Excise Duty – Proposal in Finance Bill, 2005

—S.S. Gupta

The rates of excise duty have stabilised and the same is the case with the law relating to availability of Cenvat credit. The major problem in levy and collection of excise duty pertains to administration of the department as well as improving the quality of the orders passed by lower authorities. The Budget 2005 does not provide any direction to cure these diseases.

A routine exercise of increasing and decreasing the rate of duty has been carried out. The trend of retrospectively amending the statute wherever government has lost in Supreme Court is very dangerous and needs to be curbed.

The salient features of the Budget are as follows : -

(A) Small scale exemption

Presently, the benefit of notification no. 8/2003 and 9/2003 are available to the manufacturers whose value of clearance has not exceeded Rs. 300 lakhs in the previous financial year. The limit of value of clearance of Rs. 300 lakhs is proposed to be increased to Rs. 4 crore. Thus, the manufacturer whose value of clearance in the previous financial year (say in year 2004-05) does not exceed Rs. 4 crore will be entitled to the benefit of the notification no. 8/2003 in financial year 2005-06.

The small scale manufacturer has the option either to claim the exemption from payment of duty up to the clearance of Rs. 100 lakhs without availing modvat (under notification no. 8/03) or avail Cenvat and pay duty @ 60% of the normal rate of duty under notification no. 9/2003. The second option of payment of duty @ 60% of the normal rate of duty by availing Cenvat credit is proposed to be withdrawn with effect from 1st April 2005.

The small-scale manufacturer whose value of clearance exceeds Rs. 90 lakhs is also exempted from obtaining registration under notification no. 36/2001 NT. Such manufacturer was required to file declaration with the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise. Now, it is provided that the manufacturer shall file declaration when the value of clearance has exceeded Rs. 40 lakhs. Thus, a manufacturer whose value of clearance in financial year 2004-05 exceeds Rs. 40 lacs will be required to file the declaration. This will unnecessarily result in increase in paper work with no revenue to the government.

The author is a member of the Institute. He can be reached at guptass@mtnl.net.in

(B) Amendment in the Act

(1) Mandatory availment of the benefit of the notification

The section 5A of the Central Excise Act is proposed to be amended to provide that the manufacturer must avail the benefit of the notification where the exemption from payment of duty is granted without any condition. In the past, there has been a dispute as to whether the manufacturer has the option to avail the benefit of the notification or not. The Hon. Tribunal has in number of cases has held that the availment of the benefit of notification is optional and the manufacturer has a choice not to avail the benefit of the notification and to pay the duty. The support may be taken from judgment in the case of Everest Convertor 1995(80) ELT 91 and Bombay Dyme and Manufacturing Co. Ltd. vs. CCE 2000(40) ELT 118. The ratio of these judgments after the passing of the Finance Act, 2005 will no longer hold good. However, this is going to increase litigation substantially. Very often, there is a dispute whether a particular item is covered under the description in the notification or not. No conditions might may be attached for claiming such exemption. In such

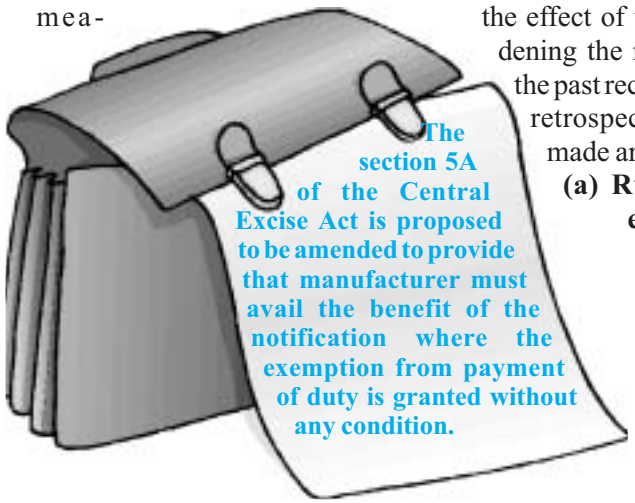
case, normally, the manufacturer used to play safe by paying duty and availing benefit of Cenvat credit. Now, the authorities may try to deny the Cenvat credit to the manufacturer as well as to the purchaser of the final product from such manufacturer.

(2) Power to Settlement Commission

Under section 32 (PA) of the Central Excise Act, the appellant whose appeal is pending with CESTAT has the option to withdraw the appeal before the CESTAT and file application before the Settlement Commission. Such application must be filed within 30 days from the date of withdrawing of the appeal. Now, it is provided that in case the assessee does not cooperate with the Settlement Commission, the Settlement Commission has the power to transfer back the case to the Tribunal. The word 'cooperate' has not been defined but in the given circumstance, it appears that the non-disclosure of proper facts, not appearing during the hearing fixed by the Commission, seeking adjournment are some of the cases which can be termed as non co-operation.

(3) Review of order by Committee of Chief Commissioners

Presently, the orders passed by Commissioner of Central Excise and Commissioner of Central Excise (Appeals) are reviewed by members of the Board of is reviewed by member of Board of Central Excise and Customs and Commissioner of Central Excise respectively. If on review it is found that the order passed by the authority is not legal and proper, the reviewing authority has the power to direct the Commissioner of Central Excise or any officer to file an appeal against the said order to CESTAT. It is observed that such appeals are filed routinely without going much in to the merit of various decided cases and facts of the case. This unnecessarily consumes the time of CESTAT, which results in huge pendency at CESTAT. Now, it is provided that these orders will be reviewed by committee of Chief Commissioner. Very senior officers are promoted to the rank of Chief Commissioner. Therefore, it is hoped that the quality of review orders will improve substantially. This is a welcome measure to reduce the pendency of appeal with CESTAT.



(c) Textile Sector

Independent texturising units have now been given an option to claim exemption from payment of duty under notification no. 30/2004 provided no Cenvat credit on input has been availed. The notification is effective from 1st March 2005. The units which intend to avail benefit of the said notification from 1st March 2005 must ensure that the credit of duty availed on the inputs, which are lying in stock are reversed prior to removal of goods from the factory. The Hon. Supreme Court, in the case of Chandrapur Magnet, has observed that if credit of duty is reversed prior to removal of goods then it tantamounts to non-availment of credit on the inputs. Therefore, the benefit of the notification can be availed by the manufacturer.

(D)Retrospective Amendment

A very dangerous trend of making retrospective amendment of rules or provisions of the Central Excise Act or of the notification has begun. Such retrospective amendment has the impact of nullifying the ratio of the judgments given by Supreme Court of the country. This also has the effect of unnecessarily burdening the manufacturer with the past recovery. Some of the retrospective amendments made are:

(a) Rule 57CC of the erstwhile Central Excise Rules, 1944 and now rule 6 of the Cenvat Credit Rules:- These rules provide that where manufacturer is engaged in the manufacture of exempted goods, as well as dutiable goods, he has two options: -

(i) To maintain account of receipt, consumption and inventory of inputs, which have been consumed in manufacture of dutiable goods as well as exempted goods and avail credit of duty only on those inputs which have been consumed in the manufacture of dutiable goods.

(ii) In case (a) is not complied with, the manufacturer shall pay the amount @ 8% (10% with effect from 10.09.2004) of the sales price excluding taxes of the exempted goods.

The department had served show-cause notices where manufacturer has not maintained separate accounts for recovery of amount @ 8% of the sales price of the exempted goods. The Hon. Tribunal has in the case of Pushpaman Forgings held that: -

(a) Such amount of 8% payable on the value of exempted goods is neither duty nor reversal of credit.

(b) There is no recovery provision made under the rule and therefore no amount can be recovered. The appeal of the department against the order of CESTAT was dismissed by Supreme Court.

The department also has vide circular no. 591/2001 dated 16.10.2001 clarified that the credit of duty availed on the inputs used in the manufacture of exempted product is only recoverable from the manufacturer who has not complied with either of the options stated above. The Tribunal has in few cases held that in view of the Board circular, the amount payable by the manufacturer is actual amount of credit availed on the inputs used in the manufacture of exempted product.

Now in the Finance Act, 2005, the recovery provisions are sought to be introduced retrospectively with effect from 1st September 1996. It may be mentioned that the anomaly was already corrected by introducing recovery provision effective from 1st Mach 2002 under rule 6 of the Cenvat Credit Rules, 2002. The impact of such retrospective amendment would be:

(a) Nullify the ratio of the judgment of Hon. Tribunal in the case of Pushpaman Forging. The appeal of the department against this case was dismissed by Supreme Court.

(b) The pending proceedings for recovery of the amount of 8% of the value of exempted goods is pending at any stage either at CESTAT or at the Commissioner of Central Excise (A) etc will get revived. The enthusiastic officers of the department may also even try to recover the amount against the show cause notices, which have been set aside by the order of CESTAT or Commissioner of Central Excise (A).

A very dangerous trend of making retrospective amendment of rules or provisions of the Central Excise Act or of the notification has begun. Such retrospective amendment has the impact of nullifying the ratio of the judgments given by Supreme Court of the country.

Such retrospective amendment shakes faith of the manufacturer in the government.

(E) Recovery of Credit Duty paid under Additional Excise Duty (Goods of Special Importance) Act [AED (GSI)]

The credit of duty paid on inputs under AED (GSI) was available to the manufacturer. However, the utilisation of the said credit was restricted for payment of AED (GSI) on final product. In case the final product manufactured by the manufacturer did not attract any excise duty payable under AED (GSI), the credit remains accumulated in the accounts with no benefit. However, subsequently, the Hon. Tribunal has in the case of Madura Coats Ltd. 2001 (44) RLT 191 and other cases held that the AED (GSI) can be used for the purpose of payment of basic excise duty. Following the ratio of the said judgments, many manufacturers who have the credit of AED (GSI) utilised the credit of duty for payment of basic excise duty. The Board of Central Excise and Customs has permitted the said utilization vide circular no. 700/16/03-CX dated 6.3.03. However, the dispute arose relating to utilization of credit of duty paid on inputs prior to 1st April 2000. Now, the Finance Act, 2005 provides for recovery of the said amount of credit of duty utilized in 36 equal installments by retrospectively amending the relevant provisions.

It is high time that the association of the industry talks to the Government of India to restrict such retrospect amendments made routinely. Such powers should be rarely exercised and not routinely.

(F) Imposition of Excise Duty on Branded Jewellery

The Excise Duty has been imposed on branded jewellery effective from 1st March 2005. The entry itself reads as articles of jewellery on which brand name or trade name is indelibly affixed or embossed on the articles of jewellery itself. Thus, it is mandatory that the brand name is embossed on jewellery itself and not on the packaging material.

Conclusion

If India has to face the competition, it is the responsibility of the government to provide the proper atmosphere. The administration of the department must be toned up in order to ensure reduced litigation and corrective steps at the right time and not after 5 to 6 years. The improvement in the administration functioning can create a healthy atmosphere for manufacturer to voluntarily comply with the provisions of the law. Therefore, not only revenue will increase but also the cost of collection will also decrease. ■