PREFACE

This report for the year ended March 2009 has been prepared for submission to the President of India under the Article 151 of the Constitution of India.

Audit of Revenue Receipts – Indirect Taxes of the Union Government is conducted under section 16 of the Comptroller and Auditor General of India (Duties, Powers and Conditions of Service) Act, 1971.

The report presents the results of audit of receipts of central excise duties.

The observations included in this report have been selected from the findings of the test check conducted during 2008-09, as well as those which came to notice in earlier years but were not included in the previous reports.

EXECUTIVE SUMMARY

This report contains 75 paragraphs with a revenue implication totalling Rs. 156.84 crore. The Ministry/department had, till December 2009, accepted the audit observations in 41 paragraphs involving revenue of Rs. 48.30 crore and reported recovery of Rs. 27.59 crore. A few significant findings included in this report are mentioned in the following paragraphs:-

Chapter I: Central excise receipts

- **While during the period 2004-05 to 2007-08 the variation between the actual collections and the budget estimates was within 10 per cent, this was significantly higher at 21.2 per cent during 2008-09.**

{Paragraph 1.1}

Chapter II: Exemptions

- **Duty of Rs. 80.45 crore was levied short due to incorrect grant of exemptions.**

{Paragraphs 2.1 to 2.8}

Chapter III: Valuation of excisable goods

- **Instances of undervaluation due to incorrect determination of cost of excisable goods, incorrect exclusion from the assessable value of sales tax collected but not paid, non-inclusion of additional consideration in the assessable value, adoption of lower assessable value etc., were noticed. Duty levied short in these cases amounted to Rs. 12.42 crore.**

{Paragraphs 3.1 to 3.5}

Chapter IV: Non-levy/short levy of duty

- **Duty of Rs. 13.35 crore was not levied or short levied on excisable goods consumed within the factory, on capital goods cleared as scrap, on goods cleared without payment of duty in time, on goods not accounted for etc.**

{Paragraphs 4.1 to 4.6}

Chapter V: Non-levy of interest and penalty

- **Interest and penalty of Rs. 13.43 crore was not levied in a few cases of delayed payment of duty.**

{Paragraphs 5.1 to 5.3}

Chapter VI: Cess not levied or demanded

- **Rs. 1.95 crore of cess was not levied or demanded on textiles and textile machinery, cement, tractors etc. in a few cases.**

{Paragraphs 6.1 to 6.5}

Chapter VII: Miscellaneous topics of interest

- **Cases of non-transfer of duty to consumer welfare fund, passing of surplus credit by paying excess duty/exempted duty, incorrect grant of rebate on exported goods, fraudulent payment of duty, duty collected but not paid to the Government etc., were noticed in audit. Duty implication in these cases was Rs. 35.24 crore.**

{Paragraphs 7.1 to 7.6}

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 2004-05 to 2008-09 are exhibited in the following table and graph:-

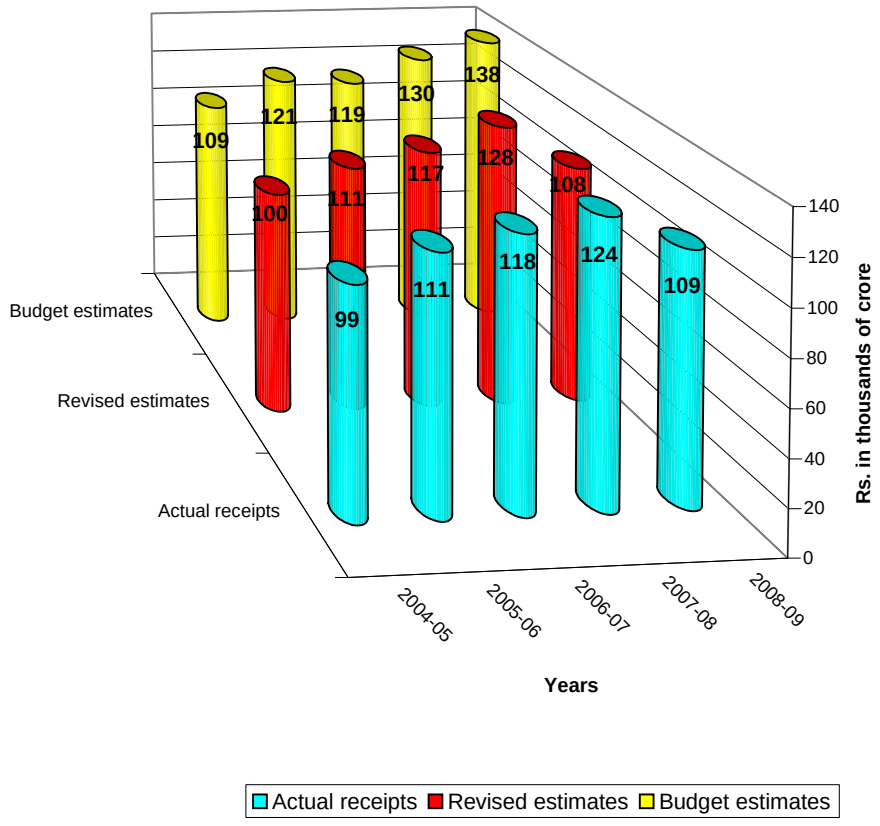
Table no. 1

(Amounts in crore of rupees)

Year	Budget estimates	Revised estimates	Actual receipts*	Difference between actual receipts and budget estimates	Percentage variation
2004-05	1,08,500	1,00,000	99,125	(-) 9,375	(-) 8.64
2005-06	1,20,768	1,11,006	1,11,226	(-) 9,542	(-) 7.90
2006-07	1,19,000	1,17,266	1,17,613	(-) 1,387	(-) 1.17
2007-08	1,30,220	1,27,947	1,23,611	(-) 6,609	(-) 5.07
2008-09	1,37,874	1,08,359	1,08,613	(-) 29,261	(-) 21.23

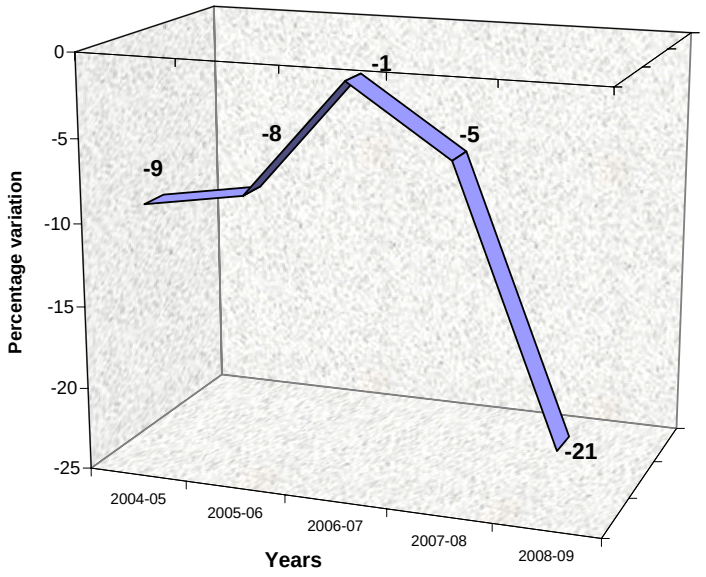
* Figures as per the Finance Accounts

Graph 1: Central Excise Receipts - Budget, Revised and Actual



While during the period 2004-05 to 2007-08 the variation between the actual collections and the budget estimates was within 10 per cent, this was significantly higher at 21.2 per cent during 2008-09. The percentage variation between the actual receipts and the budget estimates during the years 2004-05 to 2008-09 is depicted in the following graph: -

Graph 2: Percentage variation of actual receipts over budget estimates



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

The values of output** from the manufacturing sector vis-à-vis receipt of central excise duties through personal ledger account (cash collection) during the years 2004-05 to 2008-09 were as mentioned in the following table and graph:-

Table no. 2

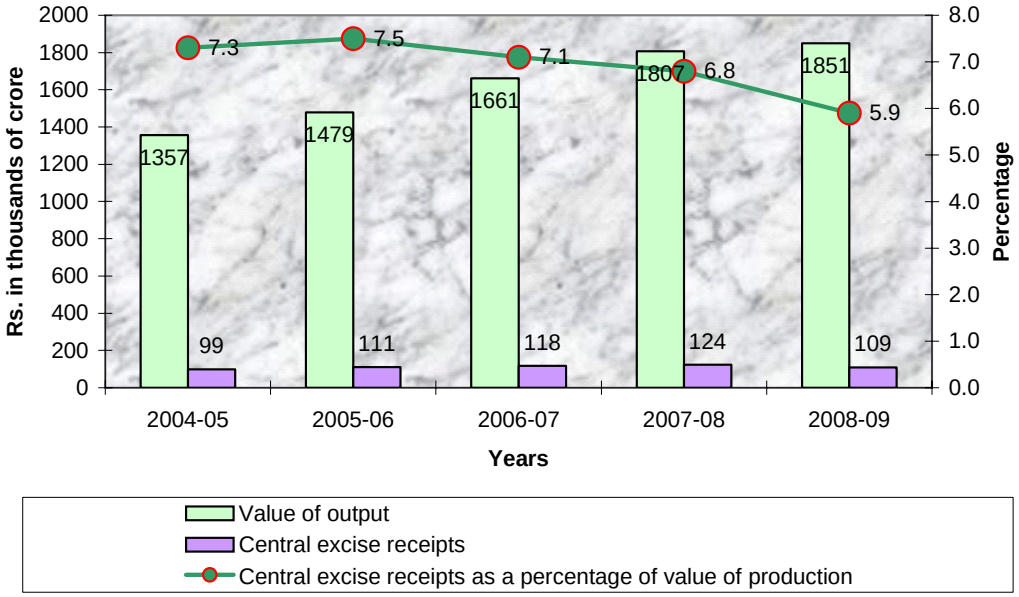
(Amounts in crore of rupees)

Year	Value of output*	Central excise receipts	Central excise receipts as a percentage of value of production
2004-05	13,57,191	99,125	7.30
2005-06	14,79,338	1,11,226	7.52
2006-07	16,61,297	1,17,613	7.08
2007-08	18,07,491	1,23,611	6.84
2008-09	18,50,871	1,08,613	5.87

* Estimated figure, Source: Central Statistical Organisation, Government of India.

******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 producer's 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.

Graph 3: Central excise receipts and value of production



The foregoing table reveals that value of output had increased by a factor of 1.36 during the years 2004-05 to 2008-09 and the corresponding increase in the central excise receipts was by a factor of 1.10. Accordingly, the central excise duties had generally kept steady pace with the value of output except for 2008-09 when there was a reduced growth in receipts compared to 2007-08.

1.3 Cost of collection

The expenditure incurred during the year 2008-09 in collecting central excise duty alongwith the corresponding figures for the preceding four years is given in the following table and graph:-

Table no. 3

(Amounts in crore of rupees)

Year	Receipts from excise duty		Expenditure on collection[$]		Cost of collection as a percentage of receipts
	Amount	Percentage increase over the previous year	Amount[*]	Percentage increase over the previous year	
2004-05	99,125	9.20	825.90	10.03	0.83
2005-06	1,11,226	12.21	901.02	9.10	0.81
2006-07	1,17,613	5.74	974.49	8.15	0.83
2007-08	1,23,611	5.10	1,107.28	13.62	0.90
2008-09	1,08,613	(-) 12.14	1,650.27	49.04	1.52

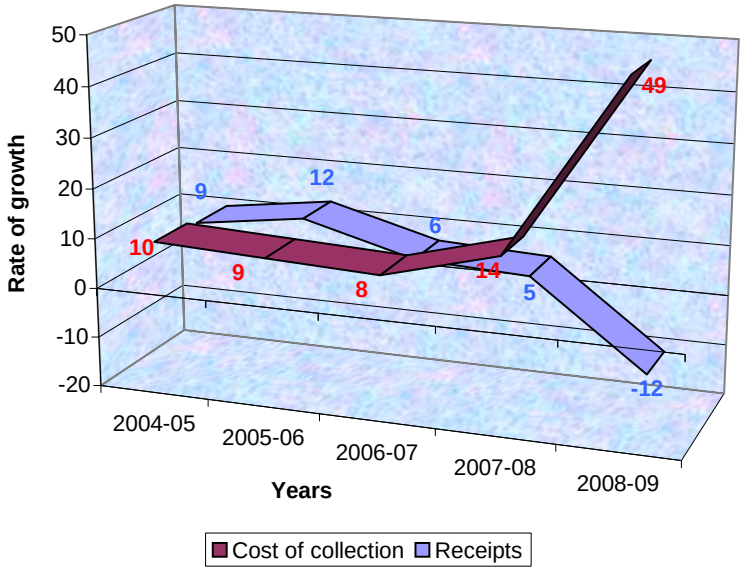
* Figures as per the Finance Accounts

$ Expenditure figure include expenditure incurred for collection of service tax as separate figures for these are not maintained by the Ministry

While the receipts from excise duty fell down by 12.14 per cent, the expenditure on its collection had increased by 49.04 per cent in 2008-09 over

the previous year 2007-08. In fact, the cost of collection as a percentage of receipts which was fairly constant from 2004-05 to 2006-07, has shown a steadily increasing trend from 2007-08.

Graph 4: Percentage growth in central excise receipts and cost of collection



1.4 Outstanding demands

The number of cases and amounts involved in demands* for excise duty outstanding for adjudication/recovery as on 31 March 2008 and 31 March 2009 are mentioned in the following table:-

Table no. 4

(Amounts in crore of rupees)

Pending decision with	As on 31 March 2008				As on 31 March 2009			
	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	11,097	112.91	11,264.78	311	13,048	32.74	11,811.85
Appellate Commissioners	367	5,380	48.66	883.53	354	6,982	262.61	1,725.56
Board	3	15	0.12	1.43	2	26	10.90	2.50
Government	19	61	6.49	45.46	70	272	58.43	99.85
Tribunals	1,373	8,309	460.41	10,662.59	1,779	8,671	3,172.03	15,969.04
High Courts	615	1,061	144.46	610.76	697	1,253	510.82	761.87
Supreme Court	77	127	21.67	269.12	129	212	2,350.34	938.84
Pending for coercive recovery measures	5,020	8,713	1,236.41	4,654.03	5,611	6,617	5,277.73	7,906.00
Total	**7,639**	**34,763**	**2,031.13**	**28,391.70**	**8,953**	**37,081**	**11,675.60**	**39,215.51**

* Figures furnished by the Ministry

A total of 46,034 cases involving duty of Rs. 50,891.11 crore were pending as on 31 March 2009 with different authorities, of which 29 per cent in terms of number were with the adjudicating officers of the department. Pendency with the department's adjudicating officers had increased from 11,262 in 2007-08 to 13,359 in 2008-09 i.e. an increase of 18.62 per cent.

1.5 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 2006-07 and 2008-09 is shown below:-

Table no. 5

(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
2006-07	917	3,315.96	1,587.40	183	186.72	171.37	38	3.67
2007-08	1,021	950.88	775.63	292	137.59	157.98	105	0.93
2008-09	1,161	1,433.91	968.68	133	93.36	81.12	43	0.30
Total	**3,099**	**5,700.75**	**3,331.71**	**608**	**417.67**	**410.47**	**186**	**4.90**

** Figures furnished by the Ministry

The foregoing table indicates that while a total of 3,099 cases of fraud/presumptive fraud were detected during the years 2006-09 by the department involving duty of Rs. 5,700.75 crore, it raised a demand of Rs. 3,331.71 crore only and recovered Rs. 410.47 crore (12.32 per cent) out of it. Similarly, out of a penalty of Rs. 417.67 crore that was imposed, the department could recover only Rs. 4.90 crore (1.2 per cent).

1.6 Commodities contributing major revenue

Commodities which yielded revenue* of more than Rs. 1,000 crore during 2008-09 alongwith corresponding figures for 2007-08 are mentioned in the following table:-

Table no. 6

(Amounts in crore of rupees)

Sl. No.	Budget head	Commodity	2007-08 (Actual)	2008-09 (Actual)	Percentage variation of actual over previous year	Percentage share in total collection
1.	36	Refined diesel oil	23,847.80	21,536.77	(-) 9.69	20.57
2.	34	Motor spirit	20,101.47	21,074.74	4.84	20.13
3.	102	Iron and steel	15,940.28	14,112.19	(-) 11.47	13.48
4.	40	All other mineral oils and products falling under chapter 27	13,178.80	13,472.49	2.23	12.87
5.	27	Cigarettes and cigarillos of tobacco or tobacco substitutes	8,152.49	9,310.24	14.20	8.89
6.	31	Cement	6,990.97	6,483.93	(-) 7.25	6.19

Sl. No.	Budget head	Commodity	2007-08 (Actual)	2008-09 (Actual)	Percentage variation of actual over previous year	Percentage share in total collection
7.	30	All other falling under chapter 24	943.65	2,584.95	173.93	2.47
8.	128	Motor cars and other motor vehicles for transport of persons	2,715.81	2,326.80	(-) 14.32	2.22
9.	119	All other machinery, articles and tools falling under chapter 84	4,359.94	2,282.63	(-) 47.69	2.18
10.	38	Furnace oil	1,984.82	2,135.33	7.58	2.04
11.	61	Plastic and articles thereof	2,537.01	2,075.78	(-) 18.18	1.98
12.	103	Articles of iron and steel	2,529.67	1,753.27	(-) 30.69	1.67
13.	130	All other motor vehicles including two wheelers	2,948.16	1,614.05	(-) 45.25	1.54
14.	17	Cane or beet sugar and chemically pure sucrose in solid form	1,205.87	1,455.58	20.71	1.39
15.	45	Organic chemicals	1,870.95	1,165.30	(-) 37.72	1.11
16.	60	Miscellaneous chemical products	1,365.62	1,097.59	(-) 19.63	1.05

*** Figures furnished by the Ministry.**

The above table reveals that in 10 out of 16 commodities, the collection of revenue during 2008-09 had gone down by 47.69 to 7.25 per cent. This could be due to reduction in general rate of duty from 16 to 14 per cent. A substantial dip in revenue was noticed in 'all other machinery, articles and tools falling under chapter 84' (- 47.69 per cent), 'all other motor vehicles including two wheelers' (- 45.25 per cent) and 'organic chemicals' (- 37.72 per cent).

1.7 Remission of revenue

Central excise duty remitted/abandoned* or written off due to various reasons for the years 2007-08 and 2008-09 is shown in the following table:-

Table no.7

(Amounts in crore of rupees)

		2007-08		2008-09	
		Number of cases	Amount	Number of cases	Amount
Remitted due to :					
(a)	Fire	7	1.20	2	0.09
(b)	Flood	4	0.89	3	0.20
(c)	Theft	0	0.00	0	0.00
(d)	Other reasons	529	3.90	397	0.42
Written off due to :					
(a)	Assessees having died leaving behind no assets	1	0.01	7	0.10
(b)	Assessees untraceable	114	6.97	88	4.70
(c)	Assessees left India	0	0.00	0	0.00
(d)	Assessees incapable of payment of duty	0	0.00	8	0.08
(e)	Other reasons	2	0.08	57	4.04
Total		**657**	**13.05**	**562**	**9.63**

* Figures furnished by the Ministry

1.8 Results of audit

This report contains 75 paragraphs, featured individually or grouped together, arising from test check of records maintained in departmental offices and premises of the manufacturers. The revenue implication of these paragraphs is Rs. 156.84 crore. The concerned Ministries/departments had accepted (till December 2009) audit observations in 41 paragraphs involving Rs. 48.30 crore and had recovered Rs. 27.59 crore.

1.9 Impact of audit reports

1.9.1 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. 11,177.02 crore through 741 audit paragraphs. Of these, the Government had accepted audit observations in 508 audit paragraphs involving Rs. 2,823.96 crore and had recovered Rs. 194.47 crore. The details are shown in the following table:-

Table no. 8

(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
2004-05	227	7,696.94	122	200.40	--	--	122	200.40	32	20.02	57	20.78	89	40.80
2005-06	124	1,410.39	89	1,315.73	9	10.27	98	1,326.00	35	25.97	29	19.94	64	45.91
2006-07	152	1,195.36	118	57.30	5	998.81	123	1,056.11	59	23.57	26	13.47	85	37.04
2007-08	163	717.49	104	156.27	20	36.88	124	193.15	41	43.13	--	--	41	43.13
2008-09	75	156.84	41	48.30	--	--	41	48.30	24	27.59	--	--	24	27.59
Grand Total	**741**	**11,177.02**	**474**	**1,778.00**	**34**	**1,045.96**	**508**	**2,823.96**	**191**	**140.28**	**112**	**54.19**	**303**	**194.47**

1.9.2 Amendment to Act/Rules

The Government had amended Act/Rules addressing the concerns raised by audit through audit reports. An important change made through budget 2009-10 is briefly mentioned in the following table:-

Table no. 9

Reference of audit report (AR) paragraph	Issue raised in audit	Amendment to Act/Rules etc.
Paragraph 6.1 of AR no. 7 of 2007	Items like MS plates, angles, channels, HR sheets, beams, strips, TMT bars, plates, cement, tyres and tubes etc., are general purpose items or structural items and also do not conform to definition of capital goods and hence availing of cenvat credit thereon was incorrect.	In explanation 2 below rule 2(k) of the Cenvat Credit Rules 2004, a clause has been inserted to exclude cement, angles, channels CTD bar, TMT bar and other items used for construction of factory shed, building or laying of foundation or making structures for support of capital goods {Notification No. 16/2009 - CE (NT) dated 7 July 2009}.

1.10 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 the audit report in Parliament.

Review of outstanding action taken notes on paragraphs relating to central excise contained in earlier audit reports on indirect taxes indicated that the Ministries had not submitted remedial action taken notes on 70 paragraphs. The delay in response in these cases ranged from four months to sixty five months. Summarised position of outstanding action taken notes is depicted in the following table:-

Table no.10

No. of ATNs pending	Related audit paragraph and audit report	Name of the Ministry
5	**12.1 of 11 of 2004, 17.2 of 7 of 2006, 15.2 of 7 of 2007, 8.2 of CA 7 of 2008 and 7.3 of CA 20 of 2009-10**	**Ministry of Commerce and Industry**
1	**8.1 of CA 7 of 2008**	**Ministry of Textiles**
64	**2.1, 2.2, 2.3, 2.4.1, 2.4.2, 2.5, 2.6, 2.7, 2.8 (DAP nos. 98, 104, 109, 143, 262, 305), 3.2.1, 3.2.2, 3.3, 3.4.1 (DAP nos. 22, 45, 63, 67, 84, 127, 151, 171, 197, 208, 292), 3.4.2, 3.4.3 (DAP nos. 106, 107, 108, 116, 149, 296, 335), 3.5.2, 3.5.3, 3.6, 3.8.1, 3.8.2, 3.8.3, 3.8.4, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14.1, 3.14.2, 3.15, 3.16.2, 3.17, 3.18 (DAP nos. 5, 46, 51, 58, 61, 73, 79, 92, 95, 105, 110, 111, 120, 122, 133, 141, 161, 168, 189, 233, 243, 256, 272, 345), 4.1.1, 4.2.1, 4.2.2, 4.2.3, 4.2.4, 4.3, 4.4, 4.5, 4.6, 4.7 (DAP nos. 21, 112), 5.1.1, 5.1.2, 5.2, 6.1.1, 6.1.2.1, 6.1.2.2 (DAP nos. 42, 43, 126, 129, 286, 313), 6.1.2.3, 6.1.2.4, 6.1.2.5, 6.2, 6.3.1, 6.3.2, 6.3.3, 6.3.4, 6.4.1, 6.4.2, 6.5 (DAP nos. 4, 65, 70, 76, 85, 87, 119, 180, 202, 204, 234, 295), 7.2, 8.1.1, 8.2, 8.3 of CA 20 of 2009-10**	**Ministry of Finance**

CHAPTER II
EXEMPTIONS

Under section 5A(1) of the Central Excise Act, 1944, the Government is empowered to exempt goods attracting excise duty from the whole or any part of the duty leviable thereon, either absolutely or subject to such conditions, as may be specified in the notification granting the exemption. A few illustrative cases of incorrect allowance of exemptions from levy of duty totalling Rs. 80.45 crore are mentioned in the following paragraphs. These observations were communicated to the Ministry through 17 draft audit paragraphs. The Ministry/department has accepted (till December 2009) the audit observations in three draft audit paragraphs with a financial implication of Rs. 85.79 lakh of which Rs. 7.56 lakh has been recovered.

2.1 Exemption on setting up of power plants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Exemption on textiles and textile goods

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3 Exemption based on installed capacity

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

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

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

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

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

2.4 Exemption on machinery and parts thereof

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

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

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

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

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

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

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

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

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

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

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

2.5 Exemption linked to retail sale price

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

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

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

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

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

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

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

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

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

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

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

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

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

2.6 Exemption on goods produced and consumed within the factory

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

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

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

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

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

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

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

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

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

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

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

2.8 Other cases

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

CHAPTER III
VALUATION OF EXCISABLE GOODS

Duty at ad valorem rates is charged on a wide range of excisable commodities. 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 with reference to the retail sale price in respect of specified excisable goods is governed by section 4A of the above Act. A few cases of short levy of duty due to incorrect valuation involving revenue of Rs. 12.42 crore, are illustrated in the following paragraphs. These observations were communicated to the Ministry through 23 draft audit paragraphs. The Ministry/department has accepted (till December 2009) the audit observations in 15 draft audit paragraphs with a revenue implication of Rs. 7.65 crore, of which Rs. 3.33 crore has been recovered.

3.1 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 it or by a related person of the assessee in the manufacture of other articles, the assessable value of such goods shall be one hundred and ten per cent of the cost of production or manufacture of such goods. Further, the Board had clarified (13 February 2003) that the value of goods consumed captively should be determined in accordance with the Cost Accounting Standard (CAS-4) method only.

3.1.1 M/s BSNL (Telecom factory), in Kolkata V commissionerate, engaged in the manufacture of telecom tower, SS drop-wire etc., cleared goods to its different telecom circles paying duty on the assessable value arrived at on 'cost basis'. Scrutiny of records indicated that the assessable value was determined by adopting value of raw materials which was lower than the actual value. This resulted in short levy of duty of Rs. 20.40 lakh during the period from May 2005 to March 2006.

On this being pointed out (January 2007), the department accepted the audit observation and reported (August 2008) that a show cause cum demand notice for Rs. 1.43 crore for the period 2003-04 to 2006-07 had been issued out of which Rs. 1.17 crore had also been recovered. The recovery particulars of balance amount of Rs. 0.26 crore were awaited (October 2009).

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

3.1.2 M/s IFB Industries Ltd., in Kolkata VI commissionerate, engaged in the manufacture of auto parts, cleared goods to related company paying duty on assessable value arrived at on 'cost basis'. Audit noticed that the assessee had failed to consider a few cost elements while determining the assessable value of the goods which resulted in short levy of duty of Rs. 34.79 lakh during the period from April 2005 to June 2006.

On this being pointed out (July 2006), the department accepted the audit observation and intimated (January 2009) that a show cause notice for Rs. 1.04 crore covering the period April 2005 to December 2007 had been issued.

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

3.1.3 M/s Pearl Industries Barotiwala, in Chandigarh I commissionerate, engaged in the manufacture of additive mixture flavoured 'kiwam', cleared the goods to its sister concern on invoice value (transaction value) instead of assessable value arrived at on cost basis. The value was re-determined by the department under the Valuation Rules and the differential duty was recovered in August 2001. Audit observed that the assessable value adopted by the department was undervalued approximately by ten per cent. Moreover, value determined at one hundred and fifteen per cent of the cost of production was incorrectly adopted as cum-duty-price. This resulted in short levy of duty of Rs. 87.82 lakh during the period between January 2001 and September 2001 which was recoverable with interest.

On this being pointed out (May 2003), the department stated (December 2003 and November 2008) that the question of valuation under rule 8 did not arise as the case was covered under section 4(3)(b)(i) of the Central Excise Act, 1944 and not under section 4(3)(b)(ii).

The reply is not tenable as valuation was to be done by invoking provisions of rule 8 of the Valuation Rules in view of rule 10(a) read with the proviso to rule 9 of the Valuation Rules, as the firm was owned by the husband and wife as partners and the husband was the Managing Director in the buyer unit. Thus, by virtue of explanation (ii) below section 4(3)(b) of the Central Excise Act, 1944, both the seller and buyer were related. Besides, even after re-determination of the transaction value by the department under Valuation Rules, the goods still remained undervalued by approximately 10 per cent because one hundred and fifteen per cent of the cost of production was adopted as cum duty price.

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

3.1.4 M/s Paharpur Cooling Towers Ltd., in Kolkata VI commissionerate, engaged in manufacture of fabricated steel components, PVC fill sheet etc., cleared goods during the period from April 2005 to January 2007 to its sister units. The duty was paid on assessable value arrived at on comparable price of similar goods for the year 2002 which was lower than the value as determined on the cost of production basis. As a result, there was short levy of duty of Rs. 70.40 lakh for the period from April 2005 to January 2007.

On this being pointed out (February 2007), the Ministry while admitting the audit observation intimated (November 2009) confirmation of demand of Rs. 68.83 lakh, levy of penalty of equal amount and appropriation of duty of Rs. 46.44 lakh paid by the assessee. It was further stated that the assessee has obtained a stay from CESTAT in June 2009.

3.1.5 M/s Super Cassettes Industries Ltd., in Noida commissionerate, engaged in the manufacture of unrecorded and recorded audio cassettes cleared a few unrecorded audio cassettes for sale in the open market on payment of duty. Audit observed that the assessee had valued for captive consumption 11.36 lakh unrecorded cassettes at Rs. 7.25 per cassette and

27.16 lakh unrecorded cassettes at Rs. 7.50 per cassette for payment of duty, while similar unrecorded cassettes cleared in the open market were valued at Rs. 15 per cassette for payment of duty. Adoption of lower assessable value resulted in undervaluation of cassettes by Rs. 2.92 crore and consequential short levy of duty of Rs. 48.60 lakh on captive consumption of 38.52 lakh unrecorded cassettes during the year 2007-08. The duty short paid was recoverable with interest of Rs. 1.11 lakh (calculated till June 2008).

On the matter being pointed out (June 2008), the department issued show cause notice (October 2008) demanding duty of Rs. 12.84 crore for the period from October 2003 to March 2008. The reply of the Ministry has not been received (December 2009).

3.2 Undervaluation on account of sales tax collected but not paid

Section 4(3)(d) of the Central Excise Act, 1944 stipulates that transaction value of goods chargeable to central excise duty would not include the amount of duty of excise, sales tax and other taxes, actually paid or actually payable on such goods.

The Board had clarified (30 June 2000) that tax deferred at the time of transaction and subsequently held as not payable was not deductible from the assessable value. The CEGAT, in the case of M/s. Andhra Oxygen Pvt. Ltd. v/s CCE (Tribunal-Kolkata) {2003 (156) 239} held that sales tax collected from buyers and not paid to the sales tax department when it was exempted under the Sales Tax Act, shall be considered as additional consideration flowing to the assessees. Rule 6 of the Central Excise Valuation Rules, 2000 stipulates that in cases where price is not the sole consideration, the assessable value shall be based on the aggregate of the price and money value of the additional consideration flowing directly or indirectly from the buyer to the assessee.

3.2.1 The Government of Maharashtra introduced the package incentive scheme for deferred payment of sales tax whereby the assessee was allowed to collect sales tax from the buyer and retain it and repay it after the prescribed period of deferral. The Government of Maharashtra further amended the provisions of Sales Tax Act and issued a notification in November 2002 providing additional incentive for premature repayment of sales tax liability.

M/s Balkrishna Industries Ltd., in Aurangabad, M/s Caprihans India Ltd. and M/s Legrand India Ltd., in Nasik and M/s Visen Industries Ltd. in Thane II commissionerates, engaged in the manufacture of various excisable goods, opted for premature payment of sales tax during the years 2004-07 under the aforesaid scheme. The records of the assessees indicated that they had received cumulative discount of Rs. 11.90 crore due to premature/prepayment of sales tax liability accrued at net present value. Sales tax amount collected but not paid to the Government was an additional income and was liable to be added to the assessable value. Non-inclusion of this additional income resulted in short levy of duty of Rs. 1.94 crore which was recoverable with interest.

On the matter being pointed out (February 2008 and November 2008), the Ministry admitted the audit observations in two cases and intimated

(November 2009) that show cause notice for Rs. 99.05 lakh had been issued to M/s Balkrishna Industries Ltd. and another show cause notice was under issue to M/s Caprihans India Ltd. Reply in the remaining cases has not been received (December 2009).

3.2.2 The Government of Goa introduced Goa Sales Tax Deferment-cum Net Present Value (DNPV) Compulsory Payment Scheme, 2005 to charge sales tax at applicable rate and pay to the Government at 25 per cent of tax payable and retain the balance tax of 75 per cent.

M/s Nebula Home Products Pvt. Ltd., M/s Power Engineering Pvt. Ltd., and M/s Ellenabad Steel Pvt. Ltd., in Goa commissionerate, availed of the DNPV scheme benefit. The assessees collected sales tax of Rs. 10.30 crore during the years 2005-06 to 2007-08 and paid Rs. 2.57 crore under the scheme retaining the balance sales tax of Rs. 7.73 crore being 75 per cent of the total collection and credited it to the head 'other income'. Such income became part of the assessable value, as it was an additional consideration received and duty of Rs. 1.27 crore was recoverable with interest.

The observations were communicated to the department between August 2007 and September 2008 and to the Ministry in October 2009; its replies are awaited (December 2009).

3.2.3 M/s Aarti Industries Ltd., in Surat II commissionerate, engaged in the production of excisable goods, cleared goods on payment of duty on transaction value excluding sales tax. Audit observed that the assessee had availed of the benefit of retaining sales tax as per 'Remission of Tax Scheme' under the Gujarat Value Added Tax Act, 2003. Accordingly, the assessee collected sales tax of Rs. 5.71 crore during the period from 1 April 2006 to 21 April 2007 and retained it under the scheme. The sales tax collected and not paid to the Government, was not excludible from the assessable value. Its non-inclusion in the assessable value resulted in short levy of duty of Rs. 93.26 lakh.

On this being pointed out (November 2007), the department reported (March 2009) issue of show cause notice for Rs. 93.91 lakh in February 2009.

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

3.3 Non-inclusion of additional consideration in value

The Supreme Court in the case of Commissioner of Central Excise v/s M/s I.F.G.L. Refractories Ltd., {2005 (186) ELT 529 (SC)} held that the benefit of duty free import on surrendering of advance licence by buyers was an additional consideration flowing from buyer to seller. Further, the Board had clarified (14 September 2005) that the benefit occurring on transferring/surrendering of advance licence by buyer in favour of seller of goods, enabling him to import duty free material and bringing down cost of procurement, would be treated as an additional consideration and is valid under the provisions of section 4 of the Central Excise Act.

M/s Hiran Orgochem Ltd. Panoli and M/s Cheminova India Pvt. Ltd. Panoli, in Surat II commissionerate, charged lower prices from buyer who surrendered advance licenses in favour of the assessees, but charged higher prices from

other buyers. The assessees were liable to pay duty of Rs. 57.59 lakh on the additional consideration of difference in prices charged from the buyers who surrendered the advance licences and that charged from other buyers.

On this being pointed out (September 2007), the Ministry admitted (February 2009) the audit observation and reported issue of show cause notices to the assessees in September 2008.

3.4 Adoption of lower assessable value

3.4.1 Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with section 4 of the Central Excise Act, 1944 stipulates that the value of the 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 removal of goods under assessment, subject to such adjustment on account of the difference in the dates of delivery of such goods and the excisable goods under assessment, as may appear reasonable. The concept of transaction value as provided under section 4(1)(a) of the Act seeks to accept different value for each removal of goods to different buyers but adopting different values for the same product on the same day to the same customer defies reasonable commercial practice under which transaction value can be accepted as assessable value.

M/s Uni Products India Ltd., Rewari in Delhi III commissionerate, engaged in the manufacture of car carpet/matting and automobile parts, cleared automobile parts to M/s Maruti Udyog Ltd. Gurgaon at different values, i.e. the same automobile parts sold as original equipment at lower price and as spare parts at higher price, on the same dates during the year 2006-07. There was substantial difference between these two prices. The adoption of different values of the same products to the same customer on the same dates resulted in undervaluation of goods amounting to Rs. 2.62 crore and short levy of excise duty of Rs. 42.79 lakh. Besides, interest and penalty was also leviable.

On this being pointed out (August 2007), the department stated (February 2008) that show cause notice for Rs. 42.79 lakh had been issued in November 2007.

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

3.4.2 CESTAT decided that the telephone sets supplied to the Department of Telecommunications/Mahanagar Telephone Nigam Ltd., were assessable to duty under section 4A (MRP basis) of the Central Excise Act {ITEL Industries Pvt. Ltd. (2004 (163) ELT 219}. This decision was also upheld by the Supreme Court in August 2007.

M/s Himachal Exicom Communications Ltd. Chambaghat, in Chandigarh commissionerate, cleared telephone instruments to the Department of Telecommunications/Mahanagar Telephone Nigam Ltd., on contract price of Rs. 160 per set, which was lower by Rs. 89 per set as compared to the assessable value (after abatement) under section 4A (MRP based assessment) of the Act. The assessments done under section 4 resulted in short levy of duty of Rs. 36.62 lakh on clearance of 2.55 lakh telephone instruments during

April 2004 to July 2005. Besides, interest of Rs. 11.87 lakh up to March 2008 and equivalent penalty of Rs. 36.62 lakh were also leviable.

On the matter being pointed out (April 2007 and January 2008), the department stated (March 2008) that valuation under section 4 was resorted to as per Board's clarification dated 28 February 2002 and since the assessable value under section 4 was more than the value under section 4A of the Act, there was no loss of revenue.

The reply of the department is not tenable as Board's clarification of 28 February 2002 has not been found acceptable by CESTAT and has no legal validity after the aforesaid decision of the CESTAT which has been upheld by the Supreme Court in August 2007. Further, the reply of the department that valuation under section 4 was more than that under section 4A is also not correct as the value under section 4A was more. Moreover, the department cannot make assessments in contravention of the court decision.

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

3.5 Other cases

In 22 other cases of valuation of excisable goods involving short levy of duty of Rs. 2.36 crore, the Ministry/department has accepted all audit observations and has reported (till December 2009) recovery of Rs. 1.70 crore.

CHAPTER IV
NON-LEVY/SHORT LEVY OF DUTY

Rule 4 of the Central Excise Rules, 2002 prescribes that goods attracting excise duty shall not be removed from the place of manufacture or warehouse, unless excise duty leviable thereon has been paid in the manner prescribed in rule 8. If a manufacturer, producer or registered person of a warehouse, violates the 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 leviable under rule 25. A few cases of non-levy/short levy of duty totalling Rs. 13.35 crore, noticed in test check, are described in the following paragraphs. These observations were communicated to the Ministry through ten draft audit paragraphs. The Ministry/department has accepted (till December 2009) the audit observations in seven draft audit paragraphs with a revenue implication of Rs. 7.72 crore of which Rs. 71.34 lakh has since been recovered.

4.1 Non-payment of duty on due date

Rule 8 of the Central Excise Rules, 2002 envisages that the duty on goods removed from factory or the warehouse during a month shall be paid by the 5th of the following month and for the month of March, by 31st of March. If the assessee defaults in payment of any one installment and the liability is discharged after thirty days from the due date, the assessee is required to pay duty for each consignment in cash and in the event of failure, such goods will be deemed to have been cleared without payment of duty and penalties as provided in the rules, will be applicable.

4.1.1 M/s L.R. Alloys Pvt. Ltd., in Chandigarh commissionerate, defaulted in payment of excise duty of Rs. 3.76 crore for the goods cleared in the month of July, September and October 2007 and it was paid beyond thirty days from the due date of payment of duty. Therefore, the facility to pay duty in monthly installment was required to be forfeited and duty from PLA was required to be paid for each consignment at the time of removal, without utilising the cenvat credit till the date of payment of outstanding amount of duty alongwith interest. However, the assessee paid duty by debiting cenvat credit account on monthly basis during the said period of default which was in contravention of the rule. No action was taken by the department to recover the duty in cash and to impose penalty. This resulted in financial accommodation to the assessee amounting to Rs. 3.76 crore. Interest and penalty was also leviable.

On the matter being pointed out (June 2008), the department stated (April 2009) that demand for Rs. 4.24 crore covering the period of default from 5 September 2007 to 8 April 2008 had been confirmed (February 2009) besides a penalty of Rs.10 lakh.

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

4.1.2 M/s Midco Ltd., in Ahmedabad I commissionerate, engaged in the manufacture of petroleum/diesel dispensing pumps and parts thereof, paid a duty of Rs. 5.75 lakh for the month of January 2007 on 22 June 2007 with a

delay of 137 days and a duty of Rs. 66.60 lakh for the month of October 2007 in three installments on 12, 15 and 20 December 2007 with delays ranging between 37 and 45 days. The assessee was, therefore, required to pay duty of Rs. 3.58 crore pertaining to the period from March to June 2007 and Rs. 60.06 lakh for the period from 6 to 20 December 2007 in cash for each consignment.

On the matter being pointed out (November 2008), the department confirmed (December 2008) demand of Rs. 60.06 lakh for the month of December 2007. However, the department stated (February 2009) that there was no default in payment of duty for the month of January 2007 as it related to inputs cleared for which reversal of cenvat credit was required, which was done in June 2007.

The reply of the department is not tenable for the reasons that the said rule 8 relates to the manner of payment of duty on removal of any goods from the factory and not merely manufactured goods. This has also been upheld by CESTAT, Chennai in the case of M/s KLRF Textiles {2005 (188) ELT (169)}. Further, the assessee had availed of the facility of payment of duty on monthly basis under the provision of rule 8 in respect of removal of goods and accordingly all other provisions of the said rule shall apply to such removal of goods.

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

4.2 Short payment of differential duty

Duty short paid is recoverable alongwith interest at applicable rate under the sections 11AA and 11AB of the Central Excise Act.

M/s AVTEC Ltd. Pithampur, in Indore commissionerate, engaged in the manufacture of I.C. engine, transmission power unit and parts thereof paid differential duty amounting to Rs. 2.71 crore pertaining to the period from September 2003 to May 2006 by raising supplementary invoice to M/s General Motors India Pvt. Ltd., Halol (Gujarat) on account of price variation of raw material on 14 July 2006 but interest leviable thereon from 1 October 2003 to 14 July 2006 was not paid. Subsequent scrutiny of the statements of the differential duty paid, provided by the assessee indicated (June 2009) that actual differential duty recoverable was Rs. 3.49 crore and not Rs. 2.71 crore deposited by the assessee and interest payable thereon worked out to Rs. 45.99 lakh. This resulted in short payment of differential duty of Rs. 77.47 lakh and non-payment of interest of Rs. 45.99 lakh.

On the matter being pointed out (January 2007), the department stated (January 2008) that the differential duty of Rs. 2.71 crore had been deposited by the assessee at the instance of internal audit.

The reply is not relevant as the differential duty of Rs. 77.47 lakh is payable in addition to Rs. 2.71 crore already paid and which remains recoverable.

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

4.3 Duty not levied on goods consumed captively

Excisable goods manufactured in a factory and used within the factory of production for manufacture of final products are exempt from duty provided such final product is not exempt from duty or chargeable to 'nil' rate of duty.

4.3.1 Bodies (including cabs) for the motor vehicles of tariff headings 87.01 to 87.05 are classifiable under tariff heading 87.07. By virtue of a notification dated 1 March 2002 (serial no. 214), the rate of duty has been fixed at 16 per cent ad valorem in respect of the motor vehicles falling under headings 87.02 to 87.04 or 87.16 and manufactured by a manufacturer other than the manufacturer of the chassis.

The CESTAT, Bangalore, in the case of Kerala State Road Transport Corporation v/s CCE, Trivandrum {2007 (216) ELT 69 (Tri Bang)} decided (23 April 2007) that bodies built on duty paid chassis are classifiable under heading 87.07 of the Central Excise Tariff, attracting central excise duty and that exemption for the motor vehicles of tariff heading nos. 87.02, 87.03 and 87.04 is not applicable to bodies of tariff heading 87.07.

M/s Shri Krishna Urja Products Ltd., in Jaipur I commissionerate, engaged in the fabrication/manufacturing of steel structures and bus/motor/car carrier bodies as well as providing goods transportation services, manufactured car carrier bodies of sub heading 87164000 of the Central Excise Tariff valuing Rs. 4.59 crore during 2004-05 and 2006-07 which were cleared for their transportation business without payment of duty of Rs. 75.20 lakh. The duty was recoverable with interest.

On the matter being pointed out (December 2008), the Ministry while admitting the audit observation, stated (October 2009) that the matter had been under investigation since March 2008 and show cause notice for Rs. 1.81 crore had been issued in May 2009.

4.3.2 M/s Indian Oil Corporation Ltd. (Refinery Division) Haldia, in Haldia commissionerate, engaged in the manufacture of petroleum products, manufactured 1,567.97 kilo litre of furnace oil and consumed it as fuel for the setting up of a new plant within the refinery through the contractor M/s Punj & Lloyds without payment of excise duty. The constructed plant being fixed to the earth was not a marketable commodity and was accordingly not an excisable goods. Hence, the assessee was not entitled to the exemption from duty on captive consumption. This resulted in non-levy of duty of Rs. 43.95 lakh during the period from February 2004 to June 2006.

On the matter being pointed out (July 2006), the department accepted the audit observation and reported (December 2008) that show cause notice had been issued. Further scrutiny indicated that the case had been adjudicated with a confirmation of demand of duty of Rs. 43.95 lakh and penalty of Rs. 43.95 lakh.

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

4.4 Duty not paid on clearance of waste and scrap

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

M/s Shri Ram Rayons Kota, in Jaipur I commissionerate, engaged in the manufacture of rayon tyre cord yarn and tyre cord fabric, cleared waste and scrap of capital goods during the period from June 2005 to November 2007 valuing Rs. 1.33 crore without payment of duty. Since cenvat credit on capital goods was availed, the assessee was liable to pay duty of Rs. 21.85 lakh on clearance of waste and scrap.

On the matter being pointed out (July 2008), the department intimated (February 2009) that show cause notice for Rs. 21.90 lakh for the period from 16 May 2005 to 12 December 2007 was being issued.

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

4.5 Short levy of duty due to probable suppression of production

Rule 4 of the Central Excise Rules, 2002 stipulates that no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured or from a warehouse, unless otherwise provided in the Act/Rules.

M/s Indo Nissin Foods Ltd. Rewari, in Delhi III commissionerate, engaged in the manufacture of instant/cup noodles produced 4,304 tonne noodles (finished goods) by consuming 7,99,684 kilogram edible oil (major ingredient/input) during the year 2003-04. Audit observed that 5,012 tonne noodles were produced by consuming 9,56,972 kilogram refined oil during the year 2004-05. There was no change in the norms of production of noodles. Taking into consideration the input-output ratio of the previous year (2003-04), the production of noodles during the year 2004-05 should have been 5150.54 tonne. This indicated a probable short accounting of 138.54 tonne of noodles involving excise duty of Rs. 17.89 lakh. Besides, interest and penalty for suppression of production was also leviable.

On the observation being pointed out (November 2006), the department stated (February 2009) that the demand of Rs. 17.89 lakh for evasion of duty had been confirmed in March 2008. The party had appealed against the confirmed demand which had been rejected by the Commissioner (Appeals) in February 2009. Report on recovery has not been received (May 2009).

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

4.6 Other cases

In 96 other cases of non-levy/short levy of duty of Rs. 1.05 crore, the Ministry/department has accepted all the audit observations and has reported recovery of Rs. 71.34 lakh in 95 cases till December 2009.

CHAPTER V
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 of the Central Excise Act, 1944, is in addition to the duty, 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 foregoing Act. Where duty has not been paid or short paid with the intent to evade duty or in contravention of the provisions of the Act or Rules or notifications issued thereunder, penal provisions exist under section 11AC of the said Act and Rules 25 to 27 of the Central Excise Rules, 2002. A few illustrative cases of non-levy of interest and penalty involving revenue of Rs. 13.43 crore are mentioned in the following paragraphs. These observations were communicated to the Ministry through 15 draft audit paragraphs. The Ministry/department has accepted (till December 2009) the audit observations in 12 draft audit paragraphs with revenue implication of Rs. 6.81 crore of which Rs. 1.53 crore has since been recovered.

5.1 Non-recovery of interest on differential duty

Where any duty of excise has not been levied or paid or has been short levied or short paid, interest is leviable from the first day of the month succeeding the month in which the duty ought to have been paid till the payment of duty.

The Ministry clarified on 28 July 2003 that interest under section 11AB is leviable even in cases where duty is paid by an assessee before serving of the notice by the department. The Ministry further clarified on 14 March 2006, that interest under section 11AB 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 and differential duty is paid/payable.

No time limit for payment of interest

5.1.1 M/s BHEL Bhopal, in Bhopal commissionerate, engaged in the manufacture of various excisable goods had paid differential duty in the month of March 2007 on account of price revisions for the supplies made between the years 2002-03 to 2006-07. It was, therefore, liable to pay interest on differential duty payment, which worked out to Rs. 4.24 crore as per provisions of the sections 11A(2B) and 11AB of the Central Excise Act. The department, however, did not take any action for recovery of interest.

On the matter being pointed out (February 2008), the department stated (May 2008) that the assessment was pending.

The reply is not tenable as the differential duty was paid in the month of March 2007 and non-payment of interest of Rs. 4.24 crore on the grounds that the assessment was provisional, has resulted in further financial accommodation to the assessee of Rs. 1.38 crore by way of interest from April 2007 to September 2009, as interest beyond the date of payment of duty (in this case March 2007) is not leviable under the existing Act.

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

Recommendation:

There is no time limit in the Act for recovery of interest on duty from the assessees. Audit recommends that appropriate provision may be included prescribing a time limit for payment of interest and for charging of interest beyond this prescribed time limit, till the interest amount is finally paid.

5.1.2 M/s Kanyaka Parameshwari Engineering Pvt. Ltd., M/s Indian Hume Pipe Company Ltd., M/s Hi-power Electrical Industries and M/s Vijai Electricals Ltd., in Hyderabad I commissionerate, engaged in the manufacture of electric transformers, cylinders, PSC, BWSC and MS pipes etc., sold their final products on payment of duty on provisional assessable values. Later these assessees collected additional amounts from their customers on account of price escalation, between April 2003 and November 2008. The assessees also paid the applicable differential duty of Rs. 25.98 crore. However, interest liability of Rs. 1.07 crore on the differential duty paid was not discharged.

On the matter being pointed out (between March 2008 and December 2008), the Ministry accepted the audit observations and stated (November 2009) that show cause notices for Rs. 1.05 crore had been issued to three assessees and show cause notice to M/s Indian Hume Pipe Company Ltd. was under issue.

5.1.3 M/s Hindustan Insecticides Ltd., in Raigad commissionerate, engaged in the manufacture of pesticides, cleared goods on payment of duty to a Government department. The assessee paid the differential duty of Rs. 4.05 crore relating to the years 2002-03, 2003-04 and 2004-05 in March 2005, August 2008 and March 2007 respectively. However, the applicable interest of Rs. 1.19 crore leviable for the delayed payment of differential duty was not paid. The department also did not demand it.

On the matter being pointed out (February 2008), the department issued a show cause notice for Rs. 1.19 crore in September 2008.

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

5.1.4 M/s Vapi Care Pharma Pvt. Ltd., Vapi in Daman commissionerate, engaged in the manufacture of medicaments, paid the differential duty of Rs. 49.03 lakh in January 2007 on physician's samples, cleared between April 2005 and December 2006, against Rs. 80.45 lakh demanded by the department. However, interest of Rs. 11.56 lakh payable on the differential duty of Rs. 49.03 lakh was neither paid by the assessee nor was it demanded by the department. The remaining differential duty of Rs. 31.42 lakh was also recoverable along with interest.

On the matter being pointed out (September 2007), the department accepted the audit observation and reported (January 2009) issue of show cause notice on 26 December 2008. It further stated (June 2009) that action for the recovery of differential duty and interest was in progress.

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

5.1.5 M/s Crompton Greaves Ltd. (Transformer Division), in Mumbai III commissionerate, engaged in the manufacture of machineries and parts thereof, paid differential duty of Rs. 12.40 crore between August 2005 and

December 2007 on the supplementary invoices raised due to revision of prices for the period from 1 June 2005 to 21 November 2007. However, interest payable at 13 per cent thereon was not paid by the assessee.

On the observation being pointed out (May 2006), the department intimated (August 2008) issue of two show cause notices for Rs. 38.36 lakh covering the period from June 2005 to December 2007. The department, however, subsequently stated (November 2008) that Bombay High Court in case of M/s Rucha Engineering Pvt. Ltd., had held that demand of interest and penalty was not sustainable on the differential duty paid on supplementary invoices which was stated to have been upheld by the Supreme Court.

The reply is not tenable as the Supreme Court has not decided the case on merits but set aside the order in the said case requiring the Tribunal to examine the case afresh (Civil Appeal No. 910 of 2008 - February 2008).

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

5.1.6 M/s Kothari Sugars and Chemicals Ltd., Kattur in Tiruchirapalli commissionerate, engaged in the manufacture of denatured ethyl alcohol (dutiable) and ethyl alcohol (exempted), availed of modvat credit against duty paid on common inputs such as hydrochloric acid, caustic soda lye, furnace oil etc. But the proportionate credit on the inputs used in the manufacture of the exempted products was not paid back by the assessee. The department confirmed (December 1997) the demand of Rs. 14.57 lakh for the period from September 1995 to March 1996 and the assessee paid the amount on 11 August 2003. The assessee, however, did not pay interest of Rs. 15.90 lakh for the delayed payment and the department also did not demand the same.

On the matter being pointed out (March and April 2005), the department initially contended (September and October 2005) that the assessee company being a sick company had represented to the Commissioner for the waiver of interest. Subsequently, the department admitted (February 2009) the audit observation that there was no statutory provision under the law for waiver of interest and issued show cause notice for recovery of interest.

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

5.2 Non-levy of penalty

Rule 8(3) of the Central Excise Rules, 2002, stipulates that if the assessee fails to pay duty by the due date, he is liable to pay the outstanding amount alongwith interest at the rate of 2 per cent per month or rupees one thousand per day, whichever is higher. The rule further provides that till such time the amount of duty outstanding and the interest payable thereon are not paid, the goods in question would be deemed to have been cleared without the 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 penalty as provided in the aforesaid rules shall follow. Penalty not exceeding the duty on excisable goods or Rs. ten thousand, whichever is greater, is leviable under rule 25 of the Central Excise Rules, 2002.

M/s Himachal Futuristic and Communication Ltd., Chambaghat, in Chandigarh I commissionerate, engaged in the manufacture of

telecommunication equipment, defaulted in paying duty aggregating Rs. 2.97 crore during the months of June 2003 (Rs. 202.57 lakh) and November 2003 (Rs. 94.18 lakh). The penalty of Rs. 2.97 crore for the clearances made in contravention of rules during these months was leviable.

On the matter being pointed out (September 2004 and April 2008), the department intimated (November 2008) that the show cause notice had been adjudicated (June 2007) and a penalty of Rs. 20 lakh for the default in payment of duty in June 2003 had been imposed. However, the assessee had filed an appeal in the Tribunal. The reply of the department in respect of action taken on the delayed payment of duty of Rs. 94.18 lakh for the month of November 2003 had not been received (October 2009).

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

5.3 Other cases

In 88 other cases of non-levy of interest and penalty with revenue implication of Rs. 2.18 crore, the Ministry/department had accepted all the audit observations and reported (till December 2009) recovery of Rs. 1.53 crore in 86 cases.

CHAPTER VI
CESS NOT LEVIED OR DEMANDED

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

A few cases where applicable cess amounting to Rs. 1.95 crore was not levied or demanded are mentioned in the following paragraphs. These observations were communicated to the concerned Ministries through five draft audit paragraphs. The Ministries/department had accepted (till December 2009) the audit observations in two draft audit paragraphs with a financial implication of Rs. 1.41 crore of which Rs. 59.59 lakh had been recovered.

6.1 Non-levy of cess on textiles and textile machinery

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

Test check of records of four assessees engaged in the manufacture of textile material/machinery in the Union Territory of Dadra and Nagar Haveli, indicated that they did not pay applicable cess of Rs. 98.49 lakh on processed fabrics and textile machinery valued at Rs. 1,969.91 crore and cleared between April 2005 and May 2007. The Textile Committee also did not take any action to collect the applicable cess.

On the matter being pointed out (between June 2008 and August 2008), the Ministry of Textiles stated (November 2009) that the recovery of cess was being closely pursued on priority basis.

6.2 Non-levy/payment of cess on cement

Section 9(1) of the Industries (Development and Regulation) Act, 1951 (read with Cement Cess Rules, 1993 made there under), stipulates that every manufacturer producing cement in cement plants of capacity not lower than 99,000 tonne per annum based on rotary kiln and 66,000 tonne per annum based on vertical shaft kiln, shall pay cess at the rate of Re. 0.75 per tonne of cement manufactured and removed from the factory. Rules 3 and 4 of the said Rules further stipulate that every manufacturer of cement who is liable to pay cess shall submit to the 'Development Commissioner' for cement industry, under the Ministry of Commerce and Industry, Government of India, a monthly return relating to stocks of cement produced and removed during the preceding month and shall remit the amount of cess to the said authority by 15^{th} of the following month.

Five manufacturers of cement in Nalgonda (Andhra Pradesh), in Hyderabad III commissionerate, cleared 27.99 lakh tonne of cement manufactured in their factories during the period from April 2002 to July 2004 without payment of cess, notwithstanding the fact that the installed capacity of these factories,

based on rotary kilns was in excess of 99,000 tonne per annum and cess was accordingly payable. The total cess not paid by the five assessees amounted to Rs. 20.99 lakh.

On the observations being pointed out (between December 2003 and June 2008), the Ministry of Commerce and Industry informed (July 2008) that the assessees had been directed to pay the applicable cess.

6.3 Non-levy of cess on tractors

In terms of the Ministry of Industry, Department of Industrial Development, order dated 6 September 1985 read with the orders dated 22 March 1990 and dated 26 May 1994, cess at the rate of 0.125 per cent is leviable on tractors of more than 25 horse power under the Automobile Cess Rules, 1984. The cess is leviable on tractors whether exported or cleared for home consumption.

M/s International Tractors Ltd., in Jalandhar commissionerate of central excise, engaged in the manufacture of tractors and parts thereof, manufactured tractors exceeding 25 horse power and cleared these for export without paying automobile cess. The assessee exported 2,915 tractors valuing Rs. 125.35 crore between April 2003 and March 2006 on which automobile cess amounting to Rs. 16 lakh was payable.

On the observation being pointed out (between January 2007 and June 2008), the department stated (June 2008) that a show cause notice demanding Rs. 3.24 lakh on export of 699 tractors between May 2007 and March 2008 had been issued (June 2008). Action taken to recover cess for the period prior to May 2007 had not been intimated (October 2009).

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

6.4 Short payment of education cess

Education cess (with effect from 10 September 2004), at the rate of two per cent of the service tax payable, was imposed under section 91 read with section 95 of the Finance (No. 2) Act, 2004.

Scrutiny of ST-3 returns of M/s HDFC Bank Ltd., in Mumbai service tax commissionerate, indicated that during the period from October 2006 to April 2007, the assessee had wrongly calculated the amount of education cess on the service tax payable. This resulted in short payment of education cess of Rs.14.37 lakh during the aforementioned period.

On this being pointed out (December 2007), the Ministry stated (September 2009) that the assessee had actually deposited the cess under a wrong accounting head. However, in compliance with the audit observation, the assessee had again paid the education cess of Rs. 14.37 lakh alongwith Rs. 2.50 lakh as interest for delayed payment in June 2008 and December 2008 respectively.

6.5 Other cases

In 20 other cases of cess not levied or demanded involving a total amount of Rs. 42.73 lakh, the Ministry/department has accepted all audit observations and reported full recovery.

CHAPTER VII
MISCELLANEOUS TOPICS OF INTEREST

Apart from the cases reported in the foregoing chapters, some interesting cases noticed in audit (including a case of fraud) and involving duty of Rs. 35.24 crore are illustrated in the following paragraphs. These observations were communicated to the Ministry through five draft audit paragraphs. The Ministry/department had accepted (till December 2009) the audit observations contained in two draft audit paragraphs with a financial implication of Rs. 23.85 crore and had further reported recovery of Rs. 21.35 crore.

7.1 Duty not credited to consumer welfare fund

Section 11B of the Central Excise Act, 1944, provides for grant of refund of duty if the incidence of such duty had not been passed on by the manufacturer to any other person. In case, the duty had been passed to any other person, the amount is required to be credited to the consumer welfare fund established under section 12C of the foregoing Act.

M/s Bombay Chemicals Ltd., in Thane I commissionerate, submitted fifteen refund claims amounting to Rs. 13.17 crore for different periods falling between 27 September 1979 and 28 February 1994. After hearing the assessee, the Assistant Collector (Excise), Thane passed an order on 22 March 1995 sanctioning refund of Rs. 67.79 lakh to it, transferring Rs. 10.43 crore (refund relating to duty paid in cash) to consumer welfare fund and leaving balance amount of Rs. 2.07 crore untouched as it related to payment from cenvat credit account. Aggrieved by the order, the assessee filed a writ petition with the Mumbai High Court, which decided (July 2005) to restore the original order and payment of refund of Rs. 67.79 lakh with interest at nine per cent per annum.

Audit noticed (June 2008) that though the original order of March 1995 was restored in July 2005 by the High Court and refund of Rs. 67.79 lakh was paid with interest in January 2006, yet the refund of Rs. 10.43 crore was not credited to the consumer welfare fund.

On this being pointed out (June 2008), the Ministry admitted the audit observation and intimated (November 2009) that Rs. 8.07 crore had been credited to the consumer welfare fund in October 2008 and a cheque for Rs. 2.36 crore has been sent in September 2009 to the Principal Chief Controller of Accounts, New Delhi for crediting to the consumer welfare fund.

7.2 Passing of surplus credit by paying excess duty/exempted duty

The Board clarified on 4 January 1991 that the duty paid in excess of the payable amount was not duty but a deposit with the Government.

M/s Dabur India Ltd. Baddi (Amla Extract Unit), in Chandigarh commissionerate, engaged in the manufacture of khshudhavardhak vati churn, khshudhavardhak imli churn, chyavanprash prakshep special, and

chyavanprash prakshep vishwat (sub-heading 3003.39), cleared these goods for captive use in its sister units on payment of duty on value with margins of profit ranging from 192 to 263 per cent of the cost of production. The incorrect valuation resulted in enhanced payment of duty from cenvat and facilitated the sister units to utilise excess credit aggregating Rs. 6.05 crore during the period from April 2002 to November 2003.

On the matter being pointed out (January 2004 and July 2007), the department stated (November 2008) that the goods were sold to the sister units of the assessee only and the valuation of goods was correctly done under rule 8 of the valuation rules by adopting 110 per cent of the cost of production.

The reply of the department is not tenable as the margin of profit ranged between 192 to 263 per cent as against the statutory provision of 15 per cent/10 per cent, which facilitated the assessee to pass excess credit to its sister units. In terms of the Board's circular dated 4 January 1991, the excess duty paid was a deposit with the Government for which buyers were not eligible for credit.

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

7.3 Incorrect grant of rebate on exported goods

Rule 18 of the Central Excise Rules, 2002, provides rebate of duty paid on excisable goods exported or duty paid on materials used in the manufacture or processing of such goods.

In terms of rule 3 of the Custom, Central Excise Duties and Service Tax Drawback Rules, 1995, a drawback may be allowed on the export of goods at such rate or at such amount as may be determined by the Central Government, provided that where cenvat credit of the duties paid on inputs used in the manufacture of exported goods, has been taken or such duties or taxes have been refunded or rebated either in whole or in part under the Central Excise Act, 1944 or Customs Act 1962, then the drawback is available at reduced rate.

M/s Indorama Synthetics Ltd., (POY unit) MIDC Butibori, in Nagpur commissionerate, manufactured polyester filaments yarn (partially oriented yarn) and polyester staple fibre and exported these goods on payment of duty through cenvat credit, under claim of rebate of duties so paid. During the period from January 2008 to April 2008, the assessee availed of cenvat credit of central excise duties paid on inputs used in the manufacture of exported finished goods. However, at the time of clearance of such finished goods for export under claim of rebate of duties, the assessee reversed the cenvat credit availed of, on inputs and claimed duty drawback at full rate on inputs. Duty drawback of Rs. 15.70 crore at full rate (of 16 per cent of FOB value i.e. value determined for shipment of goods) was paid to the assessee. The assessee was again granted rebate of Rs. 5.09 crore in cash in lieu of duty paid through cenvat credit on the said exported goods. Through this modus operandi, the assessee obtained double benefit of liquidation of cenvat credit in respect of inputs used in manufacture of exported goods, once as duty drawback at full rate in cash and again as rebate of duty on the goods exported by way of

refund in cash. As the assessee had already been granted duty drawback at full rate for the goods exported, he was not entitled for rebate claim in cash on the same goods. This resulted in incorrect grant of rebate of Rs. 5.09 crore for the goods exported during the period from January 2008 to April 2008 alone.

On this being pointed out (November 2008 and January 2009), the department stated (February 2009) that there was no double benefit as such benefit arose only when the same tax was refunded twice. A manufacturer can avail of rebate of duty on inputs, forgo the duty drawback and export the goods under bond (without payment of duty) under rule 19 of the Central Excise Rules, 2002 in which case the effect for the exporter was that the product did not suffer duty on input stage as well as the end product stage. The department further stated that if the Government's intention was to provide any one of the three rebates only, it would have provided exclusion clause in each of these schemes against the remaining two, which was not the case.

The department's reply is not tenable in view of the judgement of the Bombay High Court in the case of M/s Indorama Textiles Ltd., MIDC Butibori v/s Commissioner of Central Excise, Nagpur {2006 (200) ELT 3 (Bom)} which held that in case of export of goods, the assessee was entitled either to rebate of duties paid on inputs or to rebate of duties paid on finished goods. It was ruled that both the rebates could not be availed simultaneously by the assessee. In the said judgement the High Court had ruled that the intention of the legislature was not to simultaneously grant rebate of duty paid on exported goods as well as on inputs used in such goods. In the event that the intention of the legislature was to grant rebate of duty paid on finished excisable goods, there was no propriety to ask the assessee first to pay excise duty on these goods when the department had to refund the same in the form of rebate to an assessee. Further, while passing the rebate claim the jurisdictional sanctioning authority had mentioned that "claimant are availing the facility of cenvat credit under the Cenvat Credit Rules, 2004", so as to make assessee eligible for grant of rebate, whereas in the respective ARE-I[1], the assessee had declared that they had not availed of cenvat credit for eligibility of duty drawback. Further, the jurisdictional range superintendent had also certified that the assessee had not claimed any drawback for this amount. The statements of the different departmental authorities were, accordingly contradictory.

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

7.4 Fraudulent payment of duty

According to the instructions issued by the Board in its circular dated 22 March 1990 and dated 21 November 1994, the Chief Accounts Officers (CAOs) functioning in the Central Excise and Service Tax commissionerates have to ensure accounting of each remittance claimed to have been made by the assessee into the Government account by reconciliation with the revenue receipts maintained by the PAO.

[1] Application for removal of excisable goods for export by air/sea/post/land.

M/s Vijaya Steels Ltd. unit at Peenya, in Bangalore II commissionerate and unit at Nelamangala, in Bangalore III commissionerate, engaged in the manufacture of sponge iron, pig iron and MS rods showed payment of duty of Rs. 76.20 lakh through TR-6 challan numbers 10/31.3.06/11/31.3.06, 18/31.3.06, 8/5.11.06, 9/5.11/06 and 14/5.2.07 during the period from March 2006 to February 2007. Test check of records in audit revealed that these remittances were not traceable in the records of the PAO.

On this being pointed out (July 2008), the department approached (September 2008), the bank and the bank confirmed (November 2008) non-receipt of the amount. Thereafter, the assessee remitted Rs. 76.20 lakh in November 2008 and January 2009. The assessee also paid interest of Rs. 20.11 lakh for delay in payment of duty for more than two years. The TR-6 challans through which the amount claimed to have been paid earlier by the assessee were, accordingly, fraudulent. These fraudulent challans for Rs. 76.20 lakh would have been noticed by the commissionerates, had the reconciliation of revenue receipts been conducted between the account of the CAO and the PAO in the manner prescribed.

On the matter being pointed out again (January 2009), the department intimated (February 2009) that the Bangalore III commissionerate had initiated investigation relating to Nelamangala unit of the assessee, involving Rs. 71 lakh. It also stated that though the reconciliation was not carried out, the amount was remitted later. However, action taken to impose penalty of equal amount of duty under section 11 AC of the Central Excise Act was awaited.

The Ministry admitted the audit observation and stated (November 2009) that the Director (Finance) of M/s Vijaya Steels had been arrested and the case was being proposed for prosecution.

7.5 Duty collected but not paid to the Government

Section 11D (1) of the Central Excise Act, 1944, envisages that every person who is liable to pay duty under the Act or the rules made thereunder and has collected any amount in excess of the duty assessed or determined from the buyer of the goods in any manner as representing the duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government. Where duty has not been paid by reasons of fraud, collusion etc., the person liable to pay duty shall also be liable to pay penalty equal to duty under section 11AC of the Act.

The Director of Health Services Himachal Pradesh, Shimla placed orders for supply of medicines and equipment to M/s Narula Udyog (P) Ltd. Delhi against which goods valuing Rs. 8.16 crore were supplied on their behalf by another company namely M/s Bharat Business Centre, 47 North Avenue, Punjabi Bagh, New Delhi, after charging central excise duty of Rs. 12.43 lakh on invoices during the year 1997-98 and 1998-99. Evidence of payment of duty by way of duty debit particulars was neither available on the invoices nor

were these produced by the supplier of medicines even after six years of the matter being pointed out by audit. Absence of rectificatory action under section 11 D(2) of the Act had not only resulted in loss of revenue of Rs. 12.43 lakh but also in non-levy of penalty of Rs. 12.43 lakh under section 11AC of the Act.

On the matter being pointed out (March 2003), the department intimated (November 2007) that the matter had been taken up with the jurisdictional Commissionerate of Central Excise, Delhi.

The Assistant Commissioner of Central Excise, Division IV, New Delhi further intimated (June 2008) that no such unit had been registered under the jurisdiction of the division. Since duty had been recovered through invoices from the Government of Himachal Pradesh (buyers of medicines) and was not deposited with the Government, the matter required detailed investigation by the department but no such action had been initiated. The department should also consider engaging with investigating authorities to locate this assessee.

The matter was reported to the Ministry in September 2008; its reply has not been received (December 2009).

7.6 Other cases

In 1085 other cases of irregularities involving duty of Rs. 12.66 crore, the Ministry/department had accepted all the audit observations and reported (till December 2009) recovery of Rs.12.31 crore in 1081 cases.

New Delhi **(SUBIR MALLICK)**
Dated : **Principal Director (Indirect Taxes)**

Countersigned

New Delhi **(VINOD RAI)**
Dated : **Comptroller and Auditor General of India**

Glossary of terms and abbreviations

Abbreviated form	**Expanded form**
Board	Central Board of Excise and Customs
CAS	Cost Accounting Standard
CESTAT	Customs, Excise & Service Tax Appellate Tribunal
CETH	Central Excise Tariff Heading
commissionerate	Commissionerate of central excise
ELT	Excise Law Times
EOU	Export Oriented Unit
Ltd.	Limited
MRP	Maximum Retail Price
NCCD	National calamity contingent duty
NT	Non Tariff
PAO	Pay and Accounts Office
PLA	Personal ledger account
Pvt.	Private
RSP	Retail Sale Price
SSI	Small scale industries
the Ministry	The Ministry of Finance