

Brief Background of Customs Law

Customs duty is on import into India and export out of India. We will see some basic concepts of the Act in this Chapter.

Problems due to high customs duty - Heavy customs duty had started becoming counter-productive. Indigenous industries, protected from foreign competition, became self complacent. They neglected aspects of quality and productivity. The result is that 'Made in India' label has become a sign of poor quality product in international market. Productivity of Indian Industry in many cases is as low as 20 to 30% of comparable industries abroad. Indian exports are restricted in some countries due to our protectionist policies. Smuggling, *mafia* and *havala* trades increased to unprecedented levels due to heavy customs duties and restrictions on imports. Government has realised these aspects. Restrictions on imports have been considerably reduced. Rupee has been made freely convertible on current account. Customs duties were lowered to 150% (basic plus auxiliary) in 1991. It was brought to 110% in March 1992, 85% in March 93, 65% in March 94, 50% in March 95 and 42% in March, 1997. [40% basic plus 2% special]. The peak rate on non-agricultural goods was brought down to 38.5% in March, 2000 (35% basic plus 10% surcharge). It was brought down to 35% on 1.3.2001, 30% on 1-3-2002, 25% w.e.f. 1-3-2003 and 15% w.e.f. 1-3-2005. It is reduced to 12.5% w.e.f. 1-3-2006 and to 10% .

CVD / SAD IN ADDITION TO BASIC CUSTOMS DUTY - In addition to basic customs duty, Special Additional Duty of 4% (SAD) and Countervailing duty (CVD) equal to excise duty (which is usually 16%) is also payable.

Education Cess - In addition, education cess of 2% and secondary and higher education cess of 1% is payable.

Calculations of customs duty -

Calculation of customs duty payable is as follows -

	Duty Rate %	Amount	Total Duty
(A) Assessable Value Rs 10,000		10000.00	
(B) Basic Customs Duty	10	1000.00	1000.00
(C) Sub-Total for calculating CVD '(A+B)'		11000.00	
(D) CVD @ 16% of 'C'	16	1760.00	1760.00
(E) Education cess of excise - 2% of 'D'	2	35.20	35.20
(F) SAH Education cess of excise - 1% of 'D'	1	17.60	17.60
(G) Sub-total for edu cess on customs 'B+D+E+F'		2812.80	
(H) Edu Cess of Customs - 2% of 'G'	2	56.26	56.26
(I) SAH Education Cess of Customs - 1% of 'G'	1	28.13	28.13
(J) Sub-total for Spl CVD 'C+D+E+F+H+I'		12897.19	
(K) Special CVD - 4% of 'J'	4	515.89	515.89
(L) Total Duty			3413.08

Note - Buyer will be eligible to avail Cenvat Credit of D, E, F and K above.

Scope and coverage of Customs Law

Section 12 of Customs Act provides levy of duty on Imports as well as exports. The rate of duty is as prescribed in Customs Tariff Act, 1975, read with relevant exemption notifications. Import duty is levied on almost all items, while export duty is levied only on a few limited products, where Indian goods are in commanding position. Raising revenue for Central Government is the main but not the only purpose of Customs Act. Customs Act is used to (a) regulate imports and exports (b) protect Indian industry from dumping (c) collect revenue of customs duty. In addition, provisions of Customs Act are used for other Acts like Foreign Trade (Development and Regulation) Act, Foreign Exchange Management Act (FEMA) etc. Customs Law is covered under various Acts, rules, regulations and notifications, as follows :

CUSTOMS ACT, 1962 - This is the main Act, which provides for levy and collection of duty, import/export procedures, prohibitions on importation and exportation of goods, penalties, offences etc.

CUSTOMS TARIFF ACT, 1975 - The Act contains two schedules - Schedule 1 gives classification and rate of duties for imports, while schedule 2 gives classification and rates of duties for exports. In addition, the CTA (Customs Tariff Act) makes provisions for duties like additional duty (CVD), preferential duty, anti-dumping duty, protective duties etc.

RULES UNDER CUSTOMS ACT - Under section 156 of Customs Act, 1962, Central Government has been empowered to make rules, consistent with provisions of the Act, to carry out the purposes of the Act. Various rules have been framed under these powers. Major among these are : *Customs Valuation Rules, 1988* : for valuation of imported goods for calculating duty payable; *Customs and Central Excise Duties Drawback Rules, 1995* : mode of calculating rates of duty drawback on exports; *Baggage Rules, 1998* : rules and allowances for bringing in baggage from abroad by Indians and tourists; *Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996* : provides procedure to be followed when goods are imported for export purposes; **Other rules are** : Rules regarding notified goods, specified goods, determination of additional duty for dumping, determination of origin of goods etc.

REGULATIONS UNDER CUSTOMS ACT - Under section 157 of Customs Act, 1962, Board (CBE&C) has been empowered to make regulations, consistent with provisions of the Act, to carry out the purposes of the Act. Various regulations have been framed under these powers. Major among these are : *Project Import Regulations, 1986* : procedures for project imports; **Customs House Agents Licensing Regulations, 1984** : Regulation of CHA. **Other regulations** regarding transshipment of goods, Import and Export report, Import and Export manifest, manufacture in warehouse, shipping bill and bill of export (form) etc. have been made. In *Sukhdev Singh v. Bhagatram Sardar Singh (1975)* 1 SCC 421 = AIR 1975 SC 1331 (SC Constitution Bench), it was held that regulations framed under statutory provisions would have the force of law.

NOTIFICATIONS UNDER CUSTOMS ACT - Various sections authorise Central Government to issue notifications. The main are : section 25(1) to grant partial or full exemption from duty and section 11 to prohibit import or export of goods. *Others are* : - specifying notified goods (section 11B), specifying specified goods (section 11-I) etc.

BOARD CIRCULARS— CBE&C is empowered u/s 151A of customs Act to issue, for purpose of uniformity in classification of goods or with respect to the levy of duty thereon, issue such instructions and directions to officers of customs and they are required to observe and follow such orders, instructions and directions of Board. CBE&C issues circulars giving various instructions / prescribing various procedures etc. Normally, these instructions should be followed.

CUSTOMS MANUAL, 2001 - Customs Manual, 2001 was released by CBE&C in September, 2001. The Manual gives an overview of Customs Law and Procedures. It is not stated that the

Customs Manual is issued under any provision of Customs Act or Rules. However, normally, instructions in Customs Manual, 2001 should be followed.

PUBLIC NOTICES – Often, Commissioners of Customs issue Public Notices. Often they just forward the Board circulars, but sometimes, public notices for local requirements are also issued.

Customs and Central Excise - There are many common links between Customs and Central Excise.

- ◆ Both are Central Acts and derive power of levy from list I - Union List - of the Seventh Schedule to Constitution.
- ◆ Both are under administrative control of one Board (Central Board of Excise and Customs) under Ministry of Finance.
- ◆ Organizational hierarchy is same from top upto Assistant Commissioner level. Transfers from customs to excise and *vice versa* are not uncommon.
- ◆ Chief Commissioner in charge of each Zone is same for excise and customs at many places.
- ◆ In the interior areas, Excise officers also work as customs officers.
- ◆ Classification Tariffs of both acts are based on HSN and principles of classification are identical.
- ◆ Principles of deciding 'Assessable Value' have some similarities i.e. both are principally based on 'transaction value'. Concept of 'related person' appears in Customs as well as Excise valuation.
- ◆ Provisions of refund, including principle of 'unjust enrichment' are similar. Provisions for interest for delayed payment are also identical.
- ◆ Provisions of raising demand for short levy, non-levy or erroneous refund are similar. Provisions in respect of recovery, mandatory penalty etc. are also similar.
- ◆ Provisions for granting exemptions from duty - partial or full - conditional or unconditional are identical.
- ◆ Powers of search, confiscation etc. are quite similar in many respects. In fact, some of provisions of Customs Act have been made applicable to Central Excise with suitable modifications.
- ◆ Provisions in respect of Settlement Commission and Authority for Advance Ruling are identical.
- ◆ Appeal provisions are identical.
- ◆ Appellate Tribunal (CESTAT) is same. Hence, procedures of appeal to Tribunal are identical.

Nature of Customs Duty

Entry 83 to List I - (Union List) of Seventh Schedule to Constitution reads 'Duties of customs including export duties'. Thus, import and export duty is a Union subject and power to levy is derived from Constitution. Section 12 of Customs Act, often called *charging section*, provides that duties of customs shall be levied at such rates as may be specified under 'The Customs Tariff Act, 1975', or any other law for the time being in force, ***on goods imported into, or exported from, India.***

Section 3 of Customs Tariff Act has also been held as 'charging section' (for levy of CVD - additional customs duty) - *Jain Brothers v. UOI* 1999(4) SCALE 207 = AIR 1999 SC 2550 = JT 1999(5) SC 100 = 112 ELT 5 = 1999 AIR SCW 2718 (SC 3 member bench).

Taxable Event for Import duty - Goods become liable to import duty or export duty when there is '*import into, or export from India*'.

As per section 2(28), 'export' with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

As per section 2(23), 'import' with its grammatical variations and cognate expressions, means bringing into India from a place outside India. In *Gramophone Company of India v. Birendra Bahadur Pandey* - AIR 1984 SC 667, it was held that 'import' included goods imported for transit across to Nepal.

Section 2(27) of Customs Act defines 'India' as inclusive of territorial waters. Hence, it was thought that 'import' is complete as soon as goods enter territorial water. Similarly, export is complete only when goods cross territorial waters. There were conflicting judgments of High Courts.

Finally, in *Kiran Spinning Mills v. CC* 1999(113) ELT 753 = 2000 AIR SCW 2090 (SC 3 member bench), it has been held that import is completed only when goods cross the customs barrier. The taxable event is the day of crossing of customs barrier and not on the date when goods landed in India or had entered territorial waters. In the case of goods which are in the warehouse the customs barrier would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country.

In *Garden Silk Mills Ltd. v. UOI* 1999(6) SCALE 285 = 1999 AIR SCW 4150 = 1999(113) ELT 358 = JT 1999(7) SC 522 = AIR 2000 SC 33 [SC 3 member bench - same bench which passed judgement in *Kiran Spinning Mills (Supra)*], it was held that import of goods in India commences when they enter into territorial waters but continues and is completed when the goods become part of the mass of goods within the country. The taxable event is reached at the time when the goods reach customs barrier and bill of entry for home consumption is filed.

In case of warehoused goods, the goods continue to be in customs bond. Hence, 'import' takes place only when goods are cleared from the warehouse - confirmed in *UOI v. Apar P Ltd.* 1999 AIR SCW 2676 = 112 ELT 3 = 1999(4) SCALE 313 = AIR 1999 SC 2515 (SC 3 member bench).- followed in *Kiran Spinning Mills v. CC* 1999(113) ELT 753 = 2000 AIR SCW 2090 (SC 3 member bench), where it was held that taxable event occurs when goods cross customs barrier and not when goods land in India or enter territorial waters.

In *CC v. HPCL* 2000(121) ELT 109 (CEGAT), it was held that the 'bulk liquid cargo' would be considered to have crossed customs barrier only when they are pumped into shore tanks. That being the taxable event, duty is leviable only on that quantity. - - The view has been accepted by department. It has been confirmed that duty will be payable on the basis of 'shore tank receipt' i.e. dip measurement in tanks on shore into which oil is pumped from tanker; and not on the basis of ulage survey report i.e. ulage quantity at the port of discharge on board the vessel, as determined by independent surveyors in presence of customs officers. - MFCA(DR) circular No. 96/2002-Cus dated 27-12-2002.

Though there is slight contradiction between the SC judgments, it can be said that '*mixing up with mass of goods in the country*' after crossing customs barrier is the '*taxable event*' for customs duty. This judgement is in harmony with other judgments and law as explained below -

DATE OF FILING BILL OF ENTRY IS RELEVANT FOR DECIDING DUTY LIABILITY - As we will see later, rate of duty and tariff valuation as on date of presentation of bill of entry or date of entry inward of the vessel, *whichever is later*, is relevant for determining the customs duty payable. Thus, rate of duty when ship enters the port is relevant and *not* the date when ship enters territorial waters.

Taxable event in case of exports - Though Supreme Court judgement does not prescribe what is taxable event in case of export, it could be argued that in case of exports, export commences when goods cross customs barrier, but export is completed when it crosses territorial waters. Thus, 'taxable event' occurs only when goods cross territorial waters.

In *CC v. Sun Exports* - 1988(35) ELT 241 (SC) = 1988(1) SCALE 758 = 1988(17) ECR 6 (SC) = (1989) 1 CLA 138 (SC), it was held that export is complete once the goods leave Indian waters and property passes to purchasers. Even if goods return due to Engine trouble, duty drawback is payable. In *B K Wadeyar v. Daulatram Rameshwarlal* AIR 1961 SC 311 = 11 STC 757 (SC), it was held that export is complete when ship leaves territorial waters of India.

Overwhelming view is that export is complete only when goods cross territorial waters of India.

Territorial Waters of India - Territorial waters means that portion of sea which is adjacent to the shores of a country. On 22nd March, 1956, President of India had issued a proclamation that territorial waters of India shall extend upto 6 nautical miles from the base line. This was extended to 12 nautical miles w.e.f. 30th Sept., 1967. Later, 'Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976' was passed. Section 3 of the said Act specifies that territorial water extend upto 12 nautical miles from the base line on the coast of India and include any bay, gulf, harbour, creek or tidal river. (1 nautical mile = 1.1515 miles = 1.853 Kms). Sovereignty of India extends to the territorial waters and to the seabed and subsoil underlying and the air space over the waters.

INTERNATIONAL CONVENTION - United Nations Convention of the Law of the Sea dated 7th October, 1982 has been signed by most of the countries. This convention uses the words 'territorial sea', which is analogous to the term 'territorial waters' used in Customs Law. As per article 2(1) of this convention, Sovereignty of a coastal state extends beyond its land territory upto 'territorial sea'. The sovereignty extends to airspace over the territorial sea as well as to sea bed. *Vide* article 3 of the Convention, territorial sea extends upto 12 nautical miles from normal base-line. Base line is the low-water line along the coast. As per article 17 of the Convention, ships of all countries have right of innocent passage in the territorial sea. Article 21(1) specifically provides that coastal State may adopt laws and regulations in conformity with this convention.

'*Exclusive economic zone*' extends to 200 nautical miles from the base-line. In this zone, the coastal State has exclusive rights to exploit it for economic purposes like constructing artificial islands (for oil exploration, power generation etc.), fishing, mineral resources and scientific research. However, other countries have right of navigation and over-flight rights. Other countries can lay submarine cables and pipelines with consent of Indian Government. Such consent may be declined for protecting interest of India. Section 7 of Territorial Waters - . . . - Act, 1976 has made similar provisions and thus, these provisions have been adopted in India too.

Beyond 200 nautical miles, the area is 'High Seas', where all countries have equal rights. These high seas are reserved for peaceful purposes. Any Country can use it for navigation, over-flight, laying submarine cables and pipes, fishing, construction of artificial islands permitted under international law and for scientific research.

EXTENSION OF CUSTOMS ACT, SERVICE TAX AND EXCISE ACT TO DESIGNATED AREAS IN EEZ – Customs Act has been extended to designated areas in Continental Shelf and Exclusive Economic Zone of India vide notification No. 11/87-Cus dated 14-1-1987 and 64/97-Cus dated 1-12-1997. Similarly, Central Excise Law and Service Tax (Chapter V of Finance Act, 1994) have been extended to designated areas in Continental Shelf and Exclusive Economic Zone of India vide notification No 166/87-CE dated 11-6-1987 and 1/2002-ST dated 1-3-2002 respectively.

Vide notification No. SO 189(E) dated 7-2-2002 issued by Ministry of External Affairs, Customs Act and Customs Tariff Act has been extended to whole of Exclusive Economic Zone (EEZ) and continental shelf of India for the purpose of (i) processing for extraction or production of mineral oils and (ii) Supply of any goods in connection with activities mentioned in clause (i). - - - This has following implications – (a) Supplies from India in connection with production of mineral oils within

EEZ and/or continental shelf of India shall not be treated as export and will not be entitled to export incentives. (b) Supplies of goods (for extraction or production of mineral oils) from other countries to units in this zone will be treated as import and duty will be levied accordingly. [Earlier, vide MF(DR) circular No. 17/2002-Cus dated 13-3-2002, it was stated that mineral oil produced within territorial waters are leviable to central excise duty. This circular has been rescinded, probably because though Customs Act has been extended but Central Excise Act has not been extended].

In a further circular No. 638/29/2002-CX dated 22-5-2002, it has been clarified that Excise duty is not payable on LSD or HSD supplied to research vessels operating in territorial waters. However, if the vessels are engaged in exploration or extraction of mineral oil within EEZ or continental shelf, then no export has taken place and duty free supply of fuel is not permitted.

Indian Customs Waters - Section 2(28) define that 'Indian Customs Waters' means the waters extending into the sea up to the limit of contiguous zone of India under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and includes any bay, gulf, harbour, creek or tidal river. As per provisions of that Act, contiguous zone of India comes immediately after territorial waters. The outer limit of contiguous zone is 24 nautical miles from the nearest point of base line. Thus, area beyond 12 nautical miles and upto 24 nautical miles is 'contiguous zone of India'. The Central Government has powers to take measures in this area for security of India and immigration, sanitation, customs and other fiscal matters. [section 5(4) of Territorial Waters - Act, 1976].

Thus, 'Indian Customs Waters' extend upto 12 nautical miles beyond territorial waters. Significance of definition of 'Indian Customs Waters' is as follows -

- ◆ Customs Officer has powers to arrest a person in India or within Indian customs waters. [section 104].
- ◆ Customs officer has powers to stop and search any vessel in India or within the Indian Customs waters. [section 106]. If such vessel does not stop, it can be fired upon. If a vessel does not stop, it can be confiscated [section 115(1)(c)].
- ◆ A vessel which is within Indian customs waters or which has been in Indian Customs Waters can be confiscated which is constructed or fitted in any manner for purpose of concealing goods. [section 115(1)(a)].

Thus, powers of customs officers extend upto 12 nautical miles beyond territorial waters.

'Goods' under Customs Act - Customs duty is on 'goods' as per section 12 of Customs Act. The duty is payable on goods belonging to Government as well as goods not belonging to Government. Section 2(22), gives inclusive definition of 'goods' as - 'Goods' includes (a) vessels, aircrafts and vehicles (b) stores (c) baggage (d) currency and negotiable instruments and (e) any other kind of movable property.

Thus, ships or aircrafts brought for use in India or for carrying cargo for ports out of India, would be dutiable. Definition of goods has been kept quite wide as Customs Act is used not only to collect duty on 'goods' but also to restrict/prohibit import or export of 'goods' of any description. Main two tests for 'goods' are (a) they must be movable and (b) they must be marketable. The very fact that goods are transported by sea/air/road means that they are 'movable'. Since most of imports are on payment basis, test of 'marketability' is obviously satisfied.

DUTIABLE GOODS - Section 2(14) define 'dutiable goods' as any goods which are chargeable to duty and on which duty has not been paid. Thus, goods continue to be 'dutiable' till they are not cleared from the port. However, once goods are assessed at 'Nil' rate of duty, they no more remain 'dutiable goods'.

IMPORTED GOODS - Section 2(25) define 'imported goods' as any goods brought in India from a place outside India, but does not include goods which have been cleared for home consumption. Thus, once goods are cleared by customs authorities from customs area, they are no longer 'imported goods'. (Though in common discussions, goods cleared from customs are also called 'imported goods').

EXPORT GOODS – As per section 2(19) of Customs Act, 'export goods' means any goods which are to be taken out of India to a place outside India. Goods brought near customs area for export purpose will be '**export** goods'. Note that once goods leave Indian territory, Indian laws have no control over them and hence the term '**exported** goods' has **not been** used or defined.

Types of Customs Duties

Tariff Rates for customs duty are prescribed in Customs Tariff Act, 1975. The types of duties are : Basic, Additional (CVD), Additional (to compensate duty on inputs used by Indian manufacturers), Anti-dumping duty, protective duty, the duty on Bounty Fed articles and safeguard duty. These are explained below.

Basic Customs Duty - This is the duty levied under section 12 of Customs Act. Normally, it is levied as a percentage of Value as determined under section 14(1). The rates vary for different items, but general rate at present is 25%, w.e.f. 1-3-2003. Customs duty rates are 5%, 15%, 25% and 30% for different commodities. Duty on products in Information Technology sector is generally 15%.

To protect Indian agriculture and Indian automobile sector, duties on some articles is higher e.g. - Import duty on some products w.e.f. 1.3.2001 is - * New cars 60% * Old cars less than 3 years old – 105% (Cars older than 3 years or right hand drive cars are not permissible for import) * Tea, coffee, copra, coconut – 70% * Crude edible oil – 75% * Refined (edible) oil – 85%

Duty on beer is 100% while duty on whisky, rum, gin, vodka, wine etc. is 210%. In addition, CVD and SAD is payable.

General rate of duty on baggage is 50% w.e.f. 1-3-2003. No CVD or SAD is payable on baggage.

Education cess on customs duty - An education cess has been imposed on imported goods w.e.f. 9-7-2004. The cess will be 2% of the aggregate duty of customs. However, education cess will not be payable on safeguard duty under sections 8B and 8C, countervailing duty under section 9, Anti Dumping Duty under section 9A of the Customs Tariff Act and education cess on imported goods (i.e. these duties). Section 94 of Finance (No. 2) Act, 2004 states that education cess on customs duty a 'duty of customs'. As per section 94(3) of Finance (No. 2) Act, 2004, all provisions of Customs Act, and rules and regulations made under that Act will apply to education cess on imported goods, including those relating to refund, exemption from duty and imposition of penalty.

Secondary and Higher Education Cess - A secondary and higher education cess of 1% of customs duty has been imposed w.e.f. 1-3-2007.

Additional Customs Duty (CVD) - This is often called 'Countervailing Duty' (CVD). In *S K Pattnaik v. State of Orissa* 2000 AIR SCW 41 = AIR 2000 SC 612 = 115 ELT 9 = 2000(1) SCC 413 = 1999(7) SCALE 557 (SC 3 member bench), it was observed that 'countervailing duty' is

imposed when excisable articles are imported, in order to counter balance the excise duty, which is leviable on similar goods if manufactured within the State.

Additional duty is levied under section 3(1) of Customs Tariff Act. Thus, it is not a 'duty under the Customs Act'. - *CC v. Indian Organic Chemicals* 2000 AIR SCW 1633 = 2000(4) SCALE 321 = 2000(118) ELT 3 (SC). However, it is 'duty of customs'. - *CC v. Presto Industries* 2001 AIR SCW 828 = 2001(2) SCALE 68 = 128 ELT 321 (SC). In this case, it was also held that 'additional customs duty' is not called as 'Countervailing duty' though it may result in serving such purpose for manufacturer of such articles in India.

This duty is equal to excise duty levied on a like product manufactured or produced in India. If like article is not produced or manufactured in India, the excise duty that would be leviable on that article had it been produced in India is the base. If the product is leviable with different rates, then highest rate among those rates is to be considered. The duty is leviable on Value of goods plus customs duty payable. Thus, assume that Customs Value of goods is Rs. 10,000, customs duty is 30% and excise duty on similar goods manufactured in India is 16%. Then, basic customs duty is Rs 3,000. Additional customs duty (CVD) is payable on value plus basic customs duty, i.e. on Rs 13,000 [Rs 10,000+3,000]. Thus, CVD payable is Rs 2,080 (16% of Rs 13,000).

In addition, SAD (Special Additional Duty) @ 4% is also payable, as explained in an earlier paragraph. SAD @ 4% on Rs 15,080 [10,000+ 3,000 + 2,080] is Rs 603.20.

CALCULATION OF CVD – CVD is payable on Assessable Value [as determined u/s 14(1) of Customs Act or tariff value fixed u/s 14(2) of Customs Act] plus basic customs duty chargeable u/s 12 of Customs Act plus basic customs duty chargeable u/s 12 of Customs Act plus any other sum chargeable on that article under any law in addition to, and in the same manner as duty of customs (e.g. NCCD of customs). However, while calculating CVD, following duties are not to be considered - * Special Additional Duty payable u/s 3A of Customs Tariff Act * Safeguard duty u/ss 8B and 8C of Customs Tariff Act * Countervailing duty, if any, u/s 9 of Customs Tariff Act * Anti-dumping duty payable u/s 9A of Customs Tariff Act * CVD itself which is payable u/s 3(1). [section 3(2) of Customs Tariff Act]. - - In other words, CVD is payable on assessable value plus basic customs duty plus NCCD of customs. While calculating CVD, Anti Dumping Duty, SAD and safeguard duty is not required to be considered. [This amendment is with retrospective effect from 1-3-2002. It was also clarified in Explanatory Note - Customs released with Budget Papers on 28-2-2002].

CVD IS NOT CUSTOMS DUTY - CVD is leviable under section 3(1) Customs Tariff Act, while customs duty is levied u/s 12 of Customs Act. Thus, these are two separate independent duties. under different statutes. However, u/s 3(6) of Customs Tariff Act, the provisions of Customs Act regarding recovery, payment, drawbacks, exemption, refunds, appeals etc. are applicable to Additional Customs Duty.

CVD IS NOT EXCISE DUTY – Though excise duty rate is considered for measurement or quantifying CVD payable, it is not excise duty. – *Mohd. Zackria v. State of Tamilnadu* (1999) 115 STC 697 (TNTST).

CVD PAYABLE AT EFFECTIVE RATE OF EXCISE DUTY - Additional duty (CVD) is payable at effective rate of duty i.e. any concession granted by a notification should be considered e.g. if Excise Tariff Rate is 25%, but by an unconditional exemption notification, excise duty is reduced to 15%. In such case, additional duty is payable @ 15% and not @ 25%.

CVD PAYABLE IF CESS OR AED IS PAYABLE ON GOODS MANUFACTURED IN INDIA – If cess or Additional Excise Duty (AED) is payable on goods manufactured in India, CVD equal to cess or AED leviable on goods manufactured in India is payable. – *CC v. Birla Jute Industries*

1992(61) ELT 554 (CEGAT) * *Vareli Textile Industries v. UOI* 1997(91) ELT 279 (Guj) * *Vikrant Tyres v. CC* 2002(144) ELT 554 (CEGAT).

CVD PAYABLE EVEN IF SIMILAR GOODS NOT PRODUCED IN INDIA - Additional duty is leviable even if like goods are not produced in India.

ADDITIONAL DUTY IF CONDITIONAL EXCISE EXEMPTION NOTIFICATION - As per case law discussed below, the legal position that emerges is that if conditional exemption is such that it is impossible to be fulfilled, the exemption notification cannot be considered, i.e. duty is payable at tariff rate. However, if the requirement is only procedural requirement, exemption notification can be held as applicable, i.e. duty will be payable at effective rate after considering exemption notification.

Valuation for CVD when goods are under MRP provisions – In respect of some consumer goods, excise duty is payable on basis of MRP (Maximum Retail Price) printed on the carton as per section 4A of Central Excise Act. If such goods are imported, duty will be payable on basis of MRP printed on the packing, i.e. at MRP specified on the packing carton less abatement as permissible u/s 4A of Central Excise Act. [proviso to section 3(2)(ii) of Customs Tariff Act].

However, it has been clarified by DGFT vide policy circular No. 38(RE-2000) / 1997-2002 dated 22.1.2001 that labelling requirements for pre-packed commodities are applicable only when they are intended for retail sale. These are not applicable to raw materials, components, bulk imports etc. which will undergo further processing or assembly before they are sold to consumers.

Additional Duty under section 3(3) - In addition to Additional Duty under section 3(1) of Customs Tariff Act; which is chargeable on all goods, further additional duty can be levied by Central Government to counter-balance excise duty leviable on raw materials, components etc. similar to those used in production of such article. [Section 3(3) of Customs Tariff Act].

Central Government has issued notifications under this section levying additional duty on stainless steel manufactures for household use and transformer oil. After extension of Cenvat to most of commodities, there is no need to counter-balance the duty paid on inputs.

Protective Duties - 'Tariff Commission' has been established under Tariff Commission Act, 1951. If the Tariff Commission recommends and Central Government is satisfied that immediate action is necessary to protect interests of Indian industry, protective customs duty at the rate recommended may be imposed under section 6 of Customs Tariff Act. This notification should be introduced in Parliament in next session by way of a Bill. (or in the same session if Parliament is in session). If the Bill is not passed within six months of introduction in Parliament, the notification ceases to have force, but action already taken remains valid. The protective duty will be valid till the date prescribed in the notification. The protective duty can be rescinded, reduced or increased by a notification. Such notification should also be placed before Parliament for approval in next session. [This duty does not seem to be compatible with WTO regulations]

Countervailing duty on subsidised goods - If a country pays any subsidy (directly or indirectly) to its exporters for exporting goods to India, Central Government can impose Countervailing duty upto the amount of such subsidy under section 9 of Customs Tariff Act. If the amount of subsidy cannot be ascertained, provisional duty can be collected and after final determination, difference may be refunded. Such imposition should be by way of a notification.

Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for determination of Injury) Rules, 1995 [*Customs Notification No. 1/95 (N.T.) dated 1-1-95* provide detailed procedure for determining the injury in case of subsidised articles.]

Anti Dumping Duty on dumped articles - Often, large manufacturer from abroad may export goods at very low prices compared to prices in his domestic market. Such dumping may be with intention to cripple domestic industry **or** to dispose of their excess stock. This is called 'dumping'. In order to avoid such dumping, Central Government can impose, under section 9A of Customs Tariff Act, anti-dumping duty upto margin of dumping on such articles, if the goods are being sold at less than its normal value. Levy of such anti-dumping duty is permissible as per WTO agreement. Anti dumping action can be taken only when there is an Indian industry producing 'like articles'.

Pending determination of margin of dumping, duty can be imposed on provisional basis. After dumping duty is finally determined, Central Government can reduce such duty and refund duty extra collected than that finally calculated. Such duty can be imposed upto 90 days prior to date of notification, if there is history of dumping which importer was aware or where serious injury is caused due to dumping.

'*Margin of dumping*' means the difference between normal value and export price (i.e. the price at which these goods are exported). [section 9A(1)(a)]. '*Normal Value*' means comparable price in ordinary course in trade, for consumption in the exporting country or territory. If such price is not available or not comparable, comparable representative price of like article exported from exporting country or territory to appropriate third country can be considered. [section 9A(1)(c)]. '*Export Price*' means the price at which goods are exported. If the export price is unreliable due to association or compensatory arrangement between exporter and importer or a third party, export price can be constructed (revised) on the basis of price at which the imported articles are first sold to independent buyer or according to rules made for determining margin of dumping. [section 9A(1)(b)].

Margin of dumping is determined on basis of weighted average of 'normal value' and the 'export price' of product under consideration.

In *Volznsky Pipe Plant v. Designated Authority* 2001(129) ELT 408 (CEGAT), it was held that domestic price of foreign exporter in his country should be considered, provided it is not below per unit cost of production plus administrative selling and general cost. (i.e. overheads)

In case of non-market economy countries (mostly communist countries), 'normal value' can be determined on basis of price in a market economy third country, price paid in India for a like product or any other reasonable basis.

As per para 8 of Annexure I to Anti-Dumping Duty Rules, 'non-market economy' means any country which the designated authority determines as not operating on market principles of cost or pricing structure, so that the sales in such country do not reflect the fair value of merchandise. Designated Authority will consider various aspects to determine whether the country is a market economy.

DUMPING DUTY FOR WTO COUNTRIES - Section 9B provide restrictions on imposing dumping duties in case of imports from WTO countries or countries given 'Most Favoured Nation' by an agreement. Dumping duty can be levied on import from such countries, only if Central Government declares that import of such articles in India causes material injury to industry established in India or materially retards establishment of industry in India. [WTO agreement permits levy of anti-dumping duty when it causes injury to domestic industry as a result of specific unfair trade practice by foreign producer, by selling below normal value].

'Injury to domestic industry' will be considered on basis of volume effect and price effect on Indian industry. There must be a 'casual link' between material injury being suffered by dumped articles and the dumped imports. .

Imposition of minimum anti-dumping duty is not permissible in law. - *Oswal Woollen Mills v. Designated Authority* 2000(118) ELT 275 (CEGAT).

GAINS TO OTHER SECTIONS NOT CONSIDERED - In India, only injury to concerned local industry is considered, but gains to other industry and economy in general due to availability of imports at lower prices are not considered, i.e. welfare of society at large is not taken into account. This principle is adopted in Europe and in certain cases, dumping duties were not imposed, even when dumping was established, considering that public at large is being benefited.

QUANTUM OF DUMPING DUTY - The anti-dumping duty will be dumping margin or injury margin, *whichever is lower*. 'Injury margin' means difference between fair selling price of domestic industry and landed cost of imported product. The landed cost will include landing charges of 1% and basic customs duty. Thus, only anti-dumping duty enough to remove injury to domestic industry can be levied.

NO ANTI DUMPING DUTY IN CERTAIN CASES - Anti-dumping duty is not applicable for imports by EOU or SEZ units, unless it is specifically made applicable in the notification imposing anti-dumping duty. [section 9A(2A) of Customs Tariff Act]

NO CVD OR SAD ON ANTI DUMPING DUTY - Anti Dumping Duty and Safeguard Duty is not required to be considered while calculating CVD or SAD.

NO ANTI DUMPING DUTY ON GOODS WAREHOUSED PRIOR TO LEVY OF ANTI DUMPING DUTY – Anti dumping duty is leviable on date of importation. Hence, if goods are already warehoused prior to imposition of anti-dumping duty, anti-dumping duty will not be leviable on warehoused goods, even if cleared subsequent to imposition of anti-dumping duty. Section 15(1)(b) of Customs Act does not apply to anti-dumping duty u/s 9A of Customs Tariff Act. – *CC v. Suja Rubber Industries* 2002(142) ELT 586 (CEGAT).

Rules for deciding subsidy or dumping margin - Central Government has been empowered to make rules for determining (a) subsidy or bounty in case of bounty fed goods (b) the normal value and export price to determine margin of dumping in case of dumping. Accordingly, Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on Dumped Articles and for determination of Injury) Rules, 1995 [*Customs Notification No. 2/95 (N.T.) dated 1-1-95*] provide detailed procedure for determining the injury in case of dumped articles. [for detailed guide and forms - see Chartered Secretary, Nov. 1998 page 1168 to 1179]

Under the rules, Central Government will appoint a person as 'Designated Authority'. Complaint with all details and evidence should be made to Designated Authority, Directorate General of Anti-Dumping and Allied Duties, Ministry of Commerce, Govt. of India, Udyog Bhavan, New Delhi - 110 011. The information, as required in trade notice No. 1/98 dated 15.5.1998, issued by Directorate General of Anti-Dumping and Allied Duties should be furnished.

He will normally initiate enquiry on receiving request from affected domestic industry. Domestic producers supporting the application must account for at least 25% of production in India. However, even *suo motu* enquiry can be initiated.

Appeal against order determining dumping duty - Appeal against the order determining the duty can be made to CESTAT. The appeal will be heard by at least three member bench consisting of President, one judicial member and one technical member [section 9C of Customs Tariff Act].

Safeguard duty - Central Government is empowered to impose 'safeguard duty' on specified imported goods if Central Government is satisfied that the goods are being imported in large quantities and under such conditions that they are causing or threatening to cause serious injury

to domestic industry. Such duty is permissible under WTO agreement. The only condition under WTO is that it should not discriminate between imports from different countries having Most Favoured Nation (MFN) status.

Safeguard duty is a step in providing a need based protection to domestic industry for a limited period, with ultimate objective of restoring free and fair competition. Safeguard duty is targeted at remedying or preventing serious injury to domestic industry with a view to making it competitive and to enable it to stand on its own. - Mr. R K Gupta – (Earlier) Director General (Safeguards).

Government has to conduct an enquiry and then issue a notification. [section 8B(1) of Customs Tariff Act]. The duty, once imposed, is valid for four years, unless revoked earlier. This can be extended by Central Government, but total period of 'safeguard duty' cannot be more than ten years. [section 8B(4)]. The duty is in addition to any other customs duty being imposed on the goods. [section 8B(3)]. In case of imports from developing countries, such safeguard duty can be imposed only if import of that article from that country is more than 3% of total imports of that article in India. [*proviso* to section 8B(1)].

Central Government can impose provisional safeguard duty, pending final determination upto 200 days. [section 8B(2) of Customs Tariff Act]. [This provision has been added w.e.f. 14th May, 1997]. 'Customs Tariff (Identification and Assessment of Safeguard Duty) Rule, 1997 have been notified on 29.7.1997, providing for procedure for investigation and fixing safeguard duty. Mr. R K Gupta in office of Director General of Inspection, Customs & CE has been appointed as Director General (Safeguards), vide notification No 45/97-Cus dated 16.9.1997. He has issued a trade notice dated 26.9.97, indicating details required to be submitted and procedure to be followed. Some orders issued under these provisions have been summarised in an Article in Chartered Secretary - July 1999. - page 736.

CONCESSION ON TRQ BASIS – Central government can exempt specified quantity of article imported into India, from whole or part of safeguard duty leviable thereon. [section 8B(2) of Customs Tariff Act]. The provision has been made to enable Central Government to grant exemption from safeguard duty on Tariff Rate Quota (TRQ) basis.

NO SAFEGUARD DUTY IN CERTAIN CASES - Safeguard duty is not applicable for imports by EOU or SEZ units, unless it is specifically made applicable in the notification imposing anti-dumping duty. [section 8B(2A) of Customs Tariff Act]

NO CVD ON SAFEGUARD DUTY - CVD is to be calculated on Assessable Value plus basic customs duty. However, Anti Dumping Duty and Safeguard Duty is not required to be considered while calculating CVD.

Product specific safeguard duty on imports from China – Besides general provisions in respect of Safeguard duty (u/s 8B as above), special provisions of safeguard duty is made in respect of goods imported from Peoples Republic of China by inserting section 8C to Customs Tariff Act w.e.f. 11-5-2002. Central Government is empowered to impose 'product specific safeguard duty' on any article imported from China, if the quantities are increased and such import is causing or threatening to cause market disruption to domestic industry. [section 8C(1)].

Provisional duty can be imposed on basis of preliminary finding. However, if on final determination, it is found that the imports have not caused market disruption to a domestic industry, the safeguard duty provisionally collected is refundable.

Such product specific safeguard duty is not payable in respect of imports by EOU / SEZ units unless specifically made applicable to them . [section 8C(3)].

Government will make rule prescribing mode of identifying the threat and then how to assess and collect the safeguard duty.

The duty can be imposed for maximum four years. It can be extended to safeguard interests of domestic industry, but maximum period cannot exceed 10 years.

'Domestic Industry' means either producer of whole of India or producers having major share of total production of that article in India. 'Market disruption' shall be caused whenever the imports of a like article or a directly competitive article produced by the domestic industry, increases rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to domestic industry. The threat of market disruption should be clear and imminent danger of market disruption. [section 8C(7)].

Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002 make provisions for determining the safeguard duty. Director General (Specific Safeguard) will be appointed. He will investigate and submit his report on market disruption or threat to market disruption to domestic industry on any article due to imports from China. Central Government can fix provisional duty on basis of preliminary finding for upto 200 days. Final duty will be on basis of final finding.

Director General (Safeguard) has been appointed as Director General (Specific Safeguard). – Notification No. 4/2003-Cus(NT) dated 16-1-2003.

NCCD of customs - A 'National Calamity Contingent Duty' (NCCD) of customs has been imposed vide section 129 of Finance Act, 2001. This duty is imposed on pan masala, chewing tobacco and cigarettes. It varies from 10% to 45%. - - NCCD of customs of 1% was imposed on PFY, motor cars, multi utility vehicles and two wheelers and NCCD of Rs 50 per ton was imposed on domestic crude oil, vide section 134 of Finance Act, 2003.

Export duty - At present, 15% Export Duty is levied only on hides, skins and leather, and duty of 10% is levied on snake skins, hides, skins and leathers, and fur lamb skins. (No export duty is levied on hides, skins and leather of finished leather of goat, sheep and bovine animals and their young ones). There is no export duty on any other product.

Classification for Customs and Rate of Duty

Classification is as per Central Excise Tariff Act for Central Excise and as per Customs Tariff Act for Customs. Both are based on HSN. Customs Tariff Act, 1975 earlier contained schedule based on CCCN - Customs Cooperation Council Nomenclature. This was replaced by schedule based on Harmonised Commodity Description and Coding system w.e.f. 28th Feb., 1986. Central Excise Tariff Act, based on HSN was also brought into force on same day.

Though both tariffs are based on HSN, they are not copies of HSN. Many changes have been made to suit requirements of customs and excise. Customs tariff and excise tariffs are also not identical and both vary from each other. However, broad sections and chapter headings are same.

Sections and Chapters in Customs Tariff - Division of sections and chapters is similar under Customs Tariff Act and Central Excise Tariff Act, but there are quite a few changes.

SOME CHAPTERS BLANK IN CETA - Central Excise Tariff is only upto Chapter 96 and has 5 blank Chapter heads. Out of these, Chapter number 77 is blank in Customs Tariff too, which is kept for future use. Other Chapters are : Chapter 1 : Live Animals; Chapter 6 : Live trees and other plants, cut flowers; Chapter 10 : Cereals and Chapter 12 : Oil seeds, seed and fruit. The

obvious reason is that these items are not excisable and hence not required in Central Excise Tariff, but these can be imported and hence are required in Customs Tariff.

ADDITIONAL SECTION AND CHAPTERS - Excise Tariff contains 20 sections upto Chapter 96. Customs Tariff contains one additional section XXI, covering Chapters 97 to 99. Chapter 97 of Customs Tariff is devoted to 'work of art, collectors' pieces and antiques'. Chapter 98 is used for 'project imports, passenger's baggage, personal importations by air or post and ship stores.' Chapter 99 of Customs Tariff Act is for 'Miscellaneous Goods' like blood, postage stamps, paper money, work of art and antiques imported for national museum etc.

Thus, Customs has 98 used Chapters (1 to 99 with Chapter No. 77 blank), while excise tariff has 91 Chapters (1 to 96 with Chapters 1, 6, 10, 12 and 77 blank).

Principles of Classification - Method of classification in heading and sub-heading and Rule for interpretation of tariff are same as per Central Excise. Principles of classification like trade parlance etc. are also same.

CLASSIFICATION OF PARTS - Principles for classification of parts is also same as per Central Excise. However, often some accessories and spare parts and maintenance implements are compulsorily supplied with the machine and its cost is included in the cost of machine itself. In such cases, the duty chargeable is the same as duty on the main article, as per Accessories (Condition) Rules, 1963 and section 19 of Customs Act, *if the importer is unable to give breakup.*

CLASSIFICATION OF CONTAINERS/PACKING CASES - Central Excise Tariff does not make any separate provision for classification of containers/packing cases. However, rule 5 for interpretation of schedule to Customs Act specifically provides that cases for camera, musical instruments, drawing instruments, necklaces etc. specially shaped for that article, suitable for long term use will be classified along with that article, if such articles are normally sold along with such cases. Further, packing materials and containers are also to be classified with the goods *except when the packing is for repetitive use.* This provision is obviously made to ensure that the packing and the goods are charged at same rate of duty.

Cost of packing is not to be included when the packing is for repetitive use. [This provision is similar to provision of 'durable and returnable packing' in Central Excise]

Preferential Area Rates - Central Excise Tariff has only four columns in each Chapter i.e. Heading No, Sub-Heading No, Description and Rate of Duty. Customs Tariff have five columns i.e. Heading No. Sub-Heading No. Description, Standard rate of duty and Rate of duty for Preferential area. If no rate is mentioned in the column 'Rate for Preferential Area', then Standard rate is applicable.

Export Tariff under Customs Act - Customs Tariff Act has two schedules - first schedule is in respect of Import Tariff, which we have discussed above. Second Schedule is 'Export Tariff', showing export duties leviable. Since most of exports are exempt from export duty, the schedule contains only 26 items, out of which 24 items are exempt by way of a notification !

Rate of duty applicable - Provisions in respect of rate of duty are as follows:

Basic Customs duty - The rate of customs duty applicable will be as provided in Customs Act, subject to exemption notifications, if any, applicable. In case of imports from preferential area, the preferential rate is applicable, if mentioned in the Tariff. It is needless to mention that if partial or full exemption has been granted by a notification, the effective rate (as per notification) will apply and not the tariff rate (as mentioned in Customs Tariff).

Rate for additional duty - Rate for additional duty (CVD) will be as mentioned in Central Excise Tariff Act, subject to any general exemption notification. Any specific exemption notification (e.g. exemption to goods manufactured by SSI unit or goods manufactured without aid of power) is not considered while calculating CVD.

Value for purpose of Customs Act

Customs duty is payable as a percentage of 'Value' often called 'Assessable Value' or 'Customs Value'. The **Value** may be either (a) 'Value' as defined in section 14 (1) of Customs Act or (b) Tariff value prescribed under section 14 (2) of Customs Act.

Tariff Value - Tariff Value can be fixed by CBE&C (Board) for any class of imported goods or export goods. Government should consider trend of value of such or like goods while fixing tariff value. Once so fixed, duty is payable as percentage of this value. (The percentage applicable is as prescribed in Customs Tariff Act). As we will see later, fixing tariff value is not permitted under GATT convention and is in fact contrary to provisions of Customs Valuation Rules. However, the provision of fixing tariff values has been retained though used rarely. In August 2001, tariff value for crude palm oil, RBD Palmolein and palm oil was fixed by way of a notification.

Customs value as per section 14 (1) - Customs Value fixed as per section 14 (1) is the 'Value' normally used for calculating customs duty payable (often called 'customs value' or 'Assessable Value').

Section 14 (1) provide following criteria for deciding 'Value' for purpose of Customs Duty :

- ◆ Price at which such or like goods are ordinarily sold or offered for sale
- ◆ Price for delivery at the time and place of importation or exportation
- ◆ Price should be in course of International Trade
- ◆ Seller and buyer have no interest in the business of each other or one of them has no interest in the other
- ◆ Price should be sole consideration for sale or offer for sale
- ◆ Rate of exchange as on date of presentation of Bill of Entry as fixed by CBE&C (Board) by Notification should be considered

This criteria is fully applicable for valuing export goods. However, in case of imported goods, valuation is required to be done according to valuation rules. - *Chapter 6 Para 5 of CBE&C's Customs Manual, 2001.*

Valuation has to be on the basis of condition at the time of import - (a) CVD should be levied on goods in the stage in which they are imported - stage subsequent to processing of goods is not relevant - *Vareli Weaves P Ltd. v. UOI* - 1996(83) ELT 255 (SC) = AIR 1996 SC 1543. (b) It is well settled that the imported goods have to be assessed to duty in the condition in which they are imported. - *D N Sethna v. CC* - (1996) 85 ELT 75 (CEGAT) * *CC v. Supreme Woollen Mills* 1999(107) ELT 453 (CEGAT).

Major requirements of Customs Value - Price at which goods are being sold under an invoice is not the sole criteria for deciding 'Value' for Customs duty purposes (though it is a major criteria). Each word used in section 14 (1) is significant.

Price of such or like goods - The first criteria is that price of 'such' or 'like' goods and not 'the' goods is relevant. 'Such' means identical in all major respects. If buyer has incurred some expenditure in connection with the goods under sale, selling price of the goods may be lower. Hence, rule 9 of Valuation Rules provide that if buyer has supplied some materials, components,

parts, tools, dies etc. or has spent on engineering, development or art work etc.; cost of such expenditure will be added to the price actually paid. [Compare this provision with provision in relation to job work in excise, where the duty is payable on material cost plus job work charges even if material is supplied by the buyer.]

LIKE GOODS - If price of the goods are not available, price of identical goods or similar goods can be considered. However, the conditions are (a) price should be for sale for export (b) price should be for sale to India (c) sale should be at substantially same quantity of goods (d) price should be at same commercial level (e) these should be imported from same country (f) prices should be of goods sold at or about the same time (g) goods should be produced by same manufacturer - price of other manufacturer can be considered only if price of same manufacturer is not available. However, 'brand image' of other manufacturer should be comparable. - - Thus, price quoted for 10 pieces cannot be used for price for 1,000 pieces or price prevailing in June 2003 may not be relevant for goods imported in December 2003. Price for sale to another country or price of manufacturer in different country also cannot be considered.

Goods should be 'Ordinarily' sold' at that Price - Goods should be ordinarily sold at that price as per section 14(1). As per Valuation Rule 4(2), 'transaction value' is acceptable only if the sale is under fully competitive condition. If there is any abnormal discount or reduction from ordinary competitive price or special discounts limited to exclusive agents, the 'transaction value' cannot be accepted.

As per section 14(1), 'value' is acceptable if goods are ordinarily sold at the price. Section 14(1A) states that Valuation Rules are subject to provisions of section 14(1), i.e. in case of conflict, provisions of section 14(1) will prevail. Rule 4(2) also states that abnormal or special discounts are not permissible. This amendment in rule 4(2) made w.e.f. 7-9-2001 has completely upset the principles of valuation under Customs.

DUEL PRICE IN CASE OF SERVICE PARTS AND OE – It is standard universal practice to charge lower price when the component is supplied as OE (i.e. Original Equipment) part for manufacture of machine/equipment/vehicle to a co-manufacturer and charge higher price when same component is supplied as service part i.e. spare part. [The difference can be as high as two to five times]. CBE&C has confirmed, vide its circular No. MFCA(DR) dated 82-2002-Cus.V dated 3-12-2002, that such duel pricing is acceptable and both can be treated as 'transaction value' if other requirements of section 14 are fulfilled. Thus, price of OE component should be inclusive of factory cost, factory overheads, administration and commercial overheads and reasonable profit margin of original manufacturer. However, related party transactions should be closely looked into and aspect of 'transfer pricing' and 'tie-in sales' should be seen.

Price offered for sale can be considered - Price 'offered for sale' can be considered (e.g. price lists, quotations etc.) though there may not be actual sale at that price.

Price should be for delivery at the place of importation - Price at the place of importation does not mean that only expenses till goods enter Indian Customs water should be included. Import is an integrated process which culminates when goods land on land-mass of India so that they can be introduced in stream of supplies to form part of mass of goods within the country. Thus, all expenses upto the destination port, including freight, transit insurance, unloading and handling charges are to be included.

Price should be for delivery at the time of importation - Time of importation means price ruling when the goods were imported is relevant. In *Rajkumar Knitting Mills P Ltd. v. CC* 1998(98) ELT 292 = AIR 1998 SC 2602 = 1998(3) SCC 163 = 1998 AIR SCW 2636 (SC 3 member bench), it was held that 'ordinary' price at the time of importation is relevant and *not* the price prevalent on date of contract. [In this case, the contract was over 6 months old before date of shipment].

Price should be in International trade - Price should be in International trade. Price in domestic trade either in exporting country or within India can be discarded.

Buyer or Seller should not have interest in business of other – As per section 14(1) as amended w.e.f. 11-5-2002, transaction value can be accepted if (a) Seller and buyer do not have interest in business of 'each other' or (b) One of them has no interest in the other.

Putting it negatively, if one of them has interest in other, transaction value cannot be considered. [The drafting of amendment is faulty. As per strict interpretation of the amended provision, if one of them does not have interest in the other, transaction value is required to be accepted, even if the other has interest in the first one. Obviously, this is not the intention].

It may be noted that Customs Valuation Rules have been amended in September, 2001 giving almost unlimited power to Customs officer to discard the transaction value. Now section 14 has been amended to make this more easy for him. [It is doubtful if these amendments are in line with WTO Valuation Agreement]

Price must be the sole consideration - Price should be sole consideration for sale. If there is other consideration, it should be added to the transaction value.

In *Jindal Photo Films v. CC 2002(141) ELT 202 (CEGAT)*, it was held that license fee related to know how embedded in machine has to be added to Assessable Value. In this case, the foreign supplier had not charged license fee but had stated that if semi-processed raw material is not purchased from the foreign supplier, flat annual license fee will be payable for seven years. It was thus obvious that price was not the sole consideration and hence the license fee, which was additional consideration, was addible.

Price in case of high sea sale – In case of high sea sale, price charged by importer to assessee would form the assessable value and not the invoice issued to the importer by foreign supplier. – *National Wire v. CC 2000(122) ELT 810 (CEGAT)* * *Godavari Fertilizers v. CC (1996) 81 ELT 535 (CEGAT)*.

If the purchase is on high seas, the selling price will be naturally higher than the price at which the importer imported the goods. It will include not only his service charges, but also demurrage, bank charges etc. Thus, indirectly, duty will be payable on demurrage, which is really not part of 'normal' price.

Price which gave rise to importation in India is relevant - In *Steel Strips Ltd. v. CC 1997(95) ELT 538 (CEGAT)*, it was held that price which gave rise to importation in India is relevant. In this case, goods were originally imported by one party at agreed rate of US \$ 1,045 PMT. The party failed to take delivery and hence goods were sold to another party after negotiations for US \$ 800 PMT. It was held that price relevant for valuation is US \$ 1,045, as that is the price which gave rise to importation in India. Subsequent reduction after goods landed in India is not relevant. In *Century Enka Ltd. v. CC 1997(95) ELT 534 (CEGAT)* also, it was held that price negotiated **after import has already taken place** cannot be considered for customs valuation.

Rate of Exchange for Customs Valuation - Exchange rate as applicable on *date of presentation of bill of entry* as prescribed by CBE&C (Board) should be considered. This rate is not same as 'Inter Bank Closing Rates' fixed by 'Foreign Exchange Dealers Association' or by 'Reserve Bank of India'. These rates are quoted daily by Banks, while exchange rate applicable for valuation is prescribed periodically by CBE&C (Board) by way of a notification under section 14 (3) (a) of Customs Act. Relevant date for determining foreign exchange rate is date of presentation of Bill of Entry.

The condition of 'grant of entry inwards' is not provided for this purpose. Bill of Entry can be presented 30 days before expected date of arrival of vessel. If Bill of Entry is presented within that time and even if 'Entry Inward' is granted subsequently, rate of exchange prevalent on the date of presentation of bill of entry will be considered.

Valuation Rules for imported goods

Valuation in Customs Act has to be done as per valuation rules. These rules are based on 'WTO Valuation Agreement' (Earlier termed as GATT Valuation Code). These rules are only for valuation of imported goods and not applicable to export goods.

WTO Valuation Agreement - General Agreement on Tariff and Trade (GATT) was an International forum for discussion on custom and other related problems so that barriers to world trade are removed. [Now GATT is replaced by WTO]. It was realised that there should be a common code for valuation to provide for greater certainty and utility. 'GATT Valuation Code' was formed with this concept in view. The new code came into effect on 1st January, 1981. Some members like USA and EEC introduced the GATT Valuation System immediately. India implemented the code from 18th August, 1988 by amending 'Customs Valuation Rules'.

Under the WTO Valuation Agreement (earlier GATT code), 'transaction value' i.e. price at which the goods are actually sold is principal yardstick. However, it is not the only criteria for determining 'value' for Customs purposes.

Value to be determined as per Valuation Rules only - Section 14 (1A) provide that 'price' for purposes of section 14 (1) will be determined in accordance with rules made by Central Government. Accordingly, Customs Valuation (Determination of Price for Imported Goods) Rules, 1988 have been framed. These rules, which came into effect on 18th August, 1988, are based on WTO Valuation Agreement (earlier termed as GATT Valuation Code). These rules are (a) subject to section 14 (1) i.e. provisions of section 14 (1) will supersede provisions of the Customs Valuation Rules (b) the rules are for valuation of imported goods only and not of export goods (c) these rules are statutorily required to be followed. (*In Central Excise, Valuation Rules are required to be applied only if valuation as per section 4 is not possible, while in Customs, valuation has to be as per Valuation Rules only.*) Rules contain exhaustive interpretative notes as schedule to these rules to facilitate correct application of these rules. These interpretative notes give suitable examples to explain the provisions of rules.

Customs Value - Inclusions

Some costs, services and expenses are to be added to the price paid or payable, *if these are not already included in the invoice price*. Rule 9 of Customs Valuation Rules provide that following cost and services are to be added - * Commission and brokerage * Cost of container which are treated as being one with the goods for customs purposes * Cost of packing whether labour or materials * Materials, components, tools, dies etc. supplied by buyer * Royalties and license fees * Value of proceeds of subsequent sales * Other payment as condition of sale of goods being valued * Cost of transport upto place of importation * Landing charges * Cost of insurance.

These are discussed below :

Commission and Brokerage Includible - Commission and brokerage *except* buying commission is includible [Rule 9 (1) (a) of Customs Valuation Rules.] Buying commission means fees paid by importer to his agent for the service of representing him abroad in purchase of goods being valued.

Commission to local agent - Exporters from abroad often appoint local agents in India to promote their sales in India. These agents get commission in Indian Rupees which is paid directly by Indian Importer. (Amount net of commission is paid to foreign exporter in foreign currency.) *This commission is includible for purpose of valuation.*

Charges of purchasing agent abroad not includible - Charges to purchasing agent abroad are not includible - *Apollo Tyres Ltd. v. CC* - (1996) 9 SCALE 294 = AIR 1997 SC 3637 = 1997 AIR SCW 1042 = 1997(89) ELT 7 (SC) - confirmed and followed in *Bombay Dyeing & Mfg v. CC* - 1997(2) SCALE 221. = 1997 AIR SCW 1427 = AIR 1997 SC 1329 = 1997(90) ELT 276 (SC). [Probably because it was held as 'buying commission'.]

Service charges paid to canalizing agency includible - In some cases, when imports are made by canalizing agency, goods are sold to Indian buyer on 'high sea sale' basis. The imported goods are cleared by Indian buyer. In such cases, 'service charges' payable to the canalizing agency have to be included for calculation of 'Assessable Value'. These charges are incurred before clearance of goods and these cannot be termed as 'buying commission'.

Packing cost is includible - Cost of containers which are treated as being part of goods for customs purposes are addible for valuation purposes (e.g. * cases for camera, necklaces etc. especially shaped for the article suitable for long term * packing materials are classified along with that article. Hence, its cost will be includible). Similarly, cost of packing - both labour and material is to be included. [Rule 9 (1) (a) of Customs Valuation Rules.]

Cost of durable and re-usable containers not to be added : Modern trend is to pack goods in containers for convenience of transport. These containers are durable and re-usable. Hence, cost of such containers is not added for Customs Valuation, if importer agrees to execute a bond to re-export the containers within six months.

Value of Goods supplied by buyer to be added - If buyer has supplied goods free of cost or at reduced cost in connection with production or export of goods, these should be included. The goods may be (a) materials, components, parts and similar items incorporated in imported goods (b) tools, dies, moulds and similar items used in production of imported goods (c) consumables used in production of imported goods. [Rule 9(1)(b)](i), (ii) and (iii)]

Ascertaining cost of tooling - Cost of tooling supplied by importer to exporter should be ascertained as follows : (a) If importer has purchased the tooling from unrelated seller, the purchase cost should be considered *or* (b) if he has manufactured the tooling himself, the cost of production of tooling should be considered. If the tooling was previously used by importer, its original cost of purchase or cost of production should be suitably reduced (e.g. by suitably depreciating the cost) to reflect its present cost.

Apportioning of Cost of Tools - Tools, dies, moulds etc. (*called tooling for abbreviation in subsequent discussions in this paragraph*) are not consumed immediately, but are consumed over a period of time. Cost of the 'tooling' should be apportioned over the quantity produced. e.g. assume that cost of a mould is Rs. 1,00,000 and the mould is expected to produce 10,000 pieces. If the importer imports 1,000 pieces in the first lot, 10% of cost of such tooling i.e. (10% of Rs. 1,00,000) - Rs. 10,000 may be apportioned to the 1,000 pieces and Rs. 10,000 may be added to transaction value for arriving at 'Value' or 'Customs Value'. Such apportionment should be made on basis of documentation provided by importer.

Services / documents / technical know-how supplied by Buyer to be added - Cost of engineering, development, art work, design work and plans and sketches undertaken by buyer which is necessary for production of imported goods is includible, **only if** such work is undertaken *outside India*. [Rule 9 (1) (b) (iv) of Customs Valuation Rules.] The addition should be done on

objective and quantifiable data. Data available with importer should be used as far as possible. If the services are purchased or leased by importer, such purchase/lease cost should be added. If the importer has himself done the work abroad, its cost should be added on basis of structure and management practices of importer and his accounting methods (in other words, if development work, plans, sketches etc. is done by importer himself *outside India*, its cost should be calculated based on normal accounting practices - like apportionment of overheads, apportionment over various jobs if the same development work, design work etc. is used for more than one jobs etc.).

COST OF DRAWINGS IF THERE IS SEPARATE TARIFF HEADING - In *Tata Iron & Steel Co. Ltd. v. CCE* 2000(1) SCALE 591 = 2000 AIR SCW 572 = AIR 2000 SC 1045 = 37 RLT 239 = 116 ELT 422 (SC 3 member bench), it has been held that cost of technical documents and drawings *cannot* be included in the customs value. However, if part of cost of equipment is transferred to value of engineering drawings, there will be under-valuation of equipment and this can be examined. [Note that engineering drawings are exempt from customs duty]. [This was because there was a separate heading in Customs Tariff for 'drawings'. Otherwise, the cost would have been includible]. [This decision, which is also of 3 member bench, appears to be contrary to other decisions of SC, but it is probably because there is a separate heading in the Customs Tariff for drawings].

Royalties and licence fee - If buyer has paid royalties and licence fees separately in relation to imported goods, these are includible, unless these are already included in selling price. Royalty may include payments in respect of patents, trademarks or copyrights. However, following i.e. (a) charges for the right to reproduce the goods in India shall not be added *and* (b) payments made by buyer (importer) for right to distribute or resale the imported goods shall not be added if such payment is not a condition for export to India.

Royalties and license fees related to imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable. [Rule 9(1)(c) of Customs Valuation Rules].

Royalty payment to collaborators un-connected with imported goods not to be added - Often, a lump-sum payment of royalty is made to foreign collaborators for technical know-how. In addition, components / parts/ CKD packs are procured from foreign collaborators. Customs department normally holds that the price of parts/CKD packs should be loaded, on assumption that the part of price of component parts/CKD packs has been paid as 'royalty payment'.

In *UOI v. Mahindra and Mahindra Ltd.* - 1995 (76) ELT 481 = 1995 AIR SCW 1519 = JT 1995(9) SC 635 (SC) - the company had foreign collaboration with M/s Peugeot, a French company, for engines for 10 years. A lump sum payment was made for technical know-how for manufacture of diesel engines in India. In addition, the company imported engine CKD packs from the French company in subsequent period. Revenue contended that lump-sum payment of royalty has bearing on the price charged for CKD packs. The Invoice price is not the real price and it was loaded by 1.5%. Supreme Court did not accept the view. It was held that there is no nexus between know-how transfer fee and import of CKD packs. These are independent transactions. Revenue has not produced any material to show that price shown in invoice is not the real price, or that price of goods obtained later was affected by the lump-sum royalty paid. [Original Mumbai HC decision - *UOI v. Mahindra and Mahindra Ltd.* - 1991 (55) ELT 15 (Bom HC).]

Value of subsequent re-sale if payable to foreign supplier - If any part of proceeds of subsequent re-sale of imported goods is payable to seller, directly or indirectly, its cost is includible. (This may happen if a distributor/agent imports goods and once he sells these goods in India, part of sales proceeds may be payable to foreign seller). [Rule 9(1)(d)].

Charges for reproduction of software in India not to be added - At present, many popular softwares like Page Maker, Norton, Windows are directly imported. If such softwares are Licensed to be reproduced in India by the foreign owner of these softwares, charges for reproducing these softwares will not be added. [As per press note dated 17-12-1992 of DOE of GOI, the purpose is to bring down cost of software in India and to save foreign exchange outflow on several copies of software].

Other payments made to seller to be added - If buyer has made, directly or indirectly, any payment to seller as a condition of sale, such payments should be included for obvious reason that 'ordinary' selling price has been reduced due to such payment. [Rule 8(1)(e)].

Cost of Transport upto port should be added - Cost of transport from exporting country to India is to be added in 'Assessable Value'. [Rule 9 (2)(a) of Customs Valuation Rules.] In other words, CIF value is the basis for valuation. If the goods are imported by air, the air freight will be very high. Hence, in case air freight is higher than 20% of FOB price of goods, only 20% of FOB price will be added for Customs Valuation purposes.

If cost of transport is not ascertainable, it will be taken as 20% of FOB value of goods. *However, cost of transport within India is not to be considered.*

Landing charges to be added - Cost of unloading and handling associated with delivery of imported goods in port (*called landing charges*) shall be added. These will be calculated @ 1% of CIF value, i.e. FOB price plus freight plus insurance. [Rule 9(2)(b)].

Insurance cost should be added - Insurance charges on goods are to be added. [Rule 9(2)(c)]. If these are not ascertainable, these will be calculated @ 1.125% of FOB Value of goods.

Exclusions from Assessable Value

Note to rule 4 provide that following charges shall be excluded :

1. Charges for construction, erection, assembly, maintenance or technical assistance undertaken *after* importation of plant, machinery or equipment
2. Cost of transport *after* importation
3. Duties and taxes in India

Other payments from buyer to seller *that do not relate* to imported goods are not part of the customs value.

In *Tata Iron & Steel Co. Ltd. v. CCE* 2000(1) SCALE 591 = 2000 AIR SCW 572 = AIR 2000 SC 1013 = 116 ELT 422 (SC 3 member bench), it has been held that this note does not mean that charges other than those covered in clauses (a) to (c) are available to be included in the value of imported goods.

Cost of erection, test and commissioning is not includible. – *Andhra Pradesh Gas Corpn v. CC* 2001(136) ELT 860 (CEGAT).

DEMURRAGE CHARGES PAYABLE TO PORT TRUST - Demurrage charges payable to port trust authorities for delay in clearing goods are not to be added . - *Deepak Fertilisers v. CC* 1989(41) ELT 550 (CEGAT) * *Hindustan Lever v. UOI* 2002(142) ELT 33 (Cal HC).

Demurrage charges are not 'ordinarily payable'. Cost incurred in such extra-ordinary situations cannot be considered for purpose of levy of customs duty. – *Indian Oil Corporation Ltd. v. CC 2000(122) ELT 615 = 41 RLT 251 (CEGAT 3 member bench)*.

BANK CHARGES – Bank charges paid to banker for services rendered by them is not consideration of goods given to seller. It is not includible. - *EXIM India Oil Co. v. CC 2001(131) ELT 207 (CEGAT)*.

COMPUTER SOFTWARE – Computer software is a distinct item and is classifiable separately. Hence, even if software is supplied with the machine, its price is not includible in value of machinery. – *Technova Imaging Systems v. CC 2003(151) ELT 404 (CEGAT)*.

Methods of Valuation for Customs

The Valuation Rules, 1988, based on WTO Valuation Agreement (earlier GATT Valuation Code), consist of rules providing six methods of valuation. The methods are (a) Transaction Value of Imported goods (b) Transaction Value of Identical Goods (c) Transaction Value of Similar Goods (d) Deductive Value which is based on identical or similar **imported** goods sold in India. (e) Computed value which is based on cost of manufacture of goods plus profits (f) Residual method based on reasonable means and data available. These are to be applied in sequential order, i.e. if method one cannot be applied, then method two comes into force and when method two also cannot be applied, method three should be used and so on. The only exception is that the 'computed value' method may be used before 'deductive value' method, if the importer requests and Assessing Officer permits. [Note : 'computed value' method was introduced w.e.f. 24-4-1995].

Valuation is required to be done by proceeding sequentially from rules 5 to 8 if value cannot be determined under rule 4. Failure to observe this sequential mandate of the rules would render such value the determination to be incorrect. - *Tavadec Industries v. CC 2002(145) ELT 548 (CEGAT)*.

Transaction value of same goods - This is the first and primary method as per rule 3 of Valuation Rules.

WHAT IS TRANSACTION VALUE - As per rule 4(1), 'transaction value' of imported goods shall be the price actually paid or payable for the goods when sold for exported to India, adjusted in accordance with provisions of rule 9. [Rule 9 gives costs and services to be added to transaction value].

WHEN TRANSACTION VALUE IS ACCEPTABLE - The value of imported goods shall be the transaction value, subject to rule 9 and 10A. [rule 3(i)]. If value cannot be determined as per rule 3(i), it shall be determined by proceeding sequentially through rules 5 to 8 of Valuation Rules. [Rule 3(ii)].

Transaction Value, i.e. the price at which such goods are actually sold is the primary method and is expected to be used in majority of cases. However, some times, transaction value of same goods cannot be accepted as the conditions prescribed for accepting such value are not fulfilled (e.g. no abnormal discount, sale not in competitive conditions, unconditional sale, sale from unrelated person, no restriction on use etc.). Occasionally, transaction value may not be available when actual sale does not take place. For example, actual transaction value for goods imported on lease, hire, loan or gift may not be available. In such cases, other methods should be used.

PROVISIONS OF RULES 9 AND 10A OVERRIDE – Rule 3 is subject to rules 9 and 10A, which means that provisions of rules 9 and 10A override provisions of rule 3. As per rule 9, cost and

services specified in those rules (like cost of containers, cost of packing; cost of materials, components etc. or services supplied by buyer; royalties payable etc.) are includible, *if these do not already form part of transaction value*. As per rule 10A, the value as declared by importer can be rejected by assessing officer, if he has doubts about truth or accuracy of the value as declared. However, the assessing officer has to give reasons for his doubts in writing and provide opportunity of personal hearing. Thus, now it is not obligatory on customs officer to accept the transaction value if he has reasons to doubt the truth or accuracy of the same.

GOODS SOLD FOR EXPORT TO INDIA - Price relevant is the price at which goods are sold for export to India i.e. sale price which most directly causes the goods to be imported. Thus, if an agent purchases from a manufacturer abroad and then sells to importer in India, price charged by agent to importer is relevant and not the price charged by manufacturer to the agent abroad. Sale should be between foreign supplier and Indian importer. Subsequent sale by importer to purchaser in India is also not relevant.

PRICE PAID OR PAYABLE - The payment is total payment to seller of imported goods. Such payment may be direct or indirect e.g. adjustment of debt payable by seller. Payment may be by letter of credit or transfer of money.

WHAT IS TRANSACTION VALUE - Rule 4(1) of Valuation Rules define transaction value as the price actually paid or payable for the goods when sold for export to India. This cost is to be adjusted in accordance with the provisions of rule 9 of Valuation Rules. (As we saw above, as per rule 9, various additions like cost of containers, cost of packing; cost of materials, components etc. or services supplied by buyer; royalties payable etc. are includible, *if these do not already form part of transaction value*).

Conditions for accepting Transaction Value - In *Eicher Tractors v. CC* 2000 AIR SCW 4080 = 2000(7) SCALE 483 = AIR 2001 SC 196 = 2001(1) SCC 315 = 122 ELT 321 = 41 RLT 621 (SC), it has been held that actual transaction value can be rejected only for reasons specified in rule 4(2) of Valuation Rules and 'special circumstances' or 'extraordinary circumstances' as specified in section 14(1). Subject to the three conditions laid down in section 14(1) of time, place and absence of special circumstances, price of imported goods is to be determined u/s 14(1A) in accordance with Valuation Rules framed in this behalf.

Thus, transaction value can be rejected either for special circumstances as per section 14(1) or conditions as specified in rule 4(2).

SPECIAL CIRCUMSTANCES AS PER SECTION 14(1) - The 'special circumstances' in section 14(1) are (a) Buyer and seller have no interest in business of each other or one of them has no interest in the other **and** (b) Price should be the sole consideration for the sale. Any other 'special circumstances' cannot be considered.

CONDITIONS AS PER RULE 4(2) - As per rule 4(2), transaction value can be accepted only if following requirements are satisfied –

- (a) The sale is in the ordinary course of trade under fully competitive conditions
- (b) The sale does not involve any abnormal discount or reduction from the ordinary competitive prices
- (c) The sale does not involve special discounts limited to exclusive agents

(d) Objective and quantitative data exists with regard to adjustments required to be made under the provisions of rule 9, to the transaction value

(e) There are no restriction on buyer on use or disposition of goods *except* the following: (a) restrictions prescribed by public authorities in India (b) restriction on geographical area within which goods may be resold e.g. goods should not be sold outside particular State or outside India or (c) restriction that does not materially affect value of goods - e.g. exporter puts a condition to importer of automobile that car should not be exhibited before a particular date.

(f) The sale or price should not be subject to a condition or consideration for which value cannot be determined.

(g) Seller should not be entitled to further consideration like part of subsequent resale, disposal or use of goods by the buyer will accrue directly or indirectly to seller, unless proper adjustment in value terms can be made as per rule 9 e.g. if the importer is a trader and the condition is that after he sales the goods in India, the foreign exporter will get a fixed amount after the sale, that extra amount can be added for Customs Valuation.

(h) Buyer and seller are not be related, unless the transaction value is acceptable under rule 4(3).

If any of the aforesaid requirement is not satisfied, 'transaction value' cannot be accepted for valuation purposes.

CONDITIONS ARE TOO VAGUE – The conditions (a) to (d) have been added w.e.f. 7-9-2001. As can be seen, the conditions are too broad and vague. As per rule 10A, the assessing officer can reject 'transaction value' merely if he has doubt about its truth or accuracy. Thus, burden is not on him to prove that the declared value is incorrect.

Related person under Customs Valuations Provisions - Rule 2 (2) of Customs Valuation Rules define that persons shall be deemed to be 'related' only if one of the conditions is satisfied:

- ◆ they are officers or directors of one other's businesses
- ◆ they are legally recognised partners in business
- ◆ they are employer and employee
- ◆ Any person directly or indirectly owns or holds 5% or more of shares of both of them.
- ◆ one of them controls other directly or indirectly
- ◆ both of them are controlled - directly or indirectly - by third person.
- ◆ together they control a third person - directly or indirectly
- ◆ both are members of same family. (*what is "family" is not defined*).

Person includes legal person i.e. Company, partnership firm, trust etc. Note to rule 2 clarify that one person is deemed to control other if he is legally or operationally in a position to exercise restraint or direction over the other. Thus, control need not be only legal - even operational control is enough.

Burden of proof that transaction value is 'Value' - Importer has to declare 'value' of goods. If the assessing officer has reason to doubt about truth or accuracy of the value declared by the importer, he can ask the importer to submit further information and evidence. If the customs officer still has *reasonable doubt*, he can reject the 'value' as declared by the importer. [rule 10A(1) of Customs Valuation Rules added w.e.f. 19-2-1998]. If the importer requests, the assessing officer has to give reasons for doubting the truth or accuracy of value declared by

importer. [rule 10A(2) of Customs Valuation Rules]. Thus, burden is on the importer to prove that the 'value' declared by him is correct as per section 14 of Customs Act. This amendment has been made after agreement reached at WTO by all countries. - CBE&C circular No. 13/98-Cus dated 9-3-1998.

Transaction value of identical goods - Rule 5 of Customs Valuation Rules provide that if valuation on the basis of 'transaction value' is not possible, the 'Assessable value' will be decided on basis of transaction value of identical goods sold for export to India and imported at or about the same time, subject to making necessary adjustments.

WHAT ARE IDENTICAL GOODS - 'Identical goods' are defined under Rule 2(1)(c) as those goods which fulfil all following conditions i.e. (a) the goods should be same in all respects, including physical characteristics, quality and reputation; except for minor differences in appearance that do not affect value of goods. (b) the goods should have been produced in the same country in which the goods being valued were produced. (c) they should be produced by same manufacturer who has manufactured goods under valuation - if price of such goods are not available, price of goods produced by another manufacturer in the same country.

IMPORTED AT OR ABOUT SAME TIME - Import of identical goods should be at or around same time. Price of identical goods imported in July 2003 *may not be* relevant for valuation of goods imported in December 2003.

ADJUSTMENTS TO BE MADE - Price of identical goods should be compared at same commercial level and in substantially same quantity of goods.

ADJUSTMENT FOR DISTANCES AND TRANSPORT COSTS - If valuation of identical goods was made after adding costs and services as per rule 9, differences arising due to differences in distances and means of transport should be considered, while arriving at 'Assessable Value' of goods under valuation. This will be required if value of identical goods manufactured by different manufacturer and/or at different place is being taken as basis for valuation.

LOWEST VALUE TO BE TAKEN - If more than one value of identical goods is available, lowest of such value should be taken. - followed in *Resina Combination v. CC 1999(114) ELT 860 (CEGAT)*.

Transaction value of similar goods - If first method of transaction value of the goods or second method of transaction value of identical goods cannot be used, rule 6 provide for valuation on basis of 'Transaction value of similar goods imported at or about the same time'.

WHAT ARE SIMILAR GOODS - Rule 2 (1) (e) define 'similar goods' as (a) alike in all respects, have like characteristics and like components and perform same functions. These should be commercially inter-changeable with goods being valued as regards quality, reputation and trade mark. (b) the goods should have been produced in the same country in which the goods being valued were produced. (c) they should be produced by same manufacturer who has manufactured goods under valuation - if price of such goods are not available, price of goods produced by another manufacturer in the same country can be considered.

Other conditions are similar to valuation on 'identical goods' basis i.e. (a) Adjustments for commercial level and/or quantity can be made (b) if valuation of identical goods is made after adding costs and services as per rule 9, differences arising due to differences in distances and means of transport should be considered. (c) if more than one value is available, lowest of such values should be taken.

The major distinction between 'identical goods' and 'similar goods' is that the 'identical goods' should be same in all respects, except for minor differences in appearance, while in case of 'similar goods', it is enough if they have like characteristics and like components and perform same functions. In both the cases, (a) quality and reputation (including trade mark reputation) should be same (b) Goods should be from same country. (c) Goods produced by another manufacturer can be considered if price of goods produced by same manufacturer are not available. However, brand reputation and quality of other manufacturer should be comparable.

Deductive Value - Rule 7 of Customs Valuation Rules provide for the next i.e. fourth alternative method, which is called 'deductive method'. This method should be applied if transaction value of identical goods or similar goods is not available; but these products are sold in India. The assumption made in this method is that identical or similar imported goods are sold in India and its selling price in India is available. *The sale should be in the same condition as they are imported.* Assessable Value is calculated by reducing post-importation costs and expenses from this selling price. This is called 'deductive value' because assessable value has to be arrived at by method of deduction (deduction means arrive at by inference i.e. by making suitable additions/subtractions from a known price to arrive at required 'Customs Value').

SUBTRACTIONS FROM SELLING PRICE IN INDIA - Following subtractions should be made from selling price of imported goods in India. (a) Selling commission, general (selling) expenses and selling profits made in connection with sale of imported goods in India. General expenses includes direct and indirect cost of marketing the goods in question in India. (b) transport, insurance and associated costs within India (c) customs duties, sales tax and other taxes levied in India.

Seller in India of imported goods will incur all these expenses and hence, it is clear that 'CIF Value' can be arrived at i.e. 'deduced' only after all these expenses are reduced from selling price of identical or similar goods sold in India. In other words, all (estimated) expenses incurred after importation of goods should be subtracted from selling price in India to arrive at 'CIF Price' of goods.

UNIT PRICE SOLD IN GREATEST NUMBERS - Rule 7 specify that while considering selling price of imported goods in India, unit price at which greatest aggregate quantity of identical or similar goods are sold to unrelated persons in India should be the basis. e.g. if 65 units are sold @ Rs. 100, 55 units are sold @ Rs. 95 and 80 units are sold @ Rs. 90; then greatest aggregate quantity is 80 which is sold @ Rs. 90 per unit, which will be the basis for valuation.

Chances of using this method of valuation are indeed very rare.

Computed Value for Customs - If valuation is not possible by deductive method, the same can be done by computing the value under rule 7A, which is the fifth method. [This method has been added w.e.f. 24-4-95]. If the importer requests and the Customs Officer approves, this method can be used before the method of 'deductive value'. In this method, value is the sum of (a) Cost of value of materials and fabrication or other processing employed in producing the imported goods (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind, which are made in the country of exportation for export to India. (c) The cost or value of all other expenses under rule 9 (2) i.e. transport, insurance, loading, unloading and handling charges.

METHOD SUITABLE WHEN PRODUCER PREPARED TO GIVE COSTING - Generally, valuation should be done on basis of information available in India. Thus, this method is normally possible when the importer in India and foreign exporter are closely associated and the foreign exporter is willing to give necessary costings and to provide for subsequent verification, which may be necessary.

HOW TO CALCULATE COST - The Cost and Value should be on the basis of information supplied by or on behalf of the producer. The information should be on basis of commercial accounts based on generally accepted accounting practices. Cost of commission and brokerage and packing cost has to be added. Similarly, cost of material supplied free, tooling cost, development and engineering charges, design work cost etc. have also to be added. No cost should be counted twice.

Residual Method - The sixth and the last method is called "residual method". It is also often termed as 'fallback method'. This is similar to 'best judgment method' of the Central Excise. This method is used in cases where 'Assessable Value' cannot be determined by any of the preceding methods. While deciding Assessable Value under this method, reasonable means consistent with general provisions of these rules should be the basis and valuation should be on basis of data available in India. [Rule 8 (1) of Customs Valuation Rules]. This method can be considered if valuation is not possible by any other method - *CC v. Sanjay Chandiram* - (1995) 4 SCC 222 = 1995 (77) ELT 241 (SC) = 1995 (58) ECR 574 (SC) = JT 1995 (7) SC 260 = 1995(3) SCALE 262.

Best judgement assessment is a residuary rule and it cannot prevail over previous rules in the absence of discussion as to how transaction value was not to be accepted.

WHAT CAN BE CONSIDERED - Note on rule 8 provide that to the *greatest extent possible*, value should be based on previously determined values. Method of valuation should be based on previous methods e.g. transaction value, identical goods, similar goods, deductive value or computed value but some flexibility may be used in applying these rules. e.g. (a) if value of identical or similar goods produced in same country is not available, value of identical or similar goods manufactured in other country could be considered (b) if value of identical or similar goods imported at or about the same time is not available, value at other time may be considered (c) while considering deductive method, condition that imported goods should be sold in the same condition as imported may be flexibly applied. These are only illustrations. Similar other flexibilities may be considered, but certainly, arbitrary or whimsical valuation cannot be permitted under this rule.

WHAT CANNOT BE CONSIDERED - While arriving at 'best judgment price' some assumptions, extrapolations and estimations are inevitable. However rule 8 (2) expressly prohibits use of any of the following for determining Assessable Value. These prohibitions are as follows :

- ◆ Use of the selling price in India of goods produced in India
- ◆ System of accepting highest of the alternative values
- ◆ Price of goods prevalent in the country of exportation (e.g. if goods are imported from Germany, price of the goods within Germany cannot be considered)
- ◆ Price of goods for export to a country other than India
- ◆ Minimum customs values
- ◆ Arbitrary or fictitious values

In other words, selling price for export to India can alone form the basis. (Thus, fixing 'tariff value' is really against this rule).

Valuation - Other provisions

Other provisions of valuation for customs are summarised here.

Valuation of old Machinery and old Motor cars - In *Essar Graphics v. CC* 1999(107) ELT 94 (CEGAT), it was held that concept of transaction value is applicable to second hand machinery also, particularly because no exactly comparable imports can be found or exist. – followed in

International Conveyors v. CC 2000(125) ELT 1205 (CEGAT), where it was held that rule 4 of Valuation Rules applies to second hand goods also. In *Medak Rubber v. CC 2000(117) ELT 700 (CEGAT)*, it was held that invoice value of second hand machine supported by Chartered Engineer's certificate is acceptable when transaction is in normal course of international trade and there is no contemporaneous imports of like goods at higher value. In *Coats Vivella v. CC 2001(133) ELT 373 (CEGAT)*, it was held that mere fact that age as certified by Chartered Engineer is wrong cannot vitiate the invoice and transaction value has to be accepted unless it is rejected under rule 4.

Depreciation will be allowed on value of old machinery on following scale: (i) for every quarter in 1st year : 4% (ii) for every quarter in 2nd year: 3% (iii) for every quarter in 3rd year : 2.5% (iv) for every quarter in 4th and subsequent year : 2% Maximum : 70% [*Vadodara Commissionerate No. Cus/t/93 dated 15-6-1993*]. [same depreciation rate applied for old cars also].

VALUATION OF OLD CARS - Department values cars on basis of price catalogue of new cars and depreciation is allowed at standard rates. The value is arrived at on the basis of world car catalogue price less 15%. This practice has been approved in *B J Singh v. CC - 1990 (45) ELT 474 (CEGAT)* * *B K Roy v. CC - 1992 (59) ELT 329 (CEGAT)* * *Sudesh Kumar Arora v. CC - 1993 (65) ELT 491 (CEGAT)* * *Umesh Kumar v. CC 2000(124) ELT 1053 (CEGAT)*.

Export Goods - Valuation for Assessment - Customs value of export goods is to be determined under section 14 (1) of Customs Act. Customs Valuation Rules are applicable only for imported goods. Thus, Assessable Value of export goods shall be "deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other or one of them has no interest in the other, and the price is the sole consideration for the sale or offer for sale".

Normally, 'FOB Value' of exports will be the basis. If the export sale contract is a CIF contract, post exportation elements i.e. insurance and outward freight will have to be deducted. However, now many instances have come to notice where exported goods have been over-valued to get export benefits. [In *Nav Bharat Enterprises v. CC 2001(134) ELT 154 (CEGAT)*, it was observed that provisions of section 14 are not applicable to export goods. With respect, it is submitted that this observation does not seem to be correct].

Valuation for CVD when goods are under MRP provisions – In respect of some consumer goods, excise duty is payable on basis of MRP (Maximum Retail Price) printed on the carton. If such goods are imported, CVD will be payable on basis of MRP printed on the packing. However, it has been clarified by DGFT vide policy circular No. 38(RE-2000) / 1997-2002 dated 22-1-2001 that labelling requirements for pre-packed commodities are applicable only when they are intended for retail sale. These are not applicable to raw materials, components, bulk imports etc. which will undergo further processing or assembly before they are sold to consumers.

General Provisions

Goods are imported in India or exported from India through sea, air or land. Goods can come through post parcel or as baggage with passengers. Procedures naturally vary depending on mode of import or export. Procedures discussed in this Chapter are applicable for imports by sea, air or land, but not as baggage or postal despatch.

COMPUTERISATION OF CUSTOMS WORK - Work of customs at Delhi airport has been computerised. Work at Mumbai port is also computerised. Whenever the work is computerised, documents like IGM and Bill of Entry have to be filed electronically. Procedure in computerised environment has been specified in CC, New Delhi PN 22/98 dated 8.5.1998. Guidelines for

preparing data file for Bill of Entry and shipping bills for Mumbai Customs House has been prescribed vide PN 108/99 dated 30-9-1999 and PN 10/2001 dated 30.1.2001.

ENTRY – ‘Entry’ in relation to goods means an entry made in a Bill of Entry, Shipping Bill or Bill of Export. It includes (a) label or declaration accompanying the goods which contains description, quantity and value of the goods, in case of postal articles u/s 82 (b) Entry to be made in case of goods to be exported (c) Entry in respect of goods imported which are not accompanied by label or declaration made as per provisions of section 84. [section 2(16)].

AMENDMENT TO DOCUMENTS - Importer, exporter or ‘Person In charge’ have to submit various documents to customs authorities like Bill of Entry, Import Manifest, Export Manifest etc. Some times, it may become necessary to amend the document due to various reasons like change in classification, clerical mistake in document, change in unloading / loading plan of vessel etc. In such case, permission to amend these documents have to be obtained from customs authorities. [section 149]. Such permission can be given if there are no fraudulent intentions.

In case of bill of entry, shipping bill or bill of export, it can be amended after clearance only on the basis of documentary evidence which was in existence at the time the goods were cleared, warehoused or exported, and not on basis of any subsequent document. [proviso to section 149].

Customs Station - Imported goods are permitted to be unloaded only at specified places. Similarly, goods can be exported only from specified area. In view of this, definitions of ‘Customs Station’ is important.

Customs area means all area of Customs Station and includes any area where imported goods or export goods are ordinarily kept pending clearance by Customs authorities. Thus, ‘Customs Area’ could include some area even outside the ‘Customs Station’. Customs Station means (a) customs port (b) inland container depot (c) customs airport and (d) land customs station.

Section 7 of Customs Act empowers CBEC (Board) to appoint * Customs ports * Customs airports * Places for inland container depots * Coastal ports. These are appointed by issuing a notification. Section 8 authorises Commissioner of Customs to approve proper places in any customs port, customs airport or coastal port for unloading and loading of goods or for any class of goods and specify the limits of customs area. Thus, the place (city / town / village etc.) is approved by CBEC, while exact location within that city / town / village is approved by Commissioner of Customs.

Import Procedures

Procedures have to be followed by ‘person-in-charge of conveyance’ as well as the importer.

WHO IS ‘PERSON IN CHARGE’ - As per section 2(31), ‘person in charge’ means (a) In case of vessel - its master (b) In case of aircraft - its commander or pilot-in-charge (c) In case of train - its conductor or guard and (d) In case of vehicle or other conveyance - its driver or other person in charge.

The significance of this definition is -

- ◆ He is responsible for submitting Import Manifest and Export Manifest
- ◆ He is responsible to ensure that the conveyance comes through approved route and lands at approved place only.
- ◆ He has to ensure that goods are unloaded after written order, at proper place. Loading also

- has to be only after permission.
- ◆ He has to ensure that conveyance does not leave without written order of Customs authorities.
 - ◆ He can be penalised for (a) Giving false declaration and statement (b) shortages or non-accounting of goods in conveyance

Procedure to be followed by the Carrier - The 'person in charge of conveyance' (carrier of goods) has to follow prescribed procedure.

Arrival at customs port/airport only - Section 29 provides that person-in-charge of a vessel or an aircraft entering India shall call or land at customs port or customs airport *only*. It can land at other place only if compelled by accident, stress of weather or other unavoidable cause. In such case, he should report to nearest police station or Customs Officer. While arriving by land route, the vehicle should come by approved route to 'land customs station' only.

Import Manifest / Report- Person-in-charge of vessel, aircraft or vehicle has to submit Import Manifest / Report. [also termed as IGM - Import General Manifest]. (In case of a vessel or aircraft, it is called import manifest, while in case of vehicle, it is called import report.) The import manifest in case of vessel or aircraft is required to be submitted *prior* to arrival of a vessel or aircraft. Import report (in case of vehicle) has to be submitted within 12 hours of arrival at the customs station. If the report / manifest could not be submitted within prescribed time, person-in-charge or any person specified as responsible by a notification is liable to penalty upto Rs 50,000. Such penalty will not be imposed if the excise officer is satisfied that there was sufficient cause for the delay. [section 30(1)].

IGM can be submitted electronically through floppy where EDI facility is available.

IMPORT MANIFEST IS REQUIRED TO BE SUBMITTED BEFORE ARRIVAL OF AIRCRAFT OR VESSEL - Section 30(1) of Customs Act provides that Import Manifest should be filed before arrival of ship or aircraft. Normally, the Agents submit the Import Manifest before arrival, so that maximum possible formalities are completed before vessel or aircraft arrives. This also enables importers to file 'Bill of Entry' in advance.

Grant of Entry Inwards by Customs Officer - Unloading of cargo can start only after Customs Officer grant 'Entry Inwards'. Such entry inwards can be granted only when berthing accommodation is granted to a vessel. If there is heavy congestion at port, shipping berth may not be available and in such case, 'Entry Inwards' cannot be granted. This date is highly relevant for determining rate of customs duty applicable.

Carrier responsible for shortages during unloading - If the goods are short landed, the carrier is liable to pay penalty upto twice the amount of duty payable on such short landed goods. It has been held that tally sheet prepared by Port Trust authorities on unloading of goods is a statutory document and should be accepted in preference to steamer survey - *Scindia Steam Navigation v. CC* - 1988 (33) ELT (CEGAT) followed in *re India Steamship Co. Ltd.* - 1992 (57) ELT 510 (GOI).

Procedure by Importer - The importer importing the goods has to follow prescribed procedures for import by ship/air/road. (There is separate procedure for goods imported as a baggage or by post.)

Bill of Entry - This is a very vital and important document which every importer has to submit under section 46. The Bill of Entry should be in prescribed form. The standard size of Bill of Entry is 16" × 13". However, for computerisation purposes, 15" × 12" size is permitted. (Mumbai Customs Public Notice No. 142/93 dated 3-11-93).

Bill of Entry should be submitted in quadruplicate – original and duplicate for customs, triplicate for the importer and fourth copy is meant for bank for making remittances.

Under EDI system, Bill of Entry is actually printed on computer in triplicate only after 'out of charge' order is given. Duplicate copy is given to importer.

Types of Bill of Entry - Bills of Entry should be of one of three types. Out of these, two types are for clearance from customs while third is for clearance from warehouse.

BILL OF ENTRY FOR HOME CONSUMPTION - This form, called 'Bill of Entry for Home Consumption', is used when the imported goods are to be cleared on payment of full duty. *Home consumption means use within India*. It is white coloured and hence often called 'white bill of entry'.

BILL OF ENTRY FOR WAREHOUSING - If the imported goods are not required immediately, importer may like to store the goods in a warehouse without payment of duty under a bond and then clear from warehouse when required on payment of duty. This will enable him to defer payment of customs duty till goods are actually required by him. This Bill of Entry is printed on yellow paper and often called 'Yellow Bill of Entry'. It is also called 'Into Bond Bill of Entry' as bond is executed for transfer of goods in warehouse without payment of duty.

BILL OF ENTRY FOR EX-BOND CLEARANCE - The third type is for Ex-Bond clearance. This is used for clearance from the warehouse on payment of duty and is printed on green paper. The goods are classified and value is assessed at the time of clearance from customs port. Thus, value and classification is not required to be determined in this bill of entry. The columns in this bill of entry are similar to other bills of entry. However, declaration by importer is not required as the goods are already assessed.

RATE OF DUTY FOR CLEARANCE FROM WAREHOUSE - It may be noted that rate of duty applicable is as prevalent on date of removal *from warehouse*. Thus, if rate has changed after goods are cleared from customs port, customs duty as assessed on yellow bill of entry and as paid on green bill of entry will not be same.

Mention of BIN on Bill of Entry – A BIN (Business Identification Number) is allotted to each importer and exporter w.e.f. 1.4.2001. It is a 15 digit code based on PAN of Income Tax (PAN is a 10 digit code). [Earlier an EC (Import Export code) number issued by DGFT was required to be mentioned on Bill of Entry].

Filing of Bill of Entry - Normally, Bill of Entry is filed by CHA on behalf of the importer. Customs work at some ports has been computerised. In that case, the Bill of Entry has to be filed electronically, i.e. through Customs EDI system through computerisation of work. Procedure for the same has been prescribed vide Bill of Entry (Electronic Declaration) Regulations, 1995.

Documents to be submitted by Importer - Documents required by customs authorities are required to be submitted to enable them to (a) check the goods (b) decide value and classification of goods and (c) to ensure that the import is legally permitted. *The documents that are essentially required are* : (i) Invoice (ii) Packing List (iii) Bill of Lading / Delivery Order (iv) GATT declaration form duly filled in (v) Importers / CHAs declaration duly signed (vi) Import Licence or attested photocopy when clearance is under licence (vii) Letter of Credit / Bank Draft wherever necessary (viii) Insurance memo or insurance policy (ix) Industrial License if required (x) Certificate of country of origin, if preferential rate is claimed. (xi) Technical literature. (xii) Test report in case of chemicals (xiii) Advance License / DEPB in original, where applicable (xiv) Split up of value of spares, components and machinery (xv) No commission declaration. – A declaration in

prescribed form about correctness of information should be submitted. – *Chapter 3 Para 6 and 7 of CBE&C's Customs Manual, 2001.*

The Noting is now done electronically in large ports, while it is done manually in small ports. Thoka Number (Serial Number) is given while noting the Bill of Entry.

Electronic submission under EDI system – Where EDI system is implemented, formal submission of Bill of Entry is not required, as it is generated in computer system. Importer should submit declaration in electronic format to 'Service Centre'. A signed paper copy of declaration for non-repudiability should be submitted. Bill of Entry number is generated by system which is endorsed on printed check list. Original documents are to be submitted only at the stage of examination.

Assessment of Duty and Clearance

The documents submitted by importer are checked and assessed by Customs authorities and then goods are cleared. Section 2(2) defines 'assessment' as follows – 'Assessment' includes provisional assessment, reassessment and any order of assessment in which the duty assessed is Nil. Thus, 'assessment' includes 'Nil' assessment.

Noting of Bill of Entry - Bill of Entry submitted by importer or Customs House Agent is cross-checked with 'Import Manifest' submitted by person in charge of vessel / carrier. It is noted if the description tallies. 'Noting' really means taking on record by customs officer. This date is relevant for determining rate of customs duty. Thoka number (serial number) is given in the import section. Otherwise, it is returned for clarifications. In case of EDI system, noting is done by the system itself which also generates bill of entry number.

Date of presentation of bill of entry is highly relevant and the rate of duty as applicable on this date will be considered for calculating the duty payable. Bill of Entry is accepted only after proper scrutiny *vis-a-vis* import manifest and various declarations given in bill of entry and attached documents like invoice, bill of lading etc. If such documents are not attached, the authorities can refuse to accept the Bill of Entry, and hence submission of such incomplete Bill of Entry cannot be taken as date of presentation of Bill of Entry - *Simla Agencies v. CC - 1993 (63) ELT 248 (CEGAT)*.

Prior Entry of Bill of Entry - After the goods are unloaded, these have to be cleared within stipulated time - usually three working days. If these are not so removed, demurrage is charged by port trust/airport authorities, which is very high. Hence, importer wants to complete as many formalities as possible before ship arrives. Proviso to Section 46(3) of Customs Act allows importer to present bill of entry upto 30 days before *expected date of arrival* of vessel. In such case, duty will be payable at the rate applicable on the date on which 'Entry Inward' is granted to vessel and not the date of presentation of Bill of Entry, *but rate of exchange will be as prevalent on date of submission of bill of entry.* - confirmed in CC, New Delhi circular No 64/96 dated 10.12.1996 and CBE&C circular No 22/97-Cus dated 4.7.1997.

Assessment of Customs duty - Section 17 provides that assessment of goods will be made after Bill of Entry is filed. Date stamp of receipt is put on the 'Bill of Entry' and then it is sent to appraising department either manually or electronically

There are various Appraising groups for different Chapter headings. Each group is under an Assistant/Deputy Commissioner. Group consists of 'Examiners' and 'Appraisers'.

APPRAISING THE GOODS - Appraiser has to (a) correctly classify the goods (b) decide the Value for purpose of Customs duty (c) find out rate of duty applicable as per any exemption notification and (d) verify that goods are not imported in violation of any law. He can call for any

further documents that may be required for assessment. If he is of the opinion that goods have to be examined for appraisal, he will issue an examination order, usually on the reverse of Bill of Entry. If such order is issued, the Bill of Entry is presented to appraising staff at docks / air cargo complexes, where the goods are examined in presence of importer's representative. Assessment is finalised after getting the report of examination. – *Chapter 3 Para 11 and 12 of CBE&C's Customs Manual, 2001.*

VALUATION OF GOODS - As per rule 10 of Customs Valuation Rules, the importer has to file declaration about full 'value' of goods. If the assessing officer has doubts about the truth and accuracy of 'value' as declared, he can ask importer to submit further information, details and documents. If the doubt persists, the assessing officer can reject the value declared by importer. [rule 10A(1) of Customs Valuation Rules]. If the importer requests, the assessing officer has to give reasons for doubting the value declared by importer. [rule 10A(2)]. If the value declared by importer is rejected, the assessing officer can value imported goods on other basis e.g. value of identical goods, value of similar goods etc. as provided in Customs Valuation Rules. [This amendment has been made w.e.f. 19.2.98, as per WTO agreement. However, it has been held that burden of proof of under valuation is on department]. - - Assessing Officer should not arbitrarily reject the declared value and increase the assessable value. He should follow due process of law and issue appealable order. – MF(DR) circular No. 16/2003-Cus dated 17-3-2003.

APPROVAL OF ASSESSMENT - The assessment has to be approved by Assistant Commissioner, if the value is more than Rs one lakh. (in cases covered under 'fast track clearance for imports', appraiser is also authorised to approve valuation). After the approval, duty payable is typed by a "pin-point typewriter" so that it cannot be tampered with. As per CBE&C circular No. 10/98-Cus dated 11-2-1998, Assessing Officer should sign in full in Bill of Entry followed by his name, preferably by rubber stamp.

EDI ASSESSMENT – In the EDI system, the cargo declaration is transferred to assessing officer in the groups electronically. Processing is done on the screen itself. All calculations are done by the system itself. If assessing officer needs clarification, he can raise a query. The query is printed at service centre and importer replies through service centre. Facility of tele-enquiry about status of documents is provided in major customs stations. Under EDI, normally, documents are inspected only after assessment. After assessment, copy of Bill of Entry is printed at service centre. Final Bill of Entry is printed only after 'Out of Charge' order is given by customs officer. – *Chapter 3 Para 18 to 22 of CBE&C's Customs Manual, 2001.*

PAYMENT OF CUSTOMS DUTY - After assessment of duty, necessary duty is paid. Regular importers and Custom House Agents keep current account with Customs department. The duty can be debited to such current account, or it can be paid in cash/DD through TR-6 challan in designated banks.

After payment of duty, if goods were already examined, delivery of goods can be taken from custodians (port trust) after paying their dues. If goods were not examined before assessment, these have to be submitted for examination in import shed to the examining staff. After shed appraiser gives 'out of charge' order, delivery of goods can be taken from custodian.

First and second system of assessment - There are two systems of assessment. Section 17(2) provides for assessment after examination of goods and section 17(4) provides for assessment on basis of documents, followed by inspection and testing of goods.

"First appraisal system" or *'first check procedure'* is followed if the appraiser is not able to make assessment on the basis of documents submitted and deems that inspection is necessary. Goods are examined first and then these are assessed. This method is followed only if assessment is not possible on basis of documents. - - The importer himself may also request 'first

check procedure', if he cannot give all required details regarding description / value of goods. He has to make request for first check examination at the time of filing of Bill of Entry or at data entry stage in case of EDI. He has to give reason for seeking first appraisalment. The examination order is recorded on Bill of Entry and then returned to importer / CHA. It is then presented to import shed for examination. The shed appraiser / Dock examiner examines the goods as per examination order and records his findings. If samples are required, they are taken out. In case of EDI system, the report of examination is given in the computer itself. The goods are then assessed to duty by appraiser. - *Chapter 3 Para 23 of CBE&C's Customs Manual, 2001.*

In "*Second Appraisalment System*" or '*second check procedure*', which is normally followed, assessment is done on basis of documents and then goods are examined. Such examination is not mandatory. It is done on selective basis on the basis of 'risk assessment' or specific intelligence report. Section 17(4) of Customs Act specifically provides that if initially assessment is done on basis of documents, re-assessment can be done after examination or testing of goods or otherwise, if it is found subsequent to examination or testing or otherwise, that any statement made on Bill of Entry or any information supplied is not true in respect of matter relevant to assessment of duty.

First appraisalment is generally carried out in following cases - * If complete documents are not submitted * Goods are to be tested for correct classification * Goods are re-imported * Goods are damaged or deteriorated and abatement is claimed * Goods are abandoned and remission of duty is applied for * When goods are provisionally assessed * When importer himself requests for examination of goods before payment of duty.

EXAMINATION OF GOODS - Examiners carry out physical examination and quantitative checking like weighing, measuring etc. Selected packages are opened and examined on sample basis in 'Customs Examination Yard'. Examination report is prepared by the examiner.

Accelerated Clearance of Imports and Exports Scheme (ACS) – Finance Minister, in his budget speech on 28-2-2003, had announced a 'self assessment scheme' for importers and exporters. As per the scheme, importer will himself determine classification of goods including claim for exemption benefits. Computer System will calculate the duty based on his declaration. Physical inspection of imported goods will be done by risk-assessment and management techniques on a computer based system and not on the orders of customs examining staff. Audit of import documents will not be by existing system of concurrent audit but will be done by post-clearance audit, as prevalent in developed countries.

Subsequently, a Accelerated Clearance of Import and Export Scheme (ACS) has been announced vide MF(DR) circular No. 30/2003-Cus dated 4-4-2003. The scheme is announced through administrative instructions, without making any change in statutory provisions. Hence, the scheme is not same as 'self removal' under Central Excise. Presently, the scheme is introduced on trial basis at Air Customs, Sahar (Mumbai), ICD, New Delhi and Chennai Sea Customs.

In case of imports, the scheme will be open to all status holders under EXIM policy, Central and State Government PSUs and other importers who have been importing for at least two years and have filed at least 25 Bills of Entry in preceding year. - - In case of exports, the scheme will be open to all status holders under EXIM policy, EOU/STP/EHTP units whose goods have been sealed in presence of customs/excise officers, Central and State Government PSUs, manufacturer-exporters who have been exporting for at least two years and have filed at least 25 Shipping Bills in preceding year and bulk exporters. - - Certain sensitive items have been excluded from the provisions. Importer/exporter intending to avail this facility has to make application to Commissioner. The clearances will be subject to post clearance audit.

Provisional Assessment - Section 18 of Customs Act, 1962 provide that provisional assessment can be done in following cases (a) when Customs Officer is satisfied that importer or exporter is unable to produce document or furnish information required for assessment (b) it is deemed necessary to carry out chemical or other tests of goods (c) when importer/exporter has produced all documents, but Customs Officer still deems it necessary to make further enquiry. In such cases, assessment is done on provisional basis. The importer/exporter has to furnish guarantee/security as required by Customs Officer for payment of difference if any. Goods can be cleared after payment of duty provisionally assessed and after providing the security. After final assessment, difference is paid by importer or refunded to him as the case may be. If the imported goods were warehoused after provisional assessment, the Customs Officer may require importer to execute a bond for twice the difference in duty, if duty finally assessed is higher [section 18(2)(a)]. The bond is called as 'P D Bond' (Provisional Duty Bond). The bond is with security or surety. Bank guarantee can also be given as a security.

Checking of duty drawback / license documents - Documents in respect of Duty Entitlement Pass Book (DEPB), advance license, duty drawback etc. will be checked.

Execution of bond and payment of duty - Once the duty is assessed, the bill of entry is returned to importer. The Bill of Entry should be presented to comptist for calculation and pinpointing of the duty. If bond has to be executed, it will be taken in bond section.

Payment of duty - If goods are to be removed to a warehouse, duty payment is not required. The goods can be taken to a warehouse under bond, without payment of duty. However, if goods are to be removed for home consumption, payment of customs duty is required. CHA or the importer can take it for payment of customs duty. Large importers and CHA have P.D. accounts with customs. Duty can be paid either in cash or through P.D. account. P. D. account means provisional duty account. This is a current account, similar to PLA in central excise. The importer or CHA pays lumpsum amount in the account and gets credit on the amount paid. He can pay customs duty by debiting the amount in P.D. (Provisional Duty) account. If the importer does not have an account, he can pay duty by cash using TR-6 challan. Of course, payment through PD account is very convenient and quick.

The duty should be paid within five working days (i.e. within five days excluding holidays) after the 'Bill of Entry' is returned to the importer for payment of duty. [section 47(2)]. (Till 11-5-2002, the period allowed was only 2 days).

Interest for late payment - If duty is not paid within 5 working days as aforesaid, interest is payable. Such interest can be between 10% to 36% as may be notified by Central Government. [Section 47(2) of Customs Act, 1962.]. - - Interest rate is 15% w.e.f. 13-5-2002. [Notification No. 28/2002-Cus(NT) dated 13-5-2002] Earlier, interest rate was 24% p.a, w.e.f. 1-3-2000, as per notification No. 34/2000-Cus(NT)].

Disposal if goods are not cleared within 30 days - As per section 48 of Customs Act, goods must be cleared within 30 days after unloading. Customs Officer can grant extension. Otherwise, goods can be sold after giving notice to importer. However, animals, perishable goods and hazardous goods can be sold any time - even before 30 days. Arms & ammunition can be sold only with permission of Central Government.

Out of Customs Charge Order - After goods are examined, it is verified that import is not prohibited and after customs duty is paid, Customs Officer will issue 'Out of Customs Charge' order under section 47. Goods can be cleared from customs area only on receipt of such order. This is an 'adjudicating order' within the meaning of Customs Act, even if it is passed by Appraiser and not by Assistant Commissioner.

Demurrage if goods not cleared - Heavy demurrage is payable if goods are not cleared from port within three days.

Import of software through data communication - Import of software through data communication / tele-communication is permitted. Since such imports are not available for physical verification, proper account in books should be maintained. Unit intending to import software through datalink is required to inform estimated annual requirement to Development Commissioner of EOU / Director of STP. This should be approved by him. [what for?]. After import of software through internet, written information should be submitted to Director of STP / Development Commissioner of EOU and importer shall get a certificate. This certificate should be submitted to Assistant / Dy Commissioner of Customs within 48 hours, along with Bill of Entry and certificate from Development Commissioner of EOU / Director of STP. He will issue 'out of charge' order. The documents such as invoice etc. will be routed through bank. - MF(DR) circular No. 58/2000-Cus dated 10-7-2000.

Relevant Date for Rate and Valuation of Customs Duty - Section 15 of Customs Act prescribes that rate of duty and tariff valuation applicable to imported goods shall be the rate and valuation in force at one of the following dates. (a) if the goods are entered for home consumption, the date on which bill of entry is presented (b) in case of warehoused goods, when Bill of Entry for home consumption is presented u/s 68 for clearance from warehouse and (c) in other cases, date of payment of duty.

CONCEPT OF TERRITORIAL WATERS NOT RELEVANT - It may be noted that concept of 'date of entering into territorial waters' is not relevant for purposes of determination of rate of customs duty.

Export Procedures

Procedures have to be followed by (a) 'person-in-charge of conveyance' and (b) the exporter. The procedures are similar to procedures for import, of course, in reverse direction.

NO STOPPAGE OF EXPORT CONSIGNMENT - Exports are vital for our economy. Any stoppage in export consignment means loss of export orders to the exporter and loss of foreign exchange to the country. Hence, it has been provided that movement of export consignment will not be interrupted and no export consignment shall be withheld for any reason whatsoever. In case of any doubt, customs authorities may ask for an undertaking that the export is on sole responsibility of the exporter. [Highlights of EXIM policy 1997-2002 as amended on 13.4.1998].

Procedures by person in charge of conveyance – Any new airline, shipping line, steamer agent should be registered in Customs Systems for electronic processing of shipping bills etc.

The 'person in charge of conveyance' has to follow prescribed procedures.

Entry Outward - The vessel should be granted 'Entry Outward'. Loading can start only after entry outward is granted. (section 39 of Customs Act). Steamer Agents can file 'application for entry outwards' 14 days in advance so that intending exporters can start submitting 'Shipping Bills'. This ensures that formalities are completed as quickly as possible and loading in ship starts quickly.

LOADING WITH PERMISSION - Export goods can be loaded only after Shipping Bill or Bill of Export, duly passed by Customs Officer is handed over by Exporter to the person-in-charge of conveyance. In case of baggage and mail bags, shipping bill is not necessary, but permission of Customs Officer is required (section 40).

Export Manifest - As per section 41, an Export Manifest/Export Report in prescribed form should be submitted before departure. [The report is popularly called as 'Export General Manifest' - EGM]. The details required are similar to import manifest. Such manifest/report can be amended or supplemented with permission, if there was no fraudulent intention. Such report should be declared as true by the person-in-charge signing the export manifest. This report is not required if the conveyance is carrying only luggage of occupants.

Procedures to be followed by Exporter – Export procedures have been summarised in Chapter 3 Part II of CBE&C's Customs Manual, 2001.

Every exporter should take following initial steps ---

1. Obtain BIN (Business Identification Number) from DGFT. It is a PAN based number
2. Open current account with designated bank for credit of duty drawback claims
3. Register licenses / advance license / DEPB etc. at the customs station, if exports are under Export Promotion Schemes

Exporter has to submit 'shipping bill' for export by sea or air and 'bill of export' for export by road. Goods have to be assessed for duty, even if no duty is payable for most of exports, as 'Nil Duty' assessment is also an assessment.

Shipping Bill to be submitted by Exporter - Shipping Bill and Bill of Export Regulations prescribe form of shipping bills. It should be submitted in quadruplicate. If drawback claim is to be made, one additional copy should be submitted. There are five forms : (a) Shipping Bill for export of goods under claim for duty drawback - these should be in Green colour (b) Shipping Bill for export of dutiable goods - this should be yellow colour (c) shipping bill for export of duty free goods - it should be white colour (d) shipping bill for export of duty free goods ex-bond - i.e. from bonded store room - it should be pink colour (e) Shipping Bill for export under DEPB scheme - Blue colour.

The shipping bill form requires details like name of exporter, consignee, Invoice Number, details of packing, description of goods, quantity, FOB Value etc. Appropriate form of shipping bill should be used.

Relevant documents i.e. copies of packing list, invoices, export contract, letter of credit etc. are also to be submitted. In case of excisable goods, from ARE-1 prepared at the time of clearance from factory should also be submitted.

Customs authorities give serial number (called '*Thoka Number*') to shipping bill, when it is presented.

Excise formalities at the time of Export - If the goods are cleared by manufacturer for export, the goods are accompanied by ARE-1 (earlier AR-4). This form should be submitted to customs authorities. The Customs Officer certifies that the goods under this form have indeed been exported. This form has then to be submitted to Maritime Commissioner for obtaining 'proof of export'. The bond executed by Manufacturer-exporter with excise authorities is released only when 'proof of export' is accepted by Maritime Commissioner or Assistant Commissioner, where bond was executed.

Duty drawback formalities - If the exporter intends to claim duty drawback on his exports, he has to follow prescribed procedures and submit necessary papers. The procedures are discussed in the chapter on 'Export Incentives'. He has to make endorsement of shipping bill that claim for duty drawback is being made. If he fails to do so due to genuine reasons, Commissioner of

Customs can grant exemption from this provision. [proviso to rule 12(1)(a) of Duty Drawback Rules].

GR / SDF / SOFTEX Form under FEMA - Reserve Bank of India has prescribed GR / SDF form under FEMA. "G R" stands for 'Guaranteed Receipt' form, while SDF stands for 'Statutory Declaration Form'. SDF form is to be used where shipping bills are processed electronically in customs house, while GR form is used when shipping bills are processed manually in customs house.

Other documents required for export - Exporter also has to prepare other documents like (a) Four copies of Commercial Invoice (b) Four copies of Packing List (c) Certificate of Origin or pre-shipment inspection where required (d) Insurance policy. (e) Letter of Credit (f) Declaration of Value (g) Excise ARE-1/ARE-2 form as applicable (h) GR / SDF form prescribed by RBI in duplicate (i) Letter showing BIN Number.

RCMC certificate from Export Promotion Council - Various Export Promotion Councils have been set up to promote and develop exports. (e.g. Engineering Export Promotion Council, Apparel Export Promotion Council, etc.) Exporter has to become member of the concerned Export Promotion Council and obtain RCMC - Registration cum membership Certificate.

Check in customs – Document submitted is processed by customs authorities, and following are checked - *Chapter 3 Para 39 of CBE&C's Customs Manual, 2001.* –

- ◆ Value and classification of goods under drawback schedule in case of drawback shipping bills
- ◆ Export duty / cess if applicable
- ◆ Advance License shipping bills are checked to ensure that description in invoice and final product specified in Advance License matches. If necessary, samples may be drawn and assessment may be done after visual inspection or testing
- ◆ Exportability of goods under EXIM policy and other laws - Some exports are totally prohibited under various Acts e.g. items restricted or prohibited under Foreign Trade (Regulation) Act; antiques; art treasures; Arms; narcotics etc. Some items like tea, coffee and coir products can be exported only against authorisation/licence under respective Acts.

Examination of goods before export - After shipping bill is passed by export department, the goods are presented to shed appraiser (exports) in dock for examination. Goods will be examined by examiner. This inspection is necessary (a) to ensure that prohibited goods are not exported (b) goods tally with description and invoice (c) duty drawback, where applicable, is correctly claimed.

Let Export Order by Customs Authorities - Customs Officer will verify the contents and after he is satisfied that goods are not prohibited for exports and that export duty, if applicable is paid, will permit clearance. (section 51) by giving 'let ship' or 'let export' order.

GR-1, ARE-1, octroi papers, quota certification for export etc. are also signed. Exporter's copy of shipping Bill, GR-1, ARE-1 etc. duly certified are handed over to exporter or CHA. Drawback claims papers are also processed. - *Chapter 3 Para 43 and 60 of CBE&C's Customs Manual, 2001.*

Processing under EDI system – Under EDI system, declarations in prescribed form are to be filed through 'Service Centre' of customs. After verification, shipping bill number is generated by the system, which is endorsed on printed checklist generated for verification of data. Goods are inspected at docks on the basis of printed check list. All documents are submitted to Customs Officer along with checklist. If goods and documents are found in order, 'let export' order is issued. Then two copies of Shipping Bill are generated – one customs and other exporter's copy.

Exporter's copy is generated only after EGM (Export General Manifest) is submitted by shipping agent. These are signed by CHA and customs officer and then by Appraiser. SDF, ARE-1, octroi papers, quota certification for export etc. are also signed. Exporter's copy of Shipping Bill, SDF, ARE-1 etc. duly signed are handed over to exporter or CHA. - *Chapter 3 Paras 42 to 60 of CBE&C's Customs Manual, 2001.*

Conveyance to leave on written order - The vessel or aircraft which has brought imported goods or which carry export goods cannot leave that customs station unless a written order is given by Customs Officer. Such order is given only after (a) export manifest is submitted (b) shipping bills or bills of export, bills of transshipment etc. are submitted (c) duties on stores consumed are paid or payment of the same is secured (d) no penalty is leviable (e) export duty, if applicable, is paid. - - Such permission is not required if the conveyance is carrying only luggage of occupants.

Other Customs Procedures

Besides the aforesaid procedures, various other procedures have been prescribed. These are mainly to be followed by the person in charge of conveyance.

Boat Notes - If the vessel has to unload only a small cargo, it may not spend time in having berth in the port. If the small cargo is to be sent to shore, it may be loaded in a small boat and sent to shore. As per section 35, such small boat must be accompanied by a 'Boat Note'. Boat Notes Regulations provide that such Boat Notes will be issued by Customs Officer. It will be maintained in duplicate and should be serially numbered. Boat Note should be in prescribed form.

In case of export, if small export cargo is to be loaded in ship through small boat, no Boat Note is required if the cargo is accompanied by the 'Shipping Bill', otherwise, Boat Note is required. Boat Note is also required for transshipment of cargo, i.e. transfer from one ship to another or for re-shipment.

Transit Goods - Section 53 provide that any goods imported in any conveyance will be allowed to remain on the conveyance and to be transited without payment of customs duty, to any place out of India or any customs station. However, all these goods must be mentioned in import manifest or import report submitted by person in charge of conveyance. Such goods should not be 'prohibited goods' under section 11 of Customs Act. [The conveyance may be vehicle, ship or aircraft]. After transit, the goods may go to another customs station.

On arrival at customs station, the goods will be liable to customs duty as if it is first importation in India. - section 55.

Transshipment of Goods - Goods imported in any customs station can be transhipped without payment of duty, u/s 54 of Customs Act. Transshipment means transfer from one conveyance to another. [The conveyance may be vehicle, ship or aircraft]. Such transshipment may be to any major port or airport in India. The goods can be transhipped to any other customs station in India if customs officer is satisfied that the goods are *bonafide* intended for transshipment to any customs station. The facility is available at all customs ports and Inland Container Depots (ICDs). [Notification No. 50/95-Cus(NT) dated 6-9-95].

Goods to be transhipped must be specified in Import Manifest or Import report and a 'Bill of Transshipment' should be submitted to Customs Officer. In case of goods being transhipped under an international treaty or bilateral agreement between Government of India and Government of a foreign country, a Declaration of Transshipment shall be submitted instead of Bill of Transshipment. [section 54(1)]. [India has such bilateral agreement with Nepal].

Such goods should not be 'prohibited goods' under section 11 of Customs Act. The goods should be sealed during transshipment by customs officer. A bond has to be executed for the purpose. After execution of bond, a certificate from customs officer has to be submitted within one month that goods have been properly transferred. [Goods Imported (Conditions of Transshipment) Regulations, 1995]. On arrival at customs station, they will be liable to customs duty as if it is first importation in India. - section 55.

TRANSIT AND TRANSHIP - Distinction between transit and transshipment is that in 'transit' goods continue to be on same vessel, while in transshipment, goods are transferred to another vessel / vehicle. Hence, procedures are also different.

Coastal goods - Coastal goods means goods transported from one port in India to another port in India, *but does not include imported goods*. Thus, coastal goods means goods taken by ship from one Indian port to another. No export or import is involved, but control is necessary to ensure that coastal goods are not diverted illegally for export.

LOADING OF COASTAL GOODS - The Consignor should submit bill of coastal goods to Customs Officer (section 93). Form of the bill has been prescribed. These will be loaded by master of vessel only after 'bill of coastal goods' is passed (section 93). Master of Vessel will carry an 'Advice Book' where entries will be made by Customs Officer. This 'Advice Book' has to be presented for inspection of Customs Officers, if called for. After loading, the vessel can leave only after obtaining written order from Customs Officer. As per notification No 15/98-NT dated 27.2.1998, exemption has been granted for delivery of 'Advice Book' at each port of call. However, the 'Advice Book' will have to be submitted for inspection on board of vessel, when called for.

UNLOADING OF COASTAL GOODS - Unloading of coastal goods should be done only at Customs Port or coastal port appointed by CBEC under section 7 of Customs Act. On arrival, all bills relating to goods which are to be unloaded will be delivered to Customs Officer. Unloading can be done only after obtaining permission from Customs Officer. Customs Officer can inspect goods and ask for questions and documents relating to goods. Goods will be unloaded at approved place under supervision of Customs Officer.