



Government of India

MONTHLY AUDIT BULLETIN – SEPTEMBER, 2013

**Directorate General of Audit**

**Customs & Central Excise**

**Central Revenue Building,**

**I.P. Estate**

**New Delhi-110109**

**MONTHLY AUDIT BULLETIN – SEPTEMBER, 2013**

**CENTRAL EXCISE**

- (1) **GIST OF THE OBJECTION** : Wrong availment of exemption under Notification No. 12/2012-CE,dt. 17.03.2012  
**COMMISSIONERATE** : Central Excise Commissionerate, Raigad  
**CONTRAVENTION OF PROVISION** : Notification No. 12/2012-CE,dt. 17.03.2012

During the course of audit of the records of assessee, it is noticed that the assessee has cleared Metformin HCL to another company without payment of duty under various invoices with the remark "Duty Nil against Annexure 45". On scrutiny of Annexure 45 dated 06.11.12 it is observed that the said Annexure 45 was filed by the said company located in Village Thana, Tehsil Nalagarh, Baddi, Dist. Solan (H.P) 173205 under Central Excise (Removal of goods at concessional rate of duty for manufacture of excisable goods) Rules, 2001 for procuring 100000 Kgs of Metformin Hydrochloride to be used for the specified purpose of manufacturing Metformina & Glifortex 850 mg Tablets and export thereof under Notification No.12/2012-CE,dt. 17.03.2012 (vide Sr. no. 108) as amended.

S.No. 108 of the said notification totally exempts the following goods, namely, (A) Drugs or medicines including their salts and testers and diagnostic test kits, specified in List 3 or List 4 appended to the Notification No.12/2012-Customs, dated the 17th March, 2012, and falling within the Chapter 28,29,30 or 38, and subject to the condition that Where such use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001, is followed. (B) Bulk drugs used in the manufacture of the drugs or medicines at (A)

The goods Metformin Hydrochloride, Metformina tablets & Glifortex tablets are not specified in List 3 or List 4 appended to the notification No.12/2012-Customs, dated the 17th March, 2012 in view of which the assessee is not entitled for exemption under Not. 12/2012 CE in respect of Metformin Hydrochloride cleared by the assessee to the said company.

The assessee is therefore liable to pay duty amounting to Rs. 2472000/- along with interest in respect of such goods cleared during the period from 20.11.12 to 18.01.13.

- (2) **GIST OF THE OBJECTION :Non Reversal of attributable CENVAT Credit on receipt of Credit note**  
**COMMISSIONERATE : Central Excise Commissionerate, Allahabad**  
**CONTRAVENTION**  
**OF PROVISION : Rule 3 of the CENVAT Credit Rules, 2004 read with CBEC Circular No. 877/152008-CX dated 17th Nov. 2008**

During the year 2011-12 assessee had purchased raw materials from M/s Reliance India Ltd. and M/s Indian Oil Corporation Ltd. Both issued credit notes of Rs. 6421835/- and Rs. 3217884/- respectively, which reduced the transaction value of goods cleared by M/s Reliance India Ltd. and M/s Indian Oil Corporation Ltd. Total duty (CENVAT Credit) involved in such differential value ,reduced by issue of credit note, was ascertained as Rs. 992892/-

As per CBEC Circular No.877/152008-CX, dated 17th Nov. 2008,in such situations, the unit availing credit must confirm/ensure that the supplier (consignor) has not filed claim of refund of duty on account of reduction in price.

Assessee is required to reverse the CENVAT Credit availed amounting to Rs. 992892/- attributable to the amount mentioned in credit notes or must produce certificate to the effect that the consignor has not claimed refund. Since Assessee had not produced any such certificate about non filing of refund claim by the supplier he is not eligible to take credit.

- (3) **GIST OF THE OBJECTION: Irregular availment of CENVAT Credit**  
**COMMISSIONERATE : Central Excise Commissionerate, Chandigarh-I**  
**CONTRAVENTION**  
**OF PROVISION :Rule 2 (L) read with Rule 3 of the CENVAT Credit Rules, 2004**

During scrutiny of records, it was observed that the assessee has been clearing Cement Clinker to his related plant for the manufacture of cement through transport by road and availed input Service Tax Credit on the Strength of invoices relating to freight outwards. The freight outward is not an input service for the manufacture of Cement Clinker, as the same is not covered under the definition of input service as provided under the CENVAT Credit, 2004. As such, the input Service Tax Credit amounting to Rs.4,64,28,833/- availed and utilized by the party for the years 2009-10 to 2012-13 in respect of freight outward was irregular stands recoverable from the assessee. The assessee accepted the observation of the audit and reversed wrongly availed input service tax Credit of Rs. 4,64,28,833/- on freight outward “under protest”.

**(4) GIST OF THE OBJECTION: Non-payment of duty on clearances of Steam Coal**  
**COMMISSIONERATE : Central Excise Commissionerate, Visakhapatnam-II**  
**CONTRAVENTION**  
**OF PROVISION :Section 66 of Chapter V of the Finance Act, 1994**

During the course of audit, it was noticed that the assessee imported 'Steam Coal' as a Central Excise dealer and cleared to various parties. The audit verified the RG 23 D Register and invoices of the assessee and found that assessee had cleared 24240.310 MTs of 'Steam Coal' to his factory, without making any debit entries in the RG 23 D register. On being pointed out by the audit that duty has to be paid along with interest and penalty, the assessee agreed to the objection and debited the duty.

**(5) GIST OF THE OBJECTION :Non paymentof Excise Duty on certain invoices due to malfunctionof software**  
**COMMISSIONERATE:Central Excise Commissionerate, Chennai IV**  
**CONTRAVENTION**  
**OF PROVISION : Rule 4, 6 and 8of the Central Excise Rules, 2002**

Assessee is the manufacturers of Head/Rear Lamps for automobiles falling under TSH 85122010 of CETA, 1985. Verification of duty payment documents revealed that the assessee had not paid duty on certain invoices. It was ascertained that due to malfunction of the software certain invoices were left out from payment of duty, which resulted in short payment of duty to the government.

On being pointed out the lapse, the assessee agreed and paid the Excise duty to the tune of Rs. 18,74,065/- +Rs. 37,481/- (Edu.Cess) and Rs. 18,741 /- (SHE Cess).Assessee has requested a week's time to pay the interest of Rs.3,14,049/-.

**(6) GIST OF THE OBJECTION:Short payment of duty by setting off the duty payable against the sales returns received**

**COMMISSIONERATE:Central Excise Commissionerate, Bangalore-I**  
**CONTRAVENTION**  
**OF PROVISION**

**: Rule 4 ,6 and 8of the Central Excise Rules, 2002**

The assessee imported SEIKO brand watches and clocks and after repacking and affixing labels of MRP cleared those under Section 4A on payment of duty after availing abatement. At the time of clearance, assessee utilized the credit availed against CVD and service tax input credit and the balance duty was paid from the PLA. While verifying the ER-1 returns it was seen that the duty payable for the month was not tallying with the appropriate percentage of duty on the assessable value shown in the ER-1 return. On verifying the sales ledger it was seen that the assessable value and duty in the sales ledger was not tallying with that shown in ER-1 return every month. The assessee was actually totaling the number of watches and clocks cleared during the month and making an excel sheet with model no., total qty, total MRP, assessable value, Excise duty and cess. Thereafter the assessee took in to account the total number of watches received back from stockists/dealers for that month as sales returns and set those off against the duty payable for the month and paid the balance duty only every month. The stockists after a period of six months to one year sent back the unsold/spoiled watches through Debit Notes/Stock Transfer Notes to the assessee who retrieved the details of watches from the system by entering the sl.no. of the watches/clocks and, ascertained Assessable value; the duty paid at the time of clearance and deducted this value, and duty payable for that month and paid only the balance duty. The sales returns were returned by the stockists without proper duty documents and hence assessee was not eligible for availing CENVAT Credit against duty involved in returned goods. Even if the assessee wanted to take credit, he was required to pay the full duty for that month for all the clearances made and avail the credit on sales returns under Rule 16 of the Central Excise Rules and take it into his Annexure- 10 account for the month along with the purchases/imports for that month and record it in the monthly return ER-1 and then utilize it from the CENVAT Credit account for payment of duty. The figures of sales return was not reflected in the Annexure- 10 or ER-1 but straight away taken into the sales ledger and for payment of duty for that month which is absolutely wrong. The Debit Notes/Stock Transfer Notes issued by the stockists is not a proper document for taken credit under CENVAT Credit Rules, 2004. The duty involved and payable works out to Rs.31,43,884/- which has to be paid along with interest and penalty.

**(7) GIST OF THE OBJECTION:Irregular availment of CENVAT Credit on the services used for initial setting up of plant and machinery**

**COMMISSIONERATE :Central Excise Commissionerate, Belgaum**

**CONTRAVENTION**

**OF PROVISION**

**:Rule 3 read with Rule 2(1) of CENVAT Credit Rules, 2004**

The assessee had availed CENVAT Credit on various services such as erection commissioning, consultancy, site supervision in connection with the setting up of integrated steel plant with a total projected investment of Rs.6151 Crore. The activity of construction and setting up of the plant commenced from February, 2011 and is expected to be completed by October, 2014. So far 25% of the investment is said to have been made. The assessee has entrusted the work of consultancy for detailed engineering and site supervision service for the plant to one M/s Mecon Ltd. and have availed input service credit on the service rendered by the said service provider. Since the service credit availed by the assessee towards setting up of factory is not in accordance with the amended definition of input service as per Rule 2(1) of CENVAT Credit Rules w.e.f 1.4.2011 the assessee is required to reverse the credit of Rs.32,97,648/-.

**(8) GIST OF THE OBJECTION:Shortpayment of Central Excise Duty on clearance of Books**

**COMMISSIONERATE:Central Excise Commissionerate, Kolkata-III**

**CONTRAVENTION**

**OF PROVISION**

**:Section 3 of the Central Excise Act,1944 read with Rule 6 of the Central Excise Rules, 2002 read with Notification No.01/2011-CE, dated 01.03.2011, as amended**

In course of verification of records and documents i.e. Excise Returns and Excise Invoices for the period from March, 2010 to October, 2012, it was observed that the assessee was engaged in manufacture of finished goods. viz Paper and articles made there from covered under TSH 4802, 4816, 4804 and 4820. It was observed that from 01.03.2011. Assessee had availed exemption benefit under Notification No.01/2011-CE, dated 01.03.2011, as amended, and started paying Central Excise Duty @ 1% adv and w.e.f. 17.03.2012 @ 2% adv for payment of duty on clearance of Exercise Books. But as per the CENVAT Credit register being maintained as RG23A Pt. II & Input Service Credit register; it was observed that the assessee had availed CENVAT Credit of duty paid on all Inputs & Input Services received by him for manufacture of Exercise Books. As the assessee have availed benefit of CENVAT Credit facility, the assessee is not entitled to avail the concessional benefit under Notification No.01/2011-CE dated 01.03.2011 in respect of the said clearance of the final goods i.e. Exercise Books and hence the assessee is required to pay Central

Excise duty at normal rate. The details of the said clearance with short payment of duty in respect of Exercise Books along with the Central Excise duty liability have been calculated. The assessee is, therefore, required to pay the central excise duty of **Rs.58,26,461.00** along with appropriate interest.

**(9) GIST OF THE OBJECTION:Short payment of duty due to wrong availment of abatement on M.R.P price**  
**COMMISSIONERATE:Central Excise Commissionerate, Kolkata VII**  
**CONTRAVENTION**  
**OF PROVISION :Section 4A of Central Excise Act ,1944**

In the course of audit and on scrutiny of Cenvat documents, it was observed by the auditors that the assessee had manufactured and cleared finished goods value of which was to be determined under section 4A of CEA, 44 on the basis of MRP after allowing certain quantum of abatement as notified from time to time vide notification issued under the said section. Vide notification No. 14/2008-CE (NT) dated 01.03.2008 abatement allowed for goods falling under heading 340111, 340119 and 3402 was 31.5% and vide notification No. 49/2008-CE (NT) dated 24.12.2008 all goods falling under heading 3401,3402,3808 as manufactured by the assessee were allowed abatement of 30% of MRP for ascertaining the assessable value thereof. On scrutiny of his invoices issued for removal of the finished products it was found that the assessee had availed abatement of 33% on MRP of the products during the entire period 2008-09, 2009-10, 2010-11 and 2011-12 for ascertaining the assessable value for the purpose of calculating the Excise duty leviable thereon. This has caused short payment of duty of **Rs.12,73,026+Rs.4,71,972.00 (Interest)**. The assessee is required to pay the said amount immediately along with interest at appropriate rate. The assessee agreed and paid entire duty ie {Rs. 12, 35,948.00 (Basic) + Rs.24, 719.00 (E. Cess) + Rs.12, 359.00 (SHE Cess) Rs. 4, 71,972.00 (Int.)} in cash with interest.

**(10) GIST OF THE OBJECTION:Non reversal of CENVAT Credit on Nonmoving inventories**  
**COMMISSIONERATE : Central Excise Commissionerate, Chennai IVCONTRAVENTION**  
**OF PROVISION :Rule 3(5B)(i) of the Cenvat Credit Rules, 2004**

During the course of audit, on scrutiny of input CENVAT Credit documents for the year 2012-13, it was noticed that the assessee had taken CENVAT Credit on certain inputs which are

non moving / slow moving. As per Rule 3(5B)(i) of the Cenvat Credit Rules, 2004, CENVAT Credit taken on such non movable/slow moving inventories had to be reversed. The cenvat credit on the above non moving / slow moving input stock worked out to Rs.13,30,308/- (ED- Rs.10,43,961/-, AED- Rs.2,77,076/- Ed. cess- Rs. 6,181./-, SHE cess- Rs.3,090/-)

On being pointed out, the assessee has admitted their mistake and reversed the Rs.13,30,308/- (ED - Rs.10,43,961/-, AED - Rs.2,77,076 Ed.cess - Rs. 6,181./-, SHE cess- Rs.3,090/-) vide their Cenvat Account dt.14.08.2013.

**SERVICE TAX**



**(11) GIST OF THE OBJECTION :Nonpayment of Service Tax under reverse charge mechanism**  
**COMMISSIONERATE :Central Excise Commissionerate,Belapur**  
**CONTRAVENTION**  
**OF PROVISION :Section 66 A of Chapter V of the Finance Act, 1994**

During the course of audit, it was observed that the said unit was providing services viz. consulting engineering services i.e. advice, consulting or technical assistance in discipline of computer software engineering (explanation to Section 65 [105][g]). The said assessee was exporting 90% of the above said services to various countries (export of service – no service tax) and 10% of the said services, the assessee was providing in India and paying appropriate Service Tax. For the above said services, the assessee required some software (Information Technology Service) which the assessee was purchasing indigenously and paying VAT on the same.

During the scrutiny of his respective balance sheet for the financial year 2008-09 to 2011-12, it was observed that the assessee made some expenditure in foreign currency for importing software for business purpose. It was further found that the assessee had imported the software through Database communication / Telecommunication link and Internet and this software is covered under the Information Technology Software Service as the same was used for creating drawing and designing of the projects. This service has been introduced vide Finance Act, 2008 with effect from 16.05.2008. Providing the right to use Information Technology Software supplied electronically is a taxable service (Section 65 [105][zzzzz]) inserted vide Finance Act, 2008 with effect from 16.05.2008.

Downloading of software from outside India (whether tailor made or branded) would attract Service Tax. Person downloading software would be ‘Importer’. He will be liable to pay Service Tax under reverse charge method and he has to pay Service Tax by cash and then if it is eligible, he can take CENVAT Credit.

On further scrutiny, it was found that the said assessee had not paid the Service Tax under reverse charge method on above said Information Technology Service during the financial year 2008-09 to 2011-12. The liability of Service Tax on the expenditure in foreign currency made by the said assessee for importing the above said service is Rs.99,26,428/-

On pointing out, the assessee agreed but told that he will opt for Service Tax Amnesty Scheme and will pay the above said liability.

**(12)GIST OF OBJECTION :Irregular availment of CENVAT credit on Interior Decoration  
COMMISSIONERATE:Large Tax Payer Unit, Delhi  
CONTRAVENTION**

**OF PROVISION :Rule 3 of CENVAT Credit Rules,2004**

During the course of audit it was noticed that the assessee had availed CENVAT credit of Service tax paid on invoices related to interior decoration work carried out in his premises like fixing of glasses, partitions etc. It appeared that the same does not fall within the definition of “input service” as defined under Rule 2(1) of CCR, 2004.

In this regard Circular No. 120/01/2010/-ST dated 19/01/2010 while addressing the problems faced by exporters in availing refund of excess credit; goes on to clarify in Para 3.1.1 that “there cannot be different yardsticks for establishing the nexus (between inputs/input services and output services/export goods) for taking credit and for refund of credit. Further, Para 3.1.2 of the said Circular also clarifies that *“Activities like event management, such as company sponsored dinners/picnic/tours, flower arrangements, Mandap keepers, hydrant sprinkler systems (that is, services which can be called as recreational or used for beautification of premises), rest houses etc prima facie would not appear to impact the efficiency in providing the output services, unless adequate justification is shown regarding his need.”* i.e. the assessee will not be eligible to take CENVAT credit in respect of the Service cited above unless adequate justification is shown regarding the need for the same in relation to his output services. Though the above clarification has been given in the context of PBO services, this would apply to all other services as well. In the instant case the assessee is registered under Service Tax for GTA Services and as an “Input Service Distributor” and in view of the clarifications given in the Circular cited above, it appears that the CENVAT credit availed of Service tax paid on invoices pertaining to interior decoration work undertaken in his premises is related to ‘beautification of the premises’ as cited in the Circular above, and therefore is not adequately justified vis-a-vis the output services registered for. Thus wrongly availed CENVAT Credit amounting to Rs. 3,67,026/- stands recoverable from the assessee along with the applicable interest.

**(13)GIST OF OBJECTION:Irregular availmentof CENVAT Credit utilised on arranging Foreign  
Tours as incentives to dealers and employees.**

**COMMISSIONERATE:Large Tax Payer Unit,Delhi**

**CONTRAVENTION**

**OF PROVISION :Rule 3 read with Rule 2(1) of CENVAT Credit Rules, 2004**

During the course of audit it was noticed that the assessee had availed CENVAT credit of Service tax paid on invoices related to arranging foreign tour as incentives to dealers and foreign tour of employees. The same does not fall within the definition of “input service” as defined under Rule 2(1) of CCR, 2004. In view of the same it appears that the CENVAT credit availed of Service Tax paid on arranging foreign tours of dealers/employees is recoverable from the assessee.

Thus wrongly availed CENVAT credit amounting to Rs. 665995/- including cess stands recoverable from the assessee along with applicable interest.

**(14)GIST OF OBJECTION: Non paymentof Service Tax on ‘License Fees’ received  
COMMISSIONERAT :Service Tax Commissionerate, Delhi  
CONTRAVENTION  
OF PROVISION :Section 66 read with section 73A of Chapter V of the Finance Act,1994**

The assessee is engaged in providing Club & Association Service, Mandap Keeper & Renting of immovable Property Service.

The assessee was receiving license fees from Indian Hotels Company Ltd for running Hotel Taj Place, Sardar Patel Marg, and New Delhi. The Leasing/renting of Immovable property in respect of Hotels were exempt from service tax prior to 01-07-2012. The assessee collected S Tax from Hotel Taj Place and did not pay to the government till 07.03.2013. The assessee after receiving letter of audit dated 10.12.2012 paid service tax of Rs. 3,16,69,288/- for period 01.07.2012 to 28.02.2013 on 07.03.2013.

**(15)GIST OF OBJECTION :Non paymentof Service Tax on loading, unloading, handling & stacking charges  
COMMISSIONERAT : Central Excise Commissionerate, Jaipur-I  
CONTRAVENTION  
OF PROVISION : Section 66 read with Section 67 of the Finance Act,1994**

The assessee is registered with the department for “Transport of Goods by Road Service”. During the course of audit of the unit, it was observed that assessee tendered consolidated contract to various service providers for handling and transportation of fertilizers/goods at his various railheads in different locations of Rajasthan. The Service Providers issued consolidated invoices

bifurcating therein Loading, Unloading, Handling & Stacking charges and Transportation charges. However, the Service Recipient discharged Service Tax only on Transportation charges.

The Board vide circular No. 104/7/2008-ST dated 06.08.2008 has laid down the principles to be followed in respect of the issues raised by AIMTC as under:-

*Issue: GTA provides service to a person in relation to transportation of goods by road in a goods carriage. The service provided is a single composite service which may include various intermediary and ancillary services such as loading/unloading, packing/unpacking, transshipment, temporary warehousing. For the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of intermediary and ancillary services. In such a case, whether the intermediary or ancillary activities is to be treated as part of GTA service and the abatement should be extended to the charges for such intermediary or ancillary service?*

*Clarification: GTA provides a service in relation to transportation of goods by road which is a single composite service. GTA also issues consignment note. The composite service may include various intermediate and ancillary services provided in relation to the principal service of the road transport of goods. Such intermediate and ancillary services may include services like loading/unloading, packing/unpacking, transshipment, temporary warehousing etc., which are provided in the course of transportation by road. These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road. The contention that a single composite service should not be broken into its components and classified as separate services is a well-accepted principle of classification. As clarified earlier vide F.No. 334/4/2006-TRU dated 28.2.2006 (para 3.2 and 3.3) and F. No. 334.1/2008-TRU dated 29.2.2008 (para 3.2 and 3.3), a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of invoicing does not alter the single composite nature of the service and classification in such cases are based on essential character by applying the principle of classification enumerated in section 65 A. Thus, if any ancillary/intermediate service is provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it.*

Therefore, in terms of above circular in case of composite services which are included in the invoices issued by GTA and not by any other person then such service would form part of GTA service. Thus, the Service Tax liability automatically falls on the recipient being part of GTA. At the time of audit, it was noticed that assessee did not discharge Service Tax liability on Loading, Unloading, Handling & Stacking charges etc.

Accordingly, involved tax amount of Rs. 57,21,856/- is required to be recovered along with interest.

**(16) GIST OF OBJECTION: Non payment of Service Tax on 'Construction of Residential Complex' Service**

**COMMISSIONERATE: Central Excise Commissionerate, Jaipur-I**

**CONTRAVENTION**

**OF PROVISION : Section 67(1)(iii) of Chapter V of the Finance Act read with Rule 3(a) of Service Tax (Determination of Value) Rules**

The Service provider is registered with the department for the service of "Construction of Residential Complex Service". During the course of audit it was observed that the assessee had made agreements in the month of May 2011 with a company having its registered office at Mumbai and its administrative office at Jodhpur through its Directors for a project situated at Jodhpur having 20235.78 Mtrs land for construction of residential flats.

The assessee and the land owner made agreement that the owner and developer shall share the saleable area in the ratio of 25% and 75% respectively i.e. 25% area is of land owner and 75% area for developer. The assessee informed that total saleable area in project was 853749 SqFt( as per details given by the assessee) and the assessee had allotted 168 flats having saleable area 213251 Sq Feet to the land owner.

The assessee informed that the assessee did not pay Service Tax on land owner's flats and was also not knowing as to whether the land owner had sold these flats or not.

As per Circular No. 151/2/2012-ST dated 10.02.2013 issued under F. No. 332/13/2011-TRU, clarifying taxability of flat of land owner as under:-

*Here two important transactions are identifiable: (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two*

*categories of service receivers: (a) from landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.*

The Board has clarified the taxability of the construction service:

*For the period after 01/07/2010, construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner.*

The valuation in the matter is also discussed in the circular which is as under:-

*“Value, in the case of flats given to first category of service receiver, is determinable in terms of section 67(1)(iii) read with Rule 3(a) of Service Tax (Determination of Value) Rules, 2006, as the consideration for these flats i.e., value of land / development rights in the land may not be ascertainable ordinarily. Accordingly, the value of these flats would be equal to the value of similar flats charged by the builder/developer from the second category of service receivers. In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax. Service tax is liable to be paid by the builder/developer on the ‘construction service’ involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (e.g. allotment letter).”*

As per above mentioned circular the developer is liable to pay service tax on the flats given/allotted to land owners. The circular has also clarified that Service tax is liable to be paid by the builder/developer on the ‘Construction Service’ involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument. In the instant case, the developer has given/allotted flats to the land owner with demarcation (flat no. and Area). Therefore, the assessee has transferred the right of the flats to the land owner in the agreement and also the developer has given the flats no. and area of the flats to the land owner. Hence, the assessee is liable to pay the Service Tax on the flats given/allotted to the land owners share at time when agreement was signed in which share of land owner was defined/decided.

The assessee informed that he sold his first flat having saleable area 1616 Sq. ft (super built up area) at the rate of Rs. 1751/- per Sq. ft. to one of the customers on 30 Sept. 2011. As per above mentioned circular the total value of land owners flats given/allotted by the developer is ascertained as under:-

(Amt. in Rs)					
Saleable Area of land owner given/allotted by the developer ( Sq. ft)	Rate of sale of Istflat of developer (per Sq. ft)	Value of flats of land owners share	Taxable value (25% of value )	Rate of duty	ST Payable
213251	1751	373402501	93350625	10.30%	9615114

In view of above the assessee is liable to pay service tax of Rs 96,15,114/- on the flats given/allotted to the land owner's share, which was not deposited by him which is recoverable with interest.

**(17) GIST OF OBJECTION: Wrong availment of service tax credit on the Courier services**

**COMMISSIONERAT : Central Excise Commissionerate, Chennai IV**

**CONTRAVENTION**

**OF PROVISION : Rule 3 of CENVAT Credit Rules, 2004**

On verification of the cenvat documents, it was noticed that the assessee had wrongly availed service tax credits on the courier charges paid by M/s MRFCorp.Ltd. to his Courier agency during the period from July 2012 to June 2013, amounting to Rs.9,80,623/- (Rs.9,52,061+19,041+9,519). The assessee did not receive any service from the above courier agents and also not paid for his services; the bills were also raised in the name of M/s MRF Ltd and hence the assessee is not eligible to take credit on the service tax paid on those bills. As per CENVAT Credit Rules, the assessee is not entitled to avail service tax credit on services not provided to him.

On being pointed out, the assessee has not reversed the CENVAT Credit availed. Hence the ineligible credit is to be reversed and interest paid.

**(18) GIST OF OBJECTION: Non Payment of Service Tax on Professional Charges**

**COMMISSIONERAT : Central Excise Commissionerate, Chennai III**

**CONTRAVENTION**

**OF PROVISION**

**: Section 66 A of Chapter V of the Finance Act, 1994**

On verification of the Annual Report for the year 2011-12, it is seen that the assessee had paid an amount of Rs.7,41,935/- , Rs.14,84,370/- and Rs.24,68,498/- for the year 2010-11, 2011-





On verification of the documents it was noticed that the assessee has paid service tax only for 3 quarters ie. from 1-4-2012 to 31-12-2012 on the Trade Mark fee paid in respect of company located at Japan. The total trade mark fee for the three quarter works out to Rs.4,07,49,871/- on which service tax at the rate of 12.36% works out to Rs.50,36,684/- and the same has been paid by the assessee vide challan dated 11-01-2013, 30-3-2013.(two invoices 1 for April to September'12 and another one for Oct – Dec'12) The assessee has paid the said service tax amount belatedly. Interest on the said belated payment works out to Rs.3,25,049/- as detailed in the Annexure and the same has to be collected from the assessee.

However it is noticed that the assessee has not paid service tax on the trade mark fee paid to Company located at Japan for the period from 1-1-2013 to 31-03-2013 though the assessee has paid Trade Mark fee to company located in India (Chennai) for the said period. Hence the assessee has to pay service tax on the balance Trade mark Fee paid to Company located at Japan for period from 1-1-2013 to 31-03-2013.The trade mark fee for the said period works out to Rs.1,80,17,813/- Service tax on the said amount works out to Rs.22,27,002/- and the same has to be collected under Reverse Charge Mechanism. Similarly the assessee has to pay service tax on the trade mark fee paid by them to Company located at Japan for the period 01.04.2013 to 30.06.2013.The 1% of the total turnover paid as Trade Mark Fee by the assessee to company located in India works out to Rs.1,19,12,513/. The remaining 1% of the total turnover of Rs.1,25,81,758/ has to be paid to company located at Japan. Hence Service Tax on the remaining 1% amount works out to Rs.15,55,105/-. The same amount has to be recovered from the assessee. On being pointed out the assessee has agreed with the audit view and paid the service tax amount of Rs.22,27,002/- + Rs.15,55,105/- (Total Rs.37,82,107/-) along with applicable interest of Rs.3,25,049/(1,45,947/-+Rs.3,13,023/-)

**(21)GIST OF OBJECTION:Short payment of Service Tax under ‘Builder’s Special Services’**

**COMMISSIONERATE: Service Tax Commissionerate, Kolkata**

**CONTRAVENTION**

**OF PROVISION :Section 66 read with Section 67 of the Finance Act,1994**

The definition of Construction Services under Sec 65(105)(zzzh) of the Finance Act, 1994 includes construction, completion and finishing, repairs, alterations, renovations or restorations of complexes. It was noticed by the Government that in addition to these activities,

the builders of residential or commercial complexes provide other facilities like allotting a flat/commercial space according to the choice of the buyer, developing/maintaining parks, laying of sewerage and water pipelines, providing accessible roads and common lighting, firefighting installation, power back-up etc. and charge separately for these. These charges are covered under “ Builders’ Special Services ” by the Finance Act, 1994 effective from 01.07.2010 with CBEC Instruction letter vide F. No. 334/1/2010-TRU dated 26.02.2010. Under “Builders’ Special Services” there is no scope of abatement which is 75% or 67% as in the case of Construction Service.

Now, in course of audit, it was observed from different agreements with the customers that the assessee had charged extra amount on account of Club Membership, Pipe line for gas supply, Power back-up facility, Maintenance Deposit, CESC Connection & Transformer charges, KMC deposits and Legal Charges, which fall under “Builders’ Special Services” under Sec 65(105)(zzzzu) of the Finance Act,1994 and these services are not eligible for abatement of 75% of value because these services do not fall under Construction Services. It is further noticed that though charges under these heads had been shown separately in agreements but at the time of sending demand notice for collection, these charges were clubbed together with other basic prices of construction services, thus making it difficult for separation of this charges. However, studying various agreements with the customers, it was seen that these charges constitute 3.50% of the total consideration received. So, the auditors considered 3.50% as the percentage taken for these services. It was further noticed from the ST-3 Returns that during 2010-11(01.07.10 to 31.03.2011) and 2011-12, the assessee had received Rs.1,03,23,23,259.00 and Rs.73,98,97,562.00 as advance from Customers. Sum total of these two amounts comes to Rs.1,77,22,20,821.00 and 3.5% of it becomes Rs.6,20,27,729.00. Out of this, Service Tax was paid only on 25% after taking abatement of 75%. Now, as per Builders’ special services, this abatement is not allowable and additional amount of Service Tax should be paid on balance 75% of Rs.6,20,27,729/- i.e. on Rs.4,65,20,797/-and it comes to Rs.47,91,642.00 (10.3% of Rs.4,65,20,797.00). It should be paid alongwith Interest and Penalty u/s 73(4A) of the Finance Act,1994.

**(22)GIST OF OBJECTION:CENVATCredit availed twice on the same set of documents**

**COMMISSIONERAT : LTU Commissionerate, Bangalore**

**CONTRAVENTION**

**OF PROVISION**

**:Rule 3 of CENVAT Credit Rules,2004**

During the course of verification of Cenvat documents pertaining to availment of CENVAT Credit it was observed that the LTU had availed CENVAT Credit on the same document twice, thereby contravening Rule 3 of CENVAT Credit Rules,2004. The amount of credit thus availed twice amounts to Rs.1,09,25,717/-. The LTU is required to reverse the same along with interest in terms of Rule 14 of CENVAT Credit Rules, 2004. On pointing out the LTU paid the CENVAT Credit of Rs.1,09,25,717/- and interest of Rs.56,86,982/-.

**(23)GIST OF OBJECTION:Nonpayment of service tax on ‘Works Contract’ services  
COMMISSIONERAT : Central Excise Commissionerate, Cochin  
CONTRAVENTION  
OF PROVISION :Section 66 of Chapter V of the Finance Act, 1994**

During the verification of the records, it is observed that assessee undertook projects for different clients. The assessee first entered into an agreement with the client wherein assessee was referred as ‘consultants’. On perusal of agreement entered by the assessee with the Department of Tourism, Government of Kerala, GIDA, District Tourism Promotion Council, Spices Bard, Directorate of Ports, Department of Archeology, KTDFC, KINFRA, KITTS, Eco Tourism Project and Tourist Resort Kerala Ltd., it was noticed that the clients engage assessee to avail its professional services for the construction of the project. As per the agreement :- ‘consultant’ agreed and undertook to perform all the services, duties and responsibilities in the execution of such work which included conceptualization, preparation of all drawings, cost estimates etc. and getting client’s approval of the same. ; The‘consultant’ would advise the Client about the progress of the work and furnish progress reports. ; The‘consultant’ should take all necessary measures to ensure quality work and to keep a watch on the materials used as per approved specifications. ; The‘consultant’ should carry out joint measurements along with the contractor and should verify, approve, certify bills and release payment from the deposit amount. In all cases the entire work was done by various contractors who have no direct connection with the Client. All the payments to the contractors were given by the assessee. In short the project was being entrusted by the Clients to assessee as a deposit work on cost plus consultancy charges basis. The clients in turn deposited up to 80% of the estimated cost of the work as advance. Assessee made payment to the contractors from this deposit. The balance 20% was to be released on settling the final bill. Assessee raised final bill to the Client and handed over the completed work/project finally.

Assessee was the real contractors for the projects. The activities carried out by the assessee as referred above were not consultancy services, but those could be classified under

“Works Contract” service and service tax is required to be recovered at appropriate rate. In this case assessee failed to take registration under “Works Contract” service and also failed to pay service tax at appropriate rate. Assessee received a total amount of Rs.105,60,87,317/- as taxable income and the service tax liability works out to Rs.4,35,10,797/-.

### **OSPCA**

**(24)GIST OF OBJECTION:Wrong availment of Exemption Notification No. 24/2005 (Customs)by  
mis – declaring the imports for measuring instrument**

**COMMISSIONERAT : Central Excise Commissionerate, Nagpur**

**CONTRAVENTION**

**OF PROVISION :Notification No. 24/2005 Customs;90.30 of CETA, 1985**

The assessee manufactured measuring instruments and claimed classification of the goods under Heading 90.26 and benefit of full customs duty exemption under Notification No. 24/2005 dated 1.3.2005 on import of goods of Heading 90.26. The assessee is following procedure set out

in the Customs (Import of Goods at concessional Rate of duty for manufacture of Excisable goods) Rules, 1996 and availing full exemption on import of inputs required for manufacture of measuring instruments claiming classification Heading 90.26 of CETA, 1985.

The scrutiny of brochure and information available in their manual which is available on internet reveals that the goods manufactured by the assessee viz. flow meter is not merely measuring instruments. Measuring the desired parameter like flow is only one aspect of its function. The instruments are fitted with Sensors or Transducers, Microprocessors, Transmitters, Amplifiers, relays etc. along with software. There are optional Software available which, if loaded, makes it suitable for process control of batches.

These instruments can convert analogue signals into digital or electrical signals which are amplified further to desired strength and then are transmitted to process controller or to a Computer kept in the control room which controls the process. Even the data can be made available on internet. It further appears that it has facility of configuration of parameters to be controlled. Therefore it appears that these instruments are highly sophisticated specially designed functional units which are directly participating in process control system. So their functions are definitely beyond mere measurement of parameters.

In this regard, it appears that the products manufactured by the assessee are appropriately classifiable under Heading **90.32 of CETA, 1985** as “Automatic Regulating or Controlling instruments and Apparatus”. The HSN Explanatory notes to Heading **90.32** on page no. 1533 and Chapter Note 3 to Chapter 90 on page no. 1457 of HSN Vol.4 and Section 4 to Section XVI and part VII of General Explanatory notes to Section XVI on page no. 1133 of HSN Vol.3 (copy enclosed) also supports this view.

The decision of the Hon’ble Supreme Court in CC, Bangalore V/s. N. I. Systems (India) Pvt. Ltd. reported in 2010(256)ELT 173 (SC) is very categorical and fully supports the Commissionerate case (copy enclosed). This decision squarely covers the classification of measuring instrument and process controllers, which are part of measuring and control system. There is no confirm judgement of the Hon’ble Supreme Court on the issue.

In this judgement of CC, Bangalore V/s. N.I. Systems (India) Pvt. Ltd. (Supra), Hon'ble Apex Court has held that

“41. We do not find any merit in the submissions of the importer that in view of the Explanatory notes, the Measuring Device, the Control Device and the Operating Device has to form a “single entity”. There is no dispute that if all the above three devices are found in one “single entity” then classification will fall under chapter 90. However, the test of “single entity” containing three devices is not a pre condition for classification under CTH 90.32. On the contrary, the test is not that of single entity, but of the device being capable of working as a **functional unit**. In this connection, Note 3 of Chapter 90 is to be read. Note 3 incorporates Note 4 to Section XVI. Note 4 inter alia provides for a machine consisting of individual components which may be separate as long as they are intended to contribute to a clear defined function. The PACs/Programmable Process Controller, though separate from sensors, is an individual component intended to contribute to a clearly defined function. Note 3 of Chapter 90 has to be read with 2(b) of Chapter 90 and if so read then it becomes clear that PAC/Programmable Process Controllers, being parts and accessories and a regulating or controlling apparatus like sensors have got to be classified under CTH 9032.89.10.

42. For the above reasons, we hold that PACs (including embedded controllers/Programmable Process Controllers) have been rightly classified by the Department under 90.32.”

In view of the above, it appears that the products manufactured by the assessee and declared as instruments for flow measurement are not merely instruments for measuring flow, but are equipped with Sensors, amplifiers, micro processors/ micro controllers, transmitters, software etc. which make it a ‘Functional Unit’ which are designed to be compatible with Programmable Process Controllers and/or the automatic regulating system/ apparatus which automatically controls the process. So the products manufactured by the assessee, although a separate functional unit, are designed to perform the clearly defined specific function of ‘control or regulation’ of the process along with Programmable Process Controllers and operating devices which together controls or regulates the process automatically and would merit classification in the heading appropriate to that function. **Hence these goods are nothing but parts of automatic control or regulating system/ apparatus and would be appropriately classifiable under CTH**

**90.32 of CETA, 1985.** Accordingly exemption under notification 24/2005-Cus, dated 01.03.2005, which allows full exemption of Customs duty on import of parts of goods of CTH 90.26, is not available to the assessee. The approximate duty involved **from March, 2011 to June, 2013 would be at Rs. 20.00 Crores.**