.

(ii) Services provided from India for use outside India.

(iii) Service provided from outside India and received in India by an individual, otherwise than from purpose of use in business or commerce.

(iv) Service provided to an Export oriented unit. (2 x 3 = 6 Marks)

(b) Briefly state the provisions under the Service Tax Rules, 1994 relating to filing of returns and also state any late fee payable for delay in filing of returns. (3 Marks)

(c) Answer the following with reference to the Finance Act, 1994 as amended relating to applicability of service tax:

(i) Sale of lottery tickets.

(ii) Depository services and Electronic Access to Securities Information Services (EASI) provided by the Central Depository Services India Ltd.

(iii) Services provided by educational institutions like IIMs by charging a fee from prospective employers like corporate houses regarding recruiting candidates through campus interviews. (2 x 3 = 6 Marks)

Answer

(a) (i) As per section 64(1) of the Finance Act, 1994, service tax provisions do not extend to the State of Jammu and Kashmir. However, since service tax is a destination based consumption tax, hence service provided in Rajasthan from Jammu and Kashmir would be liable to service tax.

(ii) Since, service tax is a destination based-consumption tax, it is not leviable on export of services. Export of Services Rules, 2005 provide a scientific criteria to decide what is 'export of service'. The rules make it clear that exemption from service tax/rebate of service tax and excise duty paid is admissible only if there is 'export of service' as defined in these rules.

Thus, assuming that the given service is exported in terms of Export of Services Rules, 2005, the export thereof would not be liable to service tax.

(iii) Service tax would not be leviable in this case as the first proviso to section 66A(1) of the Finance Act, 1994 states that services received by an individual, otherwise than for the purpose of use in any business or commerce are exempt from payment of service tax.

(iv) Service provided to export oriented undertaking is liable to service tax.

(b) The service tax return is required to be filed under section 70 of the Finance Act, 1994 read with rule 7 of the Service Tax Rules, 1994, by any person liable to pay service tax in Form ST-3 as under:

for the period from April to September – by 25th October

for the period from October to March – by 25th April

A single return has to be filed in respect of all taxable services provided by an assessee.

As per rule 7C of the Service Tax Rules, 1994, delay in filing of return attracts late fee as under:

(i) Delay upto 15 days - Rs.500

(ii) Delay upto 30 days – Rs.1,000

(iii) Delay beyond 30 days – Rs.1,000 + Rs.100 per day of delay beyond 30 days

(c) (i) Section 65(19)(i) of the Finance Act, 1994 lays down that 'business auxiliary

service' means any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client. Since, lottery tickets are actionable claims and not goods as decided by the Apex Court in the case of Sunrise Associates v. Govt. of NCT of Delhi (2006) 5 SSC (603), hence sale of lottery tickets is not liable to service tax.

(ii) As per Circular No. 96/7/2007 ST dated 23.08.2007 definition of banking and other financial services inter alia specifically includes depository services [Section 65(12)(a)(v)] and provision and transfer of information and data processing [Section 65(12)(a)(vii)]. EASI services provided by the Central Depository Services India Ltd. (CDSL) fall within the scope of "provision and transfer of information and data processing". Therefore, the depository services provided by CDSL, including EASI services, for a fee are liable to service tax under banking and other financial services. [Section 65(105)(zm)]

(iii) Manpower recruitment or supply agency is defined as 'any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client [Section 65(68)].

Educational institutes like IITs, IIMs etc. fall within the above definition. Thus, service tax is liable to be paid on services provided by such institutes in relation to campus recruitment under section 65(105)(k) of the Finance Act, 1994.