REPORT ON
REFORMS OF CUSTOMS LAW AND PROCEDURE

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Preface

This report on Customs Law and Procedure covering several aspects in customs administration is a part of a larger research project on tax administration conducted at National Institute of Public Finance and Policy under the sponsorship of the United Nations Development Programme. We have covered the main aspects of import and export of goods and certain basic and structural aspects. While writing this report, we had discussions with several chambers of commerce and federations of trade and industry. We also had discussions with some officers of the Customs Department. To all of them we express our thanks.

Whereas this study mainly relates to customs administration, a few ideas on the central excise and licence aspects also have been mentioned since they were found to be relevant while conducting the study.

The opinions expressed are those of the authors and do not necessarily reflect those of NIPFP unless otherwise mentioned.

Shri S.P.Malhotra has been of great assistance in preparing the script.

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INTRODUCTION

The motivation behind this study emerged from the urgent need to improve particular aspects of customs administration. The report is based on field visits to various collectorates of customs and central excise as well as meetings and discussions with officers at various levels and representatives of chambers of business and industry. Section A of the report deals with importation of cargo and items of baggage into India. The related problems of valuation as well as the procedural aspects of imported goods have been discussed with a view to suggesting certain improvements. Section B deals with export related issues. Mainly procedural aspects have been covered with a view to improving the present system that needs restructuring. Section C deals with import policy. It covers certain conceptional issues about the nexus between import and export which is one of the most controversial subjects at present. The concept of consumer goods has also been the subject of debate amongst the importers and exporters. We have suggested certain changes in respect of these concepts. Section D relates to the tariff structure and it analyses the existing structure, suggesting certain simplified rates which will be commensurate with liberalisation of the economy. Section E deals with central excise. It covers certain policy as well as procedural matters regarding manufacture. Our view is that if certain conceptional changes are introduced the revenue position would improve. At the same time certain bottlenecks should be removed in the procedural area. Section F covers general aspects. One important suggestion is regarding the bringing in of uniformity in rulings by the Central Board of Excise and Customs or Department and making them binding on all subordinate officers. It has been felt that uniformity and certainty are much more important than a doctrinaire attitude. We have also suggested the introduction of a National Classification Code which will bring about uniformity in respect of codes used by excise, customs, drawback, and licensing authorities as well as the Directorate General of Commercial Intelligence and Statistics. Certain other general suggestions have been made which will make the system of tax collection smoother and less burdened with controversies. Section G deals with administration per se. It is suggested that there should be an administrative restructuring by downsizing the Department in order to improve efficiency and effectiveness. Section H offers a summary and conclusion in respect of all the chapters.

Chapter - 1

IMPORTATION OF CARGO

Some custom houses in India have introduced computerisation for import cargo but the level of computerisation is not uniform. In Mumbai, Calcutta and Madras computerisation was started in 1986 with a main frame computer and some mini computers. The stage of development of computers at that time was such, that except for a short time in the beginning, it was never possible to have an on-line assessment. This meant that the classification and valuation were being done manually and not through the computer. The computer is now being used in these custom houses mainly to capture the data and to compare them in a limited manner for valuation and classification. This, to a large extent, has been due to the unwillingness of the concerned people in the custom houses to use computers on an on-line basis.

In some custom houses there is no computerisation so far. However, a computer with a more advanced system with Electronic Data Interchange (EDI) was introduced in the Delhi Custom House in May 1995. So far as the import cargo is concerned, the present system at the Delhi Custom House operates basically as follows:

On an average nearly 430 import documents (bills of entry)are submitted per day. A few of them are submitted manually; the rest are entered electronically. About half of them are entered by the importers and the clearing agents into the computer of the Custom House through terminals which are there in their offices. The rest of the bills of entry relate to those importers or clearing agents who do not have computer terminals. So they come to the Custom House Service Centre where clerks [belonging to Computer Maintenance Corporation of India (CMC)] enter the data on their behalf after charging a nominal fee. In this way all the bills of entry which are needed to be submitted by the importers are electronically entered into the Custom House computer system. This replaces the previous system of filing the bills of entry in paper form. The Custom House has an appraising hall in which there are nine groups. Each group is manned by one or two appraisers who can see the bill of entry relating to his group on the screen of the computer. He can then pass

the bill of entry or raise a query. If he raises a query regarding the admissibility of exemption or classification claimed by the importer or if he chooses to call for other documents or catalogue, he enters this query in the computer. The print out of this query goes to the service centre or to the EDI terminal from where the importer is supposed to take the query. There is a system of pre-audit which means that another appraiser sees the same details in his computer terminal and either approves the classification or raises further queries. On 12th of November and 13th November,1996 it was found that queries were raised (including queries leading to adjudication) on nearly 10% of the bills of entry. Generally about 70% to 80% of the bills of entry are cleared within two days in the sense that they are processed through the computer within two days. Clearing the rest of the bills of entry can take any number of days. However, strict monitoring can be exercised by the supervisory authority, if they want to do so, with the help of the computer. After the bills of entry are cleared by the appraisers through the computer, the computer calculates its rate of duty and the print out of the bill of entry is given to the importer or his clearing agent. Thereafter the duty is paid into the Punjab National Bank situated in the Custom House building. The goods are then to be collected from the cargo godown at the airport which is only about one kilometre away. At this stage, the goods are to be located in godown. This part of the job is quite difficult and takes quite some time. Although the Custom House computerised its import cargo operations nearly two years back, the Airport Authority has not done any proper computerisation of the method of keeping the goods in the godown. On paper some sort of the computerisation has been done but the way in which the goods are thrown around on the floor and even outside the godown shows very clearly that there is no proper system at all for keeping the goods. This point has been the subject matter of several discussions by committees appointed by Ministries. But the net result is that the goods are simply strewn all over the place inside and outside the godown. Inside the godown many packages lie around on the ground in a haphazard manner instead of in their assigned places on the open steel racks.

We were told that the total "dwell time" (the time that goods actually stay in the godown) of the air cargo terminal is nearly 21 days. A step by step analysis of the total time taken is given here:

1. The time taken between the time of the arrival of the goods and the filing of the bill of entry.

Even when the goods arrive by air the importer does not come to know of their arrival because such intimation is not received quickly enough. The airways bill which comes along with the goods is despatched by the airline to the importer by post. The result is that it may be four days to five days before the importer gets to know about the consignment and comes to file the bill of entry.

2. Processing the bill of entry in the Custom House in the computer by the appraiser.

Processing the bill of entry takes one day or two days in case no queries are raised. About 70% to 80% are said to be processed within two days.

3. Payment of duty by the importer.

After the clearing agent takes possession of the bill of entry, he approaches the importer for money to pay the duty. The importer pays the duty by Pay Order which is deposited in the Punjab National Bank. Usually the importer does not keep so much money with the clearing agent, nor does the clearing agent keep so much money in the bank. Only when the importer pays the clearing agent, the latter deposits the money in the bank. On an average this takes four days to five days.

4. Locating the goods and examination of the goods in the godown.

Locating the goods sometimes takes one day or more. This is major point of harassment. The labourers of the contractors hired by the airport authority usually take a long time to search out all the packages and bring them at one spot for examination by customs. Once the goods are located they are examined the same day or by the following morning. If the importer comes before 12.00 noon, the goods are usually examined the same day,but if he arrives after 12.00 noon, the goods are examined and cleared by the next day.

Altogether, the goods remain there for 21 days on an average, in spite of computerisation of the Custom House. Moreover, seeing the amount of goods which are lying all over the place, one gets a clear impression that a large number of imported goods are not cleared even in 21 days; 21 days is only the average time taken.

As can be seen from the foregoing analysis, some of the processes are such for which the Custom House is not responsible. Delay in filing of the bill of entry, that is, the first part of the process is not because of customs. The delay in the payment of the duty is also not because of customs. Locating the goods is also not exactly the responsibility of customs. Customs is responsible primarily for classification and valuation of the bill of entry (i.e. processing the bill of entry by the appraiser in the Custom House) and the examination of the goods in the cargo godown.

The Electronic Data Interchange (EDI) which has been introduced has been useful mainly for monitoring the processing of the bill of entry and also writing the classification itself, provided the description of the goods entered into the computer by the importer matches the description in the tariff. However the EDI by itself has been able to shorten the time period for clearance of the goods probably only by a day or so. Even now the importers come and meet the appraisers with catalogues and documents called for. Even now vague queries such as, explain classification or produce catalogue, are being raised rather than any specific points of doubt. Actually, appraisers who are experts in respect of a particular group e.g. (a group dealing with a class of commodities such as machinery, chemicals etc.) could manually write the classification in respect of 70% to 80% of the goods within a day. The main advantage now in the EDI system is that monitoring by computer is possible by an alert supervisory officer. And pre-auditing is also possible simultaneously. However, the real objective of shortening the time of clearance of the goods has not been achieved merely by the introduction of the EDI system. It is therefore necessary to search for some other procedure which will cut across all the existing systems and bring about changes which will completely eliminate the delay in the clearance of goods as in the present system. The only way in which all the excess cargo lying in the godowns and the 21 days of dwell time of the cargo in the warehouse can be wiped out or substantially reduced is to bring about some sweeping changes which are going to be suggested in this report. Before

doing so, however, it would be of interest to comment on the system obtaining in some other countries such as U.S.A, Canada, England and Holland.

The system of clearance of import cargo in the United States, Canada, England and Holland is based on an elaborate method of Electronic Data Interchange (EDI) and clearance of the cargo without examination by the Customs Department. The importers themselves classify the goods, write the valuation and remove the goods. They are not even required to pay duty in the U.S. or Canada but in England they pay the duty upfront before the clearance of the goods. The examination of the goods is done only when there are intelligence reports or suspicion. There is a targeting section which deals with the collection and collation of all intelligence reports. Goods are even examined without the presence of the importers in case of suspicion. However except for this small percentage (about 5%), all goods are released without examination. After the goods are released, since the documents have been captured in the computer, the appraising officer can do the post- audit. The system works as follows.

When the bills of entry are entered into the computer, a few lower-level officers (not appraisers but those corresponding to inspectors in India) see the bills of entry on the screen and go on releasing them by just pressing one button. Only in the case of few targeted consignments do they order checking. The main emphasis, therefore, is on the post- audit as well as on collection of intelligence and targeting. There can even be searches in the premises of the importers if intelligence arrives later, after the clearance of the goods.

In conclusion, the system of holding up the goods while the documents are being processed for classification and valuation must be dispensed with. This system also gives an opportunity, in some cases, to the officers of the department to harass importers. It is suggested that the modified system in India should be as follows:

(i) Self-removal procedure (SRP) in respect of customs clearance should be introduced, like the one in the Central Excise which has been in vogue since 1968.

(ii) Ninety-five per cent of the goods should not be opened or checked. They should be opened only if they are targeted goods, which should amount to only about 5%. To those who think that not examining the goods will lead to unauthorised goods being cleared, it may be pointed out that hardly any worthwhile case has been detected while examining the goods. All important cases have been detected only on the basis of intelligence. On the other hand, examination of goods mostly leads to unfair harassment and delay.

(iii) Targeting can be done on the basis of intelligence reports and suspicion.

(iv) The 5 per cent of the goods which are opened on being targeted will also include the export-related import items. Export-related import items should not be opened in a routine manner.

(v) Self-removal procedure (SRP) will be allowed to the major customers. This concept of major customers has no relevance to the cases booked against them. The list will be drawn up by each Custom House. The major customers will easily constitute importers of about 80% to 90% of the goods. In the case of those who are not major customers (i.e. those who are traders) the existing classification and valuation method is to be followed. But even in their case the goods will be released after payment of duty and classification and valuation by the custom house appraising staff. Examination of the goods will not be done. Only targeted goods will be examined, whether they belong to major customers or traders.

(vi) The clearances will be subject to post-auditing which will be done through the computer since the bills of entry will already have been captured in the computer.

(vii) More emphasis will be on the work done by the special intelligence and investigation branch (SIIB) and post-audit. The SIIB can be strengthened by diverting staff from routine work which they are doing now.

(viii) The system of signing of documents by two officers should be done away with. The Assistant Commissioner of Customs today signs hundreds of export bills and a very large number of import bills . Obviously these degenerate into routine signatures. Signature by one officer should be enough. The system of signing and counter-signing by several officers leads to delay and even harassment.

Clearance of cargo is done in Canada and other countries around the clock. In India it was found that not many importers/clearing agents turned up for cargo clearance after 10.00 p.m. Therefore this facility of night time clearance was withdrawn. However, it should be restored once again as, over time, people will start adjusting themselves and take advantage of this facility of clearance of goods at all times of the day and night and all the days of the week. At the same time, all other agencies such as port and airport authorities, police etc. should be available for 24 hours and all 7 days in the week just as in the case of passenger baggage clearance.

In the foreign countries mentioned no importers or clearing agents (brokers) are to be found in the custom office where the goods are passed electronically. In Delhi, even now after computerisation, importers crowd the EDI area. This means that there is interaction of the importers on a day to day basis with the appraising officers. This is not a desirable situation. This aspect needs looking into. The system of EDI in Delhi and other places should be modernised in line with the American and Canadian systems so that importers and brokers do not have to crowd the custom houses.

If end-use bonds are to be given, then the importers can give them at the time of clearance. It is suggested that such end-use bonds should be phased out; declaration of end-use should be enough without insisting on bonds.

Licences, wherever they are to be produced, should be presented at the stage of clearance to Assistant Commissioner, Cargo, or Dock. In case the licence is not acceptable, it can be adjudicated later.

The suggestion of clearing the goods without examination will have the following additional advantages:

(i) Congestion at ports will be lessened. At present most of the space in the ports is occupied by goods lying uncleared. If the goods are cleared quickly, then the ports will become operationally more efficient and financially more viable.

(ii) Demurrage costs running into several crores of rupees (it is more than Rs.100 crore per year in Bombay sea port, it was Rs.64 crore in 1986) will not have to be paid by industry, which will mean a reduction in its cost of working capital.

(iii) Since industry will be assured of smooth receipt of imported input, it will be able to cut down on inventory, which again will reduce the cost of working capital.

(iv) Industry will grow faster owing to efficient handling of materials.

Chapter - 2

VALUATION OF IMPORTS

Valuation of imported goods has been a source of some controversy. There are often complaints that undervaluation is rampant and that some remedy must be found to curb it. There have been several studies to ascertain the amount of undervaluation.

Recently, a study done by Zdanowicz, J.S., Welch, W.W., and Pak,S.J.,(Finance India, September 1995, December 1996) of Florida International University, establishes the extent of capital flight from India to the U.S. through improper invoicing of exports and imports. They used a global price matrix to detect abnormal transaction prices. The extent of capital flight for the 1994 and 1995, the period under their study, was substantial, ranging from a maximum of $ 5893 million to $ 5,584 million respectively to a most conservative estimate of $ 411.5 million to $ 610.9 million respectively.

They argue that the economic benefit of detecting and deterring capital outflow is significant. The global price matrix can be applied as a means of determining optional audits and inspection will help in the detection process. This can be established by India's customs authorities.

Another economic study, was published in Economic and Political Weekly "Liberalisation and Foreign Trade - Dangerous Signals", 4 May, 1996. It was reported that during the post-liberalisation era, though the world import prices remained buoyant, the unit value index of imports to India has shown a decline of 6% per annum on an average while the import quantum has shown an increase of 34% per annum. The study shows the following reduction in the unit value index (UVI):

TABLE 1

Year	Unit Value Index	Growth Rate
	(Rs)	
1989-90	228.4	23.1
1990-91	267.7	17.2
1991-92	309.1	15.5
1992-93	333.0	7.7
1993-94	327.2	-1.7
1994-95	249.0	-23.9
1995-96	N.A.	N.A.

However, the unit value index suffers from the defect that there are several estimations made to come to the conclusion. They are the following:

a. a modest 3% increase in value of imports during 1994-95 over 1993-94 prices on account of the buoyancy in world import prices and a fall in the rupee value of the US dollar,

b. a derived average of 30% customs duty inclusive of countervailing and other duties on all imports,

c. the import value for the base year 93-94 itself was not depressed, and

d. a change in oil prices has not made any unusual difference.

Another study which has been made by us is as follows:

In 1994-95, the Sanctioned Budget Estimate(S.B.E) was Rs 26,289 crores of gross revenue. We have to see the commoditywise break up to assess the situation. This break-up of S.B.E of Rs.26,289 crores is given here:

Sl No.	Item	S.B.E.1994-95 (Rs in crore)	% of Col.3 to S.B.E. (%)
1.	Fruits, dried & fresh	140	0.53
2.	Coffee, tea, meat and spices	29	0.11
3.	Animal or vegetable fats & oils	145	0.55
4.	Beverages, spirits and vinegar	25	0.10
5.	Mineral substances	213	0.81
6.	Ores, slag and ash	95	0.36
7.	Petroleum oils & oils obtained from bituminous minerals, crude	4200	15.98
8.	Petroleum oils & oils obtained from bituminous minerals other than crude	2325	8.84
9.	Other mineral fuels, oils, waxes & bituminous substances	550	2.09
10.	Inorganic chemicals	252	0.96
11.	Organic chemicals	1850	7.04

Sl. No.	Item	S.B.E.1994-95 (Rs crore)	Col.3 to S.B.E (%)
12	Pharmaceutical products	15	0.06
13	Dyes, colours, paints & varnishes	170	0.65
14	Essential oils, resinoids & toilet preparations	34	0.13
15	Soaps,organic surface active agents and artificial wares	110	0.42
16	Photographic & cinematographic goods	388	1.48
17	Misc. chemical products	504	1.92
18	Plastic & articles thereof	1200	4.56
19	Rubber & articles thereof	351	1.34
20	Pulp paper, paper-board & articles thereof	203	0.77
21	Silk	33	0.13
22	Wool & other animal hair	64	0.24
23	Manmade filaments	73	0.28
24	Manmade staple fibres	27	0.10
25	Articles of stone, plaster cement, asbestos, mica or similar materials	46	0.18
26	Ceramic products	57	0.22
27	Glass & glasswares	100	0.38
28	Primary materials of iron & steel	339	1.29
29	Iron and non-alloy steel	726	2.76
30	Stainless steel	80	0.30
31	Other alloy steel, hollow drill bars	267	1.02
32	Articles of iron & steel	407	1.55
33	Copper	678	2.58
34	Nickel	110	0.42
35	Aluminiuim	68	0.26

36	Lead	44	0.17
37	Zinc	52	0.20
38	Tin	28	0.11
39	Other base metals	64	0.24
40	Tools, implements & other misc. articles of base metals	97	0.37
41	Machinery excluding machine tools & their parts and accessories & ball and roller bearings	2300	8.75
42	Machine tools, parts & accessories	155	0.59
43	Ball or roller bearings	266	1.01
44	Electrical machinery	1850	7.04
45	Railway locomotives & materials	87	0.33
46	Motor vehicles & parts thereof	533	2.03
47	Aircraft & vessels	210	0.80
48	Optical, photographic, cinemato-graphic,measuring, medical and surgical instruments.	529	2.01
49	Clocks & watches, parts thereof	35	0.13
50	Project imports	1450	5.52
51	Baggage	1260	4.79
52	All other articles	1045	3.98
53	Exports duties	48	0.18
54	Export cess	83	0.32
55	Other receipts	285	1.08
	Total	26289	100.00

All the items are not prone to underinvoicing. Petroleum products (sl.nos.7,8 and 9), alone account for nearly 27% (Rs.7075 crores) of the S.B.E.

Machinery items (other than ball-bearing) at sl.nos.40,41,42 and 44 alone come to Rs 4402 crore (16.74%). Motor vehicles, aircraft, railway locomotives (sl.nos.45, 46 and 47) come to Rs 830 crore (3.15%). All these items are not known for underinvoicing. This takes away a large chunk of the revenue, 46.8%, amounting to Rs.12,307 crore which is not subject to underinvoicing.

There is an alternative way of looking at things. Imports by Government departments and manufacturers themselves are generally not underinvoiced. Mostly, those imports from Hong Kong and Singapore are underinvoiced.

The following items are prone to undervaluation:

i. PAPER : Fax rolls, waste paper and chemical coated paper.

ii. BALL BEARINGS: Only ball bearings coming from East European countries and Hong Kong are underinvoiced, but not S.K.F. which is manufactured in Sweden. Moreover, with the present rate of duty of 25% + Rs.125 per kg which comes to a low rate of 43% compared to more than 100% in the past, underinvoicing has come down.

iii. PLASTICS: Mostly scraps.

iv. CLOVES. -

v. ELECTRICALS HARDWARE: With the recent reduction of import duty to 25%, the scope for undervaluation has come down substantially. Also, it has been found that a very large number of electronic parts are imported by Indian manufacturers themselves and these are not undervalued. Only a small portion of such electronic parts imported from Hong Kong etc. are undervalued. The amount would not exceed Rs 100 crore.

vi. METALS: In respect of metals, London Metal Exchange prices give a good indication of their value,and the possibility of getting away with undervaluation is minimal. Metal scraps of iron, zinc and copper are underinvoiced as they are not standard products.

When a suspected attempt is made of undervaluation, the customs officers do upgrade the value on the basis of computer print-outs to make it equal to the prevailing price.

On an overall basis, the total cost of goods which are prone to undervaluation would come to about Rs 1000 crore and even if 50% undervaluation takes place on these goods, the total amount of undervaluation would amount to approximately Rs 500 crore, the duty on which would be about Rs 150 crore, assuming 30% duty on an average. Under no circumstances, would the amount of duty lost owing to undervaluation be more than Rs 300 crore. However none of these estimates can be considered too reliable because the very nature of things does not allow any definite conclusion in the matter.

The question is what is the solution to this problem. During discussions many officers of excise and customs have suggested that a Valuation Directorate should be set up in the Bombay Custom House to which all doubtful cases could be referred. Trade however is apprehensive that if a separate Valuation Directorate is created it might lead to delay in clearance. It is likely that whenever the officers find it inconvenient to pass some case and cannot make up their minds they will simply refer the matter to the Valuation Directorate.

A Valuation Directorate may be created, but only if the Self-Removal Procedure as suggested in Chapter I is implemented. Once the goods are cleared, any delay in finding out the correct value thereafter does not harm the importer. In fact, once the Self-Removal Procedure is introduced, the justification for a Valuation Directorate would be greater. The Valuation Directorate should be a valuation organisation under the Bombay Custom House on the ground that quick decisions will have to be taken which can be better done by the field officer. Morever, Bombay Custom House is the biggest custom house dealing with

almost 40% of the goods imported and as such the Directorate will not need to refer the matter to anybody else but can take decisions on its own in the same custom house itself.

It is, therefore, suggested that in the face of ongoing undervaluation which possibly needs greater monitoring, once the Self-Removal Procedure is introduced, a Valuation Organisation should be created in the Bombay Custom House by posting the necessary staff to collect and collate all the data regarding valuation of the goods imported throughout India. All the other commissioners of customs can refer any commodity to the Valuation Organisation in the Bombay Custom House to obtain data and all other relevant material regarding its value imported by all the ports of the country. Decision can then be taken with the full knowledge of all the goods imported in India rather than on the basis of the goods imported in just one port.

Chapter 3

END-USE BOND

In the budget for 1996-97 a new step was taken to enforce the proper end-use of goods which are released on exempted rate of duty. By this, the monitoring of the end-use is to be done by the Central Excise Department. The system that has been prescribed is that the importer has first to bring a certificate from the Central Excise Department that he owns a factory situated in its jurisdiction. When he produces that certificate before the Assistant Commissioner of Customs at the time of import, the latter endorses the amount imported on this certificate. This certificate has to be produced before the Assistant Commissioner, Central Excise in whose jurisdiction the factory is situated, who certifies its end-use. The certificate of use is shown to the Assistant Commissioner, Customs who then discharges the bond which has been given by the importer at the time of importation. This whole system has introduced a straight jacket which is a source of harassment to the importers.

In the past there was a serious move for simplification in respect of end-use bond. Earlier importers had to submit end-use bonds backed by bank guarantees. Discharging them was an onerous task because they were very large in number. However, the discharging used to be done not merely by a certificate from the Assistant Commissioner of Central Excise but also alternatively by a general certificate given by chartered accountants or the Directorate of Industries. It was felt that this was also a very rigid system and therefore many of the end-use notifications were amended to drop the end-use condition. Even where the end-use conditions were there, a declaration that they would be used in a particular manner was considered sufficient. However, in the last budget this new system has been introduced which definitely is a retrograde measure. The following notifications include the list of items requiring end-use certificates which have been found to have the condition described in the first paragraph.

Notification and date	Description of items
Notification No.11/97 dated 1.3.1997.	

Under serial No.109 Condition No.17	Melting scrap of iron or steel
Under serial No.116 Condition No.19	Horological raw materials specified in List 4
Under serial No.25 Condition No.5	Goods for making fertilizers
Under serial No.54 Condition No.8	Goods for making solar cell modules.
Under serial No.120 Condition No.21	Parts of fuel injection equipment
Under serial No.158 Condition No.39	Medical equipment and parts

The different associations and chambers of commerce and even many officers of the department were consulted in this connection. The consensus view that emerges is that this system should be done away with, since it has introduced tremendous rigidity in the procedure of importation. Mere declaration in the case of end-use should be sufficient. In case there is an intelligence report that a particular consignment has been misused, penal action can be taken by the Customs Department.

Similarly, it should be possible to do away with the end-use condition in respect of other instances than mentioned earlier.

Sl.No.	Notification No. & Date	Description of items
117	11/97 dated 1.3.97	Import of machinery and tools specified in list 5
159	11/97 dated 1.3.97	Computer pheripheral devices and other parts for research institutes.
180	11/97 dated 1.3.97	Goods for modernisation of caustic soda units based on Membrane cell technology.

(a) Condition No.48 attached to the goods meant for Membrane Cell Technology is a more suitable one because it is a simple requirement. At the time of importation, the importer has to give a simple undertaking that the goods will be used for the declared purpose.

(b) In the case of non-compliance, the difference in duty will be paid. Even this condition (b) is not necessary to be written in the Notification. For, if condition (a) is not complied with, the notification is more applicable and the higher rate of duty becomes automatically chargeable. Even the goods become confiscable under section 111(0) of the Customs Act.

In this budget for 1997-98, the number of conditions for Notification No.11/97-Cus, has been increased to 72. The previous Notification 36/95 (in whose place the present notification has come) had 60 conditions. The increase in the number of conditions is not in agreement with the policy of liberalisation to which the Government is committed. In reality, the more we increase the number of conditions, the more we increase the number of certifications for getting exemption, the tax administration becomes more and more difficult and riddled with harassment and complication. The stranglehold of the Ministries over the industries must be reduced in order to free the industries which should to concentrate on effecting economic growth. We give below the names of Ministries for which certificates are required to be produced in the chart below:

Serial No.	Commodity	The name of Ministry organised which is required to give the certificate
6	Goodsfor Hotel Industry	Ministry of Tourism.
40	Goods for manu-facture of D.T.P vaccines.	UNICEF
43	Life Saving Drugs	Director General of Health Services
59	Educational films	Central Board of Film Censors
62	Educational film for defence personnel	Ministry of Defence

63	Film & Video Cassette	Ministry of Information and Broadcasting
94	Goods for Leather industry	Council for Leather Exports, Ministry of Commerce.
96	Glass fibre for Pollution Control Purposes.	Ministry of Environment and Forests.
117	Machinery & tools Specified in List 5	Ministry of Urban Affairs and Employment.
121	Goods for Non-conventional Energy	Ministry of NonConventional Energy Sources
123	Goods for Renovation of Fertilisers Plants	Department of Fertilisers
128/129	Parts of Outboard Motors	State Fisheries Corporation
144	Goods for use in a Green House	Ministry of Commerce
145	Goods for Compressed Natural Gas Driven Vehicles	Ministry of Environment and Forests
146	Air Traffic Control Equipment	Director General of Civil Aviation
147	Goods for Hotel Industry	Ministry of Tourism
148/149	Goods for Power Generation Plant	Ministry of Power,Department of Atomic Energy.
152,153/154	Goods for Oil Exploration	Ministry of Petroleum and Natural Gas.
156/159	Moulds,tools for Electronic parts. .....and so on.	Department of Electronics

This is not to suggest that each and every certificate should be abolished. The suggestion is that, there are many cases where a certificate may not be necessary and a declaration should be enough as in the case of Serial No.180, (Goods required for Membrane Cell Technology) where the requirement is only of a declaration. If the certificates as mentioned above are examined and they are recast in the same line as Condition No.48, for Serial No.180, it will be possible to do away with a large number of certificates. It is well

known that the importers are harassed to obtain certificates from the Ministries. Sometimes they have to give Bonds and Bank Guarantees and only then receive a promise that a certificate will be produced. Thereafter such cases are not finalised for many years and litigation continues before Collector (Appeal) (Tribunals and even Court). It is therefore necessary to dismantle the certificate regime as much as possible. Moreover, now that the duty rates have come down substantially it is important that many of the exemptions are done away with, for the difference between the standard rate and the exemption rate is only about 5-10% in most of the cases.

Chapter 4

BAGGAGE

There is a system in existence in England which is known as Merchandise in Baggage (MIB). Importers are allowed to bring merchandise along with them and pay the duty at merchandise rate which is much lower. This is not allowed in India. This is allowed only for couriers. The MIB system should be introduced in India.

The justification for this system is that the passengers may want to bring in an item or several items which they need for commercial purposes. If they send them by ordinary methods the transport costs would be prohibitive. The clearance procedure would also take time. If they are allowed to bring these items and pay merchandise duty rates after declaring them, they will be benefited a great deal.

Some people bring kits for machines or some electronic parts for a machine. When they declare them, they are told that they are confiscable items since they are not bonafide baggage. They are also asked to pay duty at baggage duty rates which are very high. This problem will not arise if MIB is permitted here.

Chapter 5

Export

The procedural aspects of export in the custom houses have been examined and found to be outdated except in Delhi airport where Electronic Data Interchange (EDI) has been introduced recently. This has comprised a major improvement in procedures.

Electronic Data Interchange (EDI) at Delhi Custom House

The export section at I.G. International Airport at Delhi introduced EDI in export in late 1996. It has developed a Data Bank based on the Importer- Exporter Code (IEC) number supplied by the Reserve Bank of India (RBI). This IEC number is a unique number given to the exporters and importers by R.B.I. for accounting purposes.

The Clearing House Agent (CHA) is required to file three Annexures A, B, & C. In the first two, the CHA has to furnish the IEC number,description of the goods, destination, value of the consignment and other invoice details. The last contains the physical dimension of the consignment, like size and weight, number of packets, etc. Annexures A and B can be submitted 7 days in advance at the Computer Maintenance Service Centre (CMC)which are later fed into the system by the CMC staff. On the basis of this, CMC generates a check list containing all the details of Annexures A or B. The CHA can verify the list and endorse it and finally give it back to CMC. CMC then creates a shipping bill number. After submission of the shipping bill, it is processed and looked into regarding three features,

(a) FOB value of exports exceeding Rs 10 lakh;
(b) Drawback amount exceeding Rs. 1 lakh; and
(c) Cases where no foreign exchange is involved.

If queries are raised by the scrutinising staff under the Superintendent, exporters will come to know from the Service Centre and can answer them through computers. The

drawback amount is credited to the bank account on the basis of the shipping bill which is already in the computer.

The job of the Superintendents,in Warehouse, for drawback, is to detect mistakes, if any. The signature of the Assistant Commissioner (A.C.) Export, is required in case the drawback amount is more than Rs.50,000.

The export procedures at Calcutta, Bombay and Madras Custom Houses are not computerised. The processing of a shipping bill takes about one day and 13 steps are involved in the process. Each step is manned by an individual and is so specialized that the person does not take a long time to clear. However it is still slow and outdated in comparison with what could be achieved.

Superiority of the new system

Installation of EDI has been a help to eliminate fake exporters. Earlier, IEC numbers were checked manually. Anybody could use anyone else's IEC as it was virtually impossible to verify each time the genuineness of the exporter filing the shipping bill. However now the Data Bank, as mentioned earlier, stores the IEC number which could be used to check the authenticity of the exporter filing the shipping bill.

Moreover, earlier the drawback amount used to be given to parties in cheques which the fake exporters could encash at ease. Now with EDI, this possibilty for misuse is no longer there as the drawback amount is directly credited to the bank account.

Installation of EDI ensures faster clearance of documents for export.The bonded area in the Cargo section at Delhi is now less crowded as most of the big exporters and importers have availed themselves of the on-line facility to remain connected with the Delhi Custom House. They can complete their formalities from their offices without being physically present at the Custom House.

The CHA also does not have to move from one section to another as, once the

shipping bill is entered in the computer, the same will be assessed by the appraiser and AC on-line. The drawback amount is calculated and automatically credited to the exporter's bank account after physical export of the goods. In this system the drawback and the export departments have been merged.

The system prevalent in the Delhi Custom House should be followed by other custom houses. Certain welcome changes have also been brought about in Bombay. The exporter can file his application through E-Mail. This however is only a step forward in the right direction. But full fledged EDI should be introduced quickly.

There has been a long standing demand from exporters for introduction of a single window system.The present EDI system practically meets the requirement unless there is an alleged infraction of law by the exporter. He does not have to go to any other window, except the one where he deposits his document.

Other Suggestions regarding Procedures

1. <u>On filing and physical tendering of shipping bill</u>

In the case of export by air, the filing and physical tendering of the shipping bill are both done in the air cargo section. But the same is not the case for export by sea. In the case of sea export, the export documents are filed in the custom houses and the goods are tendered in the docks. As a result, the exporters have to shuttle between the custom house and the docks, even for routine amendments. It is suggested that even for sea export , the shipping bills should be filed in the concerned docks' office. The Export Section should therefore be housed in the docks so that the exporters do not have to make frequent trips from the custom house to the docks.

2. <u>On waiting period in getting drawback amount</u>

It is suggested that rather than a three month waiting period before paying interest to the exporter in case of delay in the sanction of the drawback amount, the waiting period

should be reduced to only 15 days from the date of physical export of goods The waiting period for giving the drawback should not be compared with that of normal refunds and recoveries because in the case of the latter, a large number of documents are required to be scrutinised. On the other hand, in the case of drawback, only peripheral scrutiny is required. It may also be kept in mind that drawback is for the duty paid by importer on inputs, paid at the time of importation, implying that the importers would already have waited for more than three months.

3. On adjudication powers of Assistant Commissioner and Deputy Commissioner

The adjudication powers of A.C. and D.C. should be enhanced periodically so that the time of higher level staff is saved for carrying out better supervision. Similarly the assessment powers of the appraiser should be raised. At present the shipping bills filed by 100% Export Oriented Units (EOU) are countersigned by the A.C. Hardly any discrepancy is noticed in these shipping bills. Therefore it is suggested that even shipping bills filed by 100% EOU upto a certain limit can be signed by the appraiser.

4. On visiting Director General of Foreign Trade (DGFT) as well as Customs

At present, exporters availing themselves of the Duty Exemption Schemes are required to visit two agencies, the DGFT and Customs, a number of times for filing an application for the execution of BG/LUT (Bank Guarantee or Letter of Undertaking), registration of Duty Entitlement Exemption Certificate (DEEC), getting Certificate of Discharge of Export Obligation from the Licencing Authority. The scheme of things should be such that it would require the exporters to visit the designated authority only twice, first while undertaking LUT/BG/bonds as applicable and then at the time of redemption of the bond on completion of exporters.This would significantly reduce the transaction cost of the exporters and save them from harassment.

5. On DEEC logging

There are complaints about inordinate delay in logging of the DEEC Book at all major

ports. The exporters argue that there should not be any reason why logging would take 3-6 months time for completion even after submission of all relevant documents. It is understood that DEEC logging takes time because shipping bills filed at all the ports have to be verified. This can be overcome once all the ports are linked up with computers.We also find strength in the suggestion that at the time of clearance of export consignments, the Custom authorities should put in their endorsement in the DEEC book to obviate any unecessary difficulty to the exporters in the future.

6. Filing of Shipping Bills for Exports without insisting on Application for Removal (AR) 4 submission

Under the DEEC Scheme shipping bills are allowed to be filed only along with AR4, duly attested by the central excise authorities. This causes delay and hardship to the exporters. The central excise authorities will endorse the AR4 only when goods have been stuffed in the container and sealed. The AR4 also have to accompany the consignment. In this case, shipping bills can be given for filing only after the goods reach the port. Filing of shipping bills will take one day. Holidays like Saturday and Sunday and public holidays, if any, come in between and there is a risk that the export consignment is detained, thereby raising the risk of theft etc. apart from loss due to delay. It is suggested that at the time of filing of shipping bills AR 4 should not be insisted upon. Instead, it can be produced to the A.C. at the time of clearance of the consignment at the port.

7. On abolition of Cess

According to the various Cess Acts promulgated over a period of time, cess is collected at an insignificant rate,e.g. 1/2% ad valorem,which has become a source of harassment to the exporters, not for the amount per se but for the formality involved. It has become more of a nuisance than anything else. It is widely felt that this system should be abolished. The loss could be compensated by the Government in various ways, since the amount involved is very little.

Chapter 6

IMPORT AND EXPORT NEXUS

There has been a persistent problem in customs about the nexus between import and export. The Customs Department and the Commerce Ministry have different perceptions about what can be imported where something is exported.

To give an example, take the case of marbles. Some time in 1994 a number of importers started importing rough marbles claiming that they exported it as polished marbles. They argued that when they exported polished marbles they are entitled to duty-free import of the rough material. The reason why the issue arose was because they exported polished Indian marbles and imported rough Italian marbles. The Italian marbles were polished and sold in the Indian market. The customs took objection to this on the ground that there was no nexus between the material imported and that exported. According to the customs department the idea of allowing in rough Italian marbles was to polish it, add value to it and then export it to earn more foreign exchange.

Another example is soap. When soap is exported, the import of aromatic chemicals is permissible. Customs held that if toilet soap is exported, aromatic chemicals are permitted, but not when laundry soap is exported. The Customs could extend the argument by saying that even when toilet soap was exported they carried lavender smell while the aromatic chemicals imported contained rose smell. They do not ask such questions but they could very well do so since there has to be a nexus between exported and imported inputs.

If fish and cigarettes are exported, wrapping and packing paper are allowed to be imported. What people have been found to import are marble paper and board which are used for printing visiting cards. Two questions have been raised by customs in such cases, (a) whether the paper is usable as packing paper, and (b) whether the paper imported is paper or board. On this issue of paper or board the answer simply does not exist. This controversy has been going on for the last three decades. Nobody can give a technically correct answer because the normal distinction of 180 gm. square mtr.is not valid in too many cases.

Again, take the example of paints and printing ink. When these are exported, titanium dioxide is permitted to be imported. But instead of writing the name of the chemical the licensing authority writes chemicals or pigments. This begs the question whether titanium dioxide is actually usable in the paints exported and whether titanium dioxide is a chemical or a pigment. Even if the name titanium dioxide is written on the licence, the question that is raised by customs is whether the paints exported need titanium dioxide, since all of them do not need this chemical (pigment).

Now the question is whether customs can logically raise these questions of nexus. The answer is yes. The Policy Book issued by the licensing authority lists the export items as well as the import items. The licences are subject to the Policy Book. The customs officers exempt the goods imported under the Duty Entitlement Exemption Certificate (DEEC) scheme under the notification number 79/95 dated 31st March 1995 which at clause (i) says that the exemption is available subject to the condition that the description, quality and technical specifications of goods imported should agree with those in the DEEC Book and in the licence. However, if the licence uses expressions such as synthetic resins, pigments, chemicals, marbles which are all generic terms and contain in them thousands of products, then customs can certainly examine which particular resin or paper or chemical is the one used or usable in the manufacture of the export product. Clause (vi) of the same notification also requires that the exempted materials are utilised for export obligations. The customs officers are therefore well within their rights to see that the requirements of the notification are satisfied. That is how the nexus (between imports and exports) arises. In fact, if they do not examine this aspect and allow the exemption, serious illegalities may be committed and the Comptroller and Auditor General (CAG) will not spare the Revenue Department from scrutiny. So long as the notification for exempting the import of goods under the DEEC Scheme remains as it is now, the issue is relevant.

A solution to this problem is suggested here.

The solution is that licences issued under the scheme should not use any generic terms such as chemicals, resin, pigment, marble, paper and so on. The entries must be specific by name such as titanium dioxide zebra brand, Hypalon, Polysar SS250 (styrene butadiene

rubber), marble paper 200 gsm to 250 gsm and so on. The licensing authorities frequently use vague language. There are licences bearing descriptions such as fancy cloth and special purpose rubber. This can lead to nothing but controversies when such expressions are used on the licences.

The part of the solution is to amend the notification by incorporating a provision which will read like this:- Provided further that if in the licence and in the DEEC certificate the goods to be imported are written specifically by name, and/or brand name, then the conditions (i) and (vi) will be deemed to be satisfied. With this amendment the customs officers will be required by law not to go into the question of nexus. They can go into the question of nexus only when generic expressions are used in the licence. If the licence contains the expression Rodamin B, Rodinol or titanium dioxide zebra brand, Polysar SS250, etc. and the notification 79/95 is amended as suggested, the nexus will no longer remain controversial. The Commerce Ministry can certainly agree to write specific names at least in those cases where the importers can supply the names of the specific items they want to import. However, the licences in such cases should be granted at a sufficiently higher level of officers.

The solution to the problems arising in the day to day working in customs lies in reducing the area of discretion so that undue questions are not asked. For that purpose, specific description in the licence is the answer. And the notification is to be clearly worded as suggested above.

Chapter - 7

CONCEPT OF CONSUMER GOODS

The import policy for April 1996 to 31st March 1997 which has been effective from 1st April 1996 has been procedurally a highly commendable exercise because for the first time one can easily find out what is the import policy for a particular item. The same pattern has been followed in the 1997-2002 Policy Book. It is almost like a dictionary and one does not have to know too much on the subject beforehand in order to find out the import policy of the goods proposed to be imported. The classification followed is the harmonized system which is the same that is followed by the Department of Central Excise and Customs. There is a uniformity in the whole approach. However, while implementing the policy, a step has been taken to restrict the importation of goods which were otherwise allowed free of licence that is, under Open General Licensing (OGL). Previously, the import policy was couched in general terms. It was the policy that consumer goods were not allowed to be imported without licence. The definition of consumer goods which was given in the previous policy and which continues today is as follows. Consumer goods imply any consumption goods which can directly satisfy human needs without further processing and include consumer durables and accessories thereof.

This definition is quite a rational one and it cannot be said that it is an artificial definition. In law, even an artificial definition is acceptable. There are judgements as in the case of Saiffuddin v. Asstt. Commisioner of Sales Tax 1976(38) STC 463(Cal) wherein the Calcutta High Court has said that even if the definition given in the statute is artificial, it is still binding. Therefore, if there is a controversy about the correct definition, we have to proceed on the basis that this definition of consumer goods is binding for the purpose of goods to be imported into India. However, if this definition is taken as the guiding factor, it is found that a large number of items have been called consumer goods in the latest policy but which are not actually consumer goods by this definition. They have been made restrictive which means that a licence will have to be issued to the importers. Without such a licence they are prohibited from being imported into India.

Earlier the officials of customs in the ports in India used to pass goods without licence which were not consumer goods. A very large number of them used to be passed as belonging to the category of such non-consumer goods which are allowable without licence. Even those goods now have been termed as restricted goods in the present policy. The result is that now a very large number of commodities have been made to require a licence which previously were being released by customs without licence.

The Commerce Ministry in this import policy has committed a legal error by calling so many commodities consumer goods and also by saying that they are restricted because they are consumer goods. The goods which have been called consumer goods have to be guided by the definition of consumer goods given in the import policy. Once a definition is there the definition has to be followed. Therefore, if a particular item is not a consumer good according to the definition, the import policy cannot call it so. This will be an exercise in excess of jurisdiction. Such examples are many some of which are cited by us in the following paragraphs. The following items are not actually consumer goods but they have been restricted on the ground that they are consumer goods in the 1996-97 and 1997-2002 Policy Books:

EXIM Code	Item Description	Policy
39231009.10	Plastic packing for accommodating connectors for various types	Restricted
68113001	Asbestos cement pipes	Restricted
690100 01	Bricks	Restricted
690410 00	Building bricks	Restricted
690510 00	Roofing tiles	Restricted
690710 00	Tiles, cubes, and similar articles, whether or not rectangular, the largest surface areas of which is capable of being enclosed in a square the side of which is less than 7 cm	Restricted

731300 01	Barbed iron or steel wire	Restricted
731300 02	Twisted hoop/single fiat wire barbed or not & loosely twisted double wire used for fencing.	Restricted
731412 00	Endless bands for machinery, of stainless steel	Restricted
731413 00	Other endless bands for machinery	Restricted
731420 00	Grill, netting and fencing, welded at the intersection, of wire with a maximum cross-sectional dimension of 3 mm or more and having a mesh size of 100 cm^2 or more,other grill, netting and fencing, welded at the intersection.	Restricted
73.22	Radiators for central heating, not electrically heated, and parts thereof, or iron or steel; air heaters and hot air distributors (including distributors which can also distribute fresh or conditioned air), not electrically heated, incorporating a motor-driven fan or blower, (of iron or steel).	
732510 00	Other cast articles of non-malleable cast iron of a kind classified as consumer goods.	Restricted
732599 09.10	Other cast articles of a kind classified as consumer goods.	Restricted
732690 15.10	Finished and semi-finished steel forgings of a kind classified as consumer goods	Restricted
761010 00	Doors,windows and their frames and thresholds for doors	Restricted
761090 01	Finished structure	
841370 00	Other centrifugal pumps.	

841382 00.10	Liquid elevators of a kind classified as consumer durables	Restricted
847330 09.10	Reconditioned components of computers	Restricted
850610 00	Manganese dioxide	Restricted
850630 00	Mercuric oxide	Restricted
850640 00	Silver oxide	Restricted
850660 00	Air-zinc	Restricted
850680 02	Nickel-cadmium, chargeable (pencil battery)	Restricted
850680 09	Others	Restricted

Analysing the above list certain implications can be drawn. The first implication is that the import policy lables things as consumer goods under a notion that their free import will ruin the country's economy. This is a totally mistaken notion. If importers of these goods are made to approach the Commerce Ministry for issue of a licence, their import will be delayed and the progress and growth of the economy will suffer. Second the licence raj will come back. Third the import policy is now much more restricted than it was before 1996-97. The customs officials at all the ports agree that they were earlier passing many more goods as non-consumer goods but these have now become consumer goods. The higher-ups in the bureaucracy may not have consciously agreed to the idea of further restricting most of the goods in this liberal era. The policy is in any case anti-liberal and it is necessary that the higher achelons of bureaucracy have a close look at it and delicence those items which in effect are not consumer goods.

There are many cases where consumer goods have not been restricted (such as motor boats used for sports - (89039200.10) and stop watches 9109102). Conversely, there are many cases where obviously consumer goods such as cars have not been so called and yet are restricted. It is not that all consumer goods have been restricted. This is the right policy. That being so there is no need to write consumer goods against each item as has

been done. It is the Commerce Ministry's right to restrict the import of something if necessity demands it, but there is no need to invite legal wrangling by using a wrong nomenclature. Second the type of goods which have been called consumer goods as listed above and are not actually so should be reclassified and removed from the restricted category.

The moment something is called 'consumer goods', the first impulse of the ministry is to ban it. So it is better not to give the dog a bad name, better to see how it barks before killing it.

Chapter-8

RESTRUCTURING OF TARIFFS

Simplification of procedure can not be achieved without corresponding restructuring of tariff. The Finance Minister has gone on record to say, in his budget speech (Part B, para 122) that there should be four rates of duty in excise in the next one year or two years. In 1996-97 there are twelve rates of duty in customs and nine rates of duty in excise(Tables 1 & 2). It would have been better if in 1997-98 there could be six rates on the customs side and five rates on the excise side. Next year the rates can be further reduced to four including nil rate for both the customs and excise. The customs rates in 1997-98 budget could be 40%, 25%, 15%, 10%, 3% and nil. This 3% is because of conditions imposed by GATT. On the central excise side the rates could be 30%, 20%, 10%, 5% and nil. However in the 1997-98 Budget the rates introduced are 9 in customs and 12 in the central excise (Table-2).

Table 1

Customs Tariff Rates (as percentages)

1993-94	1994-95	1995-96	1996-97	1997-98	1998-99(suggested)
Nil	Nil	Nil	Nil	Nil	Nil
3	3	3	3	3	3
5	5	5	5	5	5
10	10	10	10	10	10
12.5					
15	15	15	15	15	
20	20	20	20	20	20
25	25	25	25	25	
30	30	30	30	30	30
35	35	35	35		
40	40	40	40	40	
45	45	45	45		
50	50	50	50		
55	55				
60	60				
65	65				
70					
75					
80					
85					
100					
110					
145					
23	15	12	12	9	5

A list of items to be included under each customs tariff rate suggested for the 1998-99 budget is as follows:

nil - Essential agricultural goods such as wheat & rice, cashewnut (in shell)

3% - Iron ore pellets, steel melting scrap, stainless steel scrap, coking coal of ash content below 12%, plans/drawings/designs, ores, concentrates, dross, ash, residue mill scale, waste and scrap of non-ferrous metals.

10% - Computer parts including computer peripherals parts, unwrought nickel article of nickel, sponge iron/HBI, steel scrap, medical equipment, electronic components and raw materials, petrochemical building blocks, acrylonitrile and other gaseous hydrocarbons, ships for breaking up.

20% - Machinery including computers, machine tools, project imports and general capital goods, general machinery/parts, ball bearings, telecommunication equipment, wireless equipment, unwrought copper, articles of copper, unwrought aluminium, input materials for refractories, LDPE, fabrics and yarns, drug intermediates, steel.

30% - Peak rate - consumer goods, viz. television sets, refrigerators, airconditioners, music systems, motor vehicles, almonds.

Table - 2

Excise Tariff Rates

(as percentage)

1993-94	1994-95	1995-96	1996-97	1997-98	1998-99 (suggested)
Nil	Nil	Nil	Nil	Nil	Nil
3	3			3	
5	5	5	5	5	
6				8	
10	10	10	10	10	10
12				13	
12.5				15	
15	15	15	15	18	
20	20	20	20	20	20
25	25	25	25	25	
30	30	30			30
35	35	35	30	30	
37.5					
40	40	40	40	40	
45	45				
50	50	50	50		
60	60				
70	70				
75					
110					
175					
225					
22	14	10	9	12	4

Items to be included under each excise tariff rate suggested for the 1998-99 budget are as follows:

nil- Fertilisers, specified drug formulations, aircraft, space craft and parts pharmaceutical products for the National Health Programme

10%- General machinery and equipment and parts and components thereof, ingots, metals including steel, portland cement, railway rolling stock, computer parts and parts of other office machines, clock and watches, ceramic products.

20%- Refrigeration machinery for the food processing industry and other industrial appliances, copper winding wire, auto components, white cement, inorganic chemicals, plastics.

30%- Peak rate: Airconditioners including car airconditioners and parts thereof, motor vehicles for transport of goods, cosmetic or toilet preparations, synthetic yarn/fibre (PFY).

When equalising the rates at 20% for Chapters 84 to 98 in customs, in some cases the rates are to be raised, whereas in others rates are to be brought down such as those for computer parts.

Revenue Consideration and Removal of Exemptions

While suggesting the reduction of the peak rate and some other rates as well and regrouping the existing rates to six in customs and five in excise, care must be taken at the same time, that there is no adverse impact on revenue. To ensure this, many exemptions should be deleted both from the customs as well as excise lists, so that the impact on revenue as a result of the lowering of the general rates of duty is largely neutralised. Exemptions have also to be removed for the sake of simplification. It is proposed that the following exemption from payment of customs and excise duties may be removed.

General Exemption No.121; Notification No.36/96-Cus.

S.No.	
7	Oleopine resin
8	Refined sugar including white crystal sugar and raw sugar
12 Tariff Heading No.2106.90	All food preparations not elsewhere specified. The tariff is 195%. This should be reduced to 40% and exemption removed.
13 Tariff Heading No.2203.00	Beer made from malt the tariff is 150%, which should be brought down to 40% and the exemption from additional duty removed.
16	Wine, for use as sacramental wine. All these rates (S.No.11, 12, 18, 22) should be made equal to the existing tariff rate and consequentially exemption can be removed.
27	Chemicals for the manufacture of centchroman.
30	Anhydrous ammonia
31	Zirconium oxide for the manufacture of zirconia
32	Gibberellic acid
33	Aminobutanol etc
35	Lysine, methionine
36	7 - ACA.
38	Codeine phosphate imported by the Government Opium Factory (if the customs & excise departments can import computers and pay duty, there is no reason why an opium factory should be exempted).
54	Silver powder suspension, silicone resins and silicone rubber
55	Extracted oleoresins
61	Exposed cinematographic films

63	Films and video cassettes
70	Retreaded tyres used in aircrafts
71	Wet blue chrome tanned leather
74	All goods covered under 47.07 viz., recovered waste and scrap paper and paper board. The tariff rate of duty is only 5%.
75	Paper used for packing grapes.
78	Paper covered by 4802.60.
97	Industrial diamonds.
117	Machinery and tools specified in List 4.
119	Goods specified in List 5, designed for use in the leather industry.
121	Wind-operated electricity generators.
142	Goods for use in electrical circuits.
150	Machinery for the textile industry -- exemption not justified.
178	Wireless, accessories as in List 12, imported by amateur radio operators. Once the rates are made 25%, they have to pay only 5% extra.
183	CD - ROMS imported by the University Grants Commission which can certainly pay duty just as the customs and income tax departments and Indian Institute of Technology are paying.

Central Excise

General Exemption No.66; Notification No.4/97-CE, dated 1.3.97.

S.No.	
54	Strips and tapes of polypropylene.

55	Strips of Plastics intended for weaving of fabrics or the manufacture of sacks and bags.
56	Polyethylene coated paper. With the duty on plastic at 20% and on paper already at 20%, this exemption will be unnecessary.
70	Certain items of paper. It is time to make the rates of all types of paper equal.
190	Specified telecommunication parts.

Duty on Machinery and Metals

Several chambers of trade and industry have been complaining about many anomalies in the rates of duty. The basic anomaly is that, while machinery which is a finished product attracts 20% rate of duty, the metals (basically iron and steel) from which it is made attract higher rate of duty. The rate of duty on iron and steel was 110% in 1991 and it has come down gradually to 30% now. If it is reduced to 20% in the 1997-98 budget, the anomaly referred to earlier will be taken care of. The rate of duty on steel has however been a matter of intense controversy. On the one hand, manufacturers of steel, mainly the secondary manufacturers and also to some extent the primary manufacturers, severely complain of the damaging effect of reducing the import duty on steel. It has, however, been found that, in the last two years, in spite of the decrease in duty on steel, the steel industry is doing very well (Table 3). Its profits have grown and its competitiveness has increased, because it has been able to export to foreign markets as well (Table 4).

While the customs duty on steel has fallen from 110% in 1991-92 to 70% in 1992-93, to 50% in 1993-94, to 40% in 1994-95 and to 30% in 1995-96, the production of crude steel, pig iron, saleable steel and finished steel has registered a substantial increase(Table 3). Exports have also experienced a considerable spurt during this period (Table 3).

Table - 3

Production, Export, Import of Iron & Steel
(1991-92 to 1995-96) (000 tonnes)

Item	1991-92	1992-93	1993-94	1994-95	1995-96 (provisional)
Crude steel (mild)	16041	16734 (4.3)	16731 (0.0)	18243 (9.0)	19982 (9.5)
Pig iron	1606	1844 (14.8)	2251 (22.1)	2785 (23.7)	2795 (0.4)
Saleable steel(mild)	13986	14715 (5.2)	14683 (-0.2)	16308 (11.1)	18311 (12.3)
Finished steel	14349	15236 (6.2)	15204 (-0.2)	17798 (17.1)	21079 (18.4)
Exports	598.0	1052.7 (76.0)	2543.4 (141.6)	1961.7 (-22.9)	2455.7 (25.2)
Imports	2636.7	3920.3 (48.7)	2084.6 (-46.8)	3542.2 (69.9)	3001.7 (-15.3)

Source: Steel Scenario Statistical Year Book 1996.
Figures in the brackets indicate % increase/decrease.

The profits after tax of the iron and steel industry have also grown sufficiently well (Table 4).

Table - 4

Profits* Iron and Steel Industry

(1991-92 to 1995-96) (Rs/crore)

Unit	1991-92	1992-93	1993-94	1994-95	1995-96
SAIL	367.3	423.4 (15.3)	545.33 (28.8)	1108.58 (103.3)	1318.61 (18.9)
TISCO	214.16	127.12 (-40.6)	180.12 (42.3)	281.12 (55.5)	565.79 (101.3)
Nipon Denro	15.32	16.5 (7.7)	47.84 (189.9)	59.47 (24.3)	100.53 (69.0)
Special Steels	18.55	18.55 (0.0)	5.14 (-72.3)	21.57 (319.6)	15.55 (-27.9)
Lloyds Steels	-	-	38.5	70.48 (81.4)	112.51 (59.6)
Mukand Steel	-	-	21.78	13.97 (-35.9)	44.08 (215.5)

Source: Top 100 Companies *Business India*, October 1996

Note: *Profit after tax
Figures in brackets indicate % increase/decrease.

Table 5

Performance of the Steel Industry (sector-wise)

Item	1996 Retained Profit 1996 (Rs/cr)	Percentage Change Over 1995
Sponge iron/ Pig iron	65.73	100.7
Steel alloys	18.45	-66.1
Steel HR/CR	231.52	17.2
Mini steel	28.28	64.5
Steel strips/ bars/wires	51.10	NA
Steel tubes/pipes	102.57	27.5
Steel composite/ alloys	1553.46	15.9

Source - 1000 Corporate Giants, Business Standard.

The figures in Table 3 will show that the production of saleable steel has increased by 43% within the last five years. Exports have grown almost five times whereas imports have remained almost at the same level (Table 4). The profits in the ore based industry have increased by two times to four times and in the secondary steel plants by two times to six times. The much talked about threat from imports is totally unfounded. Each time the duty was brought down in the last three years, the steel industry has been putting up a very tough fight at all the meetings and conferences. Its members have been giving statements for the newspapers and making a determined effort in all inter-Ministerial meetings to shout down their opponents. They usually come in large numbers and try to make their point by interrupting the other speakers. The other speakers are usually from the capital goods industry or generally from those who think of the whole economy. They do not belong to any particular sector. However, the figures of import, export, profits and production given in

Tables 3, 4 and 5 completely belie the claim that the steel industry needs protection with a high rate of import duty as much as 30%.

It has also to be taken into account that the steel industry has benefited very greatly from modvat credit on capital goods which was introduced in 1993-94 and also because of the reduction of the rates of duty on the inputs of steel. The inputs and the present rates of duty on them, against the background of the past rates, are given in Table 6.

Table - 6

Rates of Duty on Steel Inputs (1993-94 to 1996-97) (as percentage)

Item	Present Duty Rate (1996-97)	1995-96	1994-95	1993-94
Coking coal	5	5	5	85
Non-coking coal	20	35	-	-
Stainless steel scrap	10	20	30	50
Nickel	20	30	50	70
Dead burnt magnesite	40	50	85	
HBI sponge iron	20	20	30/50	75
Pig iron	20	20	20	20
Refractory	30	40	40	40

It may be seen from Table 6, that there has been a substantial reduction in the rates of duty of inputs over the last four years thus benefiting the steel industry.

There need not be any special reduction of duties on the inputs for steel. The reduction should occur in the normal course considering the item on merit and keeping in mind the proposed duty structure in the central excise, namely, 40%, 20%, 10% and 5%. There need not be any special reduction just because it is an input for steel. The inputs

should be grouped together with the goods of the same kind and made to bear duty which all other similar goods bear. The duty on non-coking coal has been reduced in the 1996-97 budget from 35% to 20% apparently to make non-coking coal when imported, equal or slightly higher in landed cost to Indian coal. What now transpires from a January 1996 study by the Delta Group, U.S., for Cogentrix Incorporated, is that imported coal has far more calorific value than Indian coal. Indian coal of the F - grade variety has a gross calorific value of 4000 kilocalories per metric ton while imported coal has a calorific value of 6400 kilocalories per metric ton. The study concludes that even with 35% duty, imported coal is cheaper than Indian coal by 19% per metric ton. So there is no reason to make the customs duty lower than 20%.

Currently, central excise duty on steel is 15%. This may be reduced to 10%. If this is done then a substantial amount of benefit will pass on to the steel industry. For the lower excise duty will lead to a lowering of prices, with a likely increase in indigenous demand.

Current position

Unaudited financial results for the first half of 1996-97 show that there has been a considerable increase in the sales, gross profit and net profit of important units of the steel industry (Table 7).

Table 7

Unaudited Financial Result(Provisional)

Unit	Net Profit Six Months Ending Sept.96 (Rs lakh)	Six Months Ending Sept.95 (Rs lakh)	Percentage increase
SAIL	36145	43320	-16.50
TISCO	25222	20133	25.00
Special Steels	42.00	29.00*	44.80
Mukand Steel	964.00	1611.00	-40.16
Essar Steel	24500.77**	910.96	2589.55
Ispat Alloys Limited	285.57	266.60	7.11

Source:- Business Standard, 13 November and other newspapers.

*Assuming Special Steel and TISCO together make Tata Steel.

**Essar Steel- These figures are of operating project. Net profit was minus Rs. 47.61 crore in March-September 1996 owing to providing for heavy initial interest payments and depreciation.

As a point of interest, a special analysis is given here on SAIL, since it is the biggest steel plant.

Table No.8

Financial Accounts of SAIL

	March Sept 96 (Rs lakh)	**March-Sept 95 (Rs lakh)**
Sales	674413	666644
Gross profits	126908	113017
Interest	53394	40582
Depreciation	32016	29115
Profit after	41498	43320
Provision for MAT	5353	nil
Net profit	36145	43320

The reason why SAIL has shown lower net profit in 1996 is because of provision for MAT to the extent of Rs 5353 lakh, higher interest amount of Rs 12812 lakh because of the need to finance expansion in Durgapur and Rourkela, and higher depreciation of Rs 2901 lakh. The gross profit has in fact increased from Rs 113017 lakhs to Rs 126908 lakh. During this period, sales have also increased from Rs 666644 lakh to Rs 674413 lakh. Export was to the extent of Rs 629 crores in 1994-95 which is a record amount. This is 12%

more than in 1993-94. Thus, considering that exports have increased, sales have increased, gross profits have increased and a substantial expansion of capacity has taken place, the fact is conclusively established that SAIL is doing very well, although the net profit is lower in the first six months of 1996-97 compared to the corresponding period of 1995-96. Therefore mere fact of lower net profit does not lead to the conclusion, wrongly, that the steel giant (SAIL) is in the doldrums.

It is reported that during the period April-September 1996 overall the steel industry showed an increase of 13.3% in total production over the corresponding period in 1995 (Steel Authority of India, Asian Age, 1 November 1996). It is also reported that the increase in the production was also matched by the secondary producers who recorded a growth of 14% compared to the 10% increase by primary manufacturers. Demand was estimated at 10.38 million metric tons which is 9.3% higher than that in the corresponding period of the previous year. The finished steel exports were 4.55 lakh metric tons in the first half of 1996 showing a growth of 15.5% over the corresponding period in 1995. Imports were estimated at 6.30 lakh metric tons during April-September 1996. which is a decline of 22% over the previous year's corresponding period. It is clear that the swing downwards in imports was attributable to a considerable increase in the indigenous production of saleable steel. In the light of these facts, the recent demand by the steel industry for fixing a trigger price for Hot Rolled (HR) and Cold Rolled (CR) coils to protect the domestic industry has to be discounted. The representatives of the steel industry (said to belong to all the steel majors namely Sail, Tisco etc.) have been urging the government to impose the regulatory duty on import of HR and CR coils. They also want a trigger price mechanism against imports from CIS countries. They contend that the CIS countries are dumping steel in India at very low prices and that there should be a basic minimum price below which if they try to export to India, a floor price will operate whereby they would have to pay a basic minimum amount of duty.

The trigger price mechanism cannot operate only for one country. It has to be operated generally for all countries. If it has to work for import in one country then it has to take the shape of an anti-dumping duty. For such an anti-dumping duty there is already a proper procedure laid down and all that the steel industry can request is that the process

of levying anti-dumping duty be expedited. The question of trigger price mechanism does not have any justification now since there is no increase in the import of steel but rather, a decrease of 22% in the first six months of the financial year. All these demands by the steel industry are for:

(a) fixing a trigger price mechanism;
(b) introducing a regulatory duty; and
(c) reduction of customs duty on inputs for the steel have no justification at all.

This whole campaign seems to be directed to prevent the further reduction of customs duty from 30% to 25% or 20%. Indeed, as has been discussed earlier, there is ample justification for reduction of customs duty from 30% to 25% or 20% in the case of steel. There is no justification for regulatory duty. There is no justification for a trigger price mechanism. There is also no justification for reduction of customs duty specially for the inputs of the steel industry.

The foregoing argument is based on the contention that the steel industry will continue to be viable, even if the rate of customs duty comes down to 20%. And at the same time, the Indian engineering industry will substantially benefit from the lower duty.

Alloy steel producers want maintenance of status-quo on the import duty on melting scrap (which is the feed stock for electronic furnaces) at 5%. This demand has some justification.

Ball Bearing Industry

There are quite a number of controversies and appeals at the tribunal stage where the importers have claimed that certain goods are not ball bearings, but machinery parts, either agricultural machinery or other machinery. The reason is that machinery rate of duty was 25%, the ball bearing rate of duty is 10% plus specific duty which takes it to 40% or more. These controversies will end if the ball bearing duty and the machinery duty are made the same, that is, 10%. This step will also make underinvoicing in ball bearings less than

remunerative. It is the contention of the ball bearing manufacturers in India that owing to the fixed rate of duty, certain components of ball bearing such as ball rolls, rubber seals and shields are subjected to very heavy duty which exceeds 200%. This has made the cost of production extremely high. This anomaly will also be remedied if the rate of duty on ball bearings as well as its components is made only 20%.

The rate of duty on ball bearings has come down over a period of time from more than 100% in 1991 to 65% to 25% + a fixed rate (which comes to nearly 40%). While the manufacturers' association does not want the import duty to be reduced further, the importers want the duty to be brought down even more.

One thing that should be noted is that in spite of import duty having been brought down substantially, the indigenous industry is doing very well as can be seen from the following facts and figures:-

In 1996 the total retained profit of the industry was Rs 39.46 crore which is 94.6% over that of 1995. (Business Standard, 1000 Giants). In April-September 1996 compared to the corresponding period in 1995, production increased by 34%, sales by 25% and exports by 9%. SKF recorded its net profit in 1996 March-September as Rs 18.80 crore compared to Rs 11.30 crore in the corresponding period in 1995 an increase of 66.37% (Ball Bearing Manufacturers' Association of India).

Thus these figures show that there is further scope for reducing customs duty, if necessary, without damaging the indigenous industry.

Paper Industry

The paper industry has been complaining about the steep reduction in customs duty on paper from 40% to 20%. It has been asking for an increase to the level of 40% from 20% in 1995-96 budget and thereafter in May 1995 is "unlikely to have an impact for the domestic industry as international paper prices are higher than domestic prices. The only segment where it will take place is the costly and speciality paper segment".

In regard to the import duty on newsprint, the paper industry wants a customs duty of 20% to be imposed on standard newsprint and 40% on glazed newsprint. The government had reduced the duty to nil, but later on raised it to 10%. Newsprint has been placed under OGL. The point made by the paper industry is that newsprint is being imported for printing books also. This point has to be examined closely. Newsprint is supposed to be used for printing newspapers and magazines. If a paper is good for magazines it is also good for printing books. Therefore merely diverting some of the newsprint for printing books is hardly misuse.

The paper industry has suggested that there should be an end-use certificate condition attached to the import of newsprint at nil or 10% duty. This will be an unwelcome measure which is liable to administrative misuse. Therefore, this suggestion should not be accepted. Another point made by the paper industry is that sometimes writing and printing paper is being imported by misdeclaring it as newsprint. On this ground also the paper industry had suggested an end-use certificate system. This suggestion is quite misconceived. Misdeclaration of paper can easily be checked (which probably is being done already by the customs), by testing the newsprint on the basis of the definition given in the tariff. There is no point in attaching an end-use condition when the identity can be verified at the point of importation itself.

From all the suggestions made by the paper industry, it is quite clear that it has been lobbying hard for higher protection which it does not deserve. The basic criterion is to see whether the paper factories are doing well or not. In this context it is necessary to take a look at the profitability of the paper factories in the first six months ending September 1996 compared to the six months ending September 1995 (Table 8). In March-September 1996 paper production has increased by 4.2%, sales by 5% and exports by 33% compared to the corresponding period in 1995 (Indian Paper Mills Association).

Table 9

Performance of the Paper Industry

(1996)

Unit	Retained proft 1996 (Rs cr)	Percentage change over 1995
Ballarpur	78.21	83.1
Orient paper	48.21	155.2
Mysore paper	51.71	120.9
T.N.Newsprint	59.82	100.7
ITC Bhadrachala	27.45	6.5
AP Paper	23.73	53.2
Shesasayee Paper	24.46	152.2
Overall	392.56	89.5

Source - Business Standard 1000 Corporate Giants, Business Standard November 1996.

It is seen that several measures have been taken for the technological upgradation of the paper industry programmes to meet international competition. This has been done in spite of knowing fully well that the duty had come down from 65% to 20% in 1995. A famous Indonesian company called Sinarmus has built a paper factory near Pune and is said to be doing well in spite of customs duty at 20%. It is known that for paper, countervailing duty comes to 24% and the freight is about 5% which brings the total protection to nearly 29%. This amount of protection should be sufficient for the paper industry in India to survive foreign competition.

In general, the Budget of 1997-98 has not removed the anomalies which could have been possible if metal rates and machinery rates were made the same. On the other hand,

the inverted ladder continues, machines being at lower duty while inputs like steel (and even some parts such as CNC systems) attract 30%.

The rates of duty given below show the anamoly in regard to components and raw materials on the one hand and finished goods or capital goods on the other hand:

Table No.10

Raw Materials		Components		Capital Goods	
Alloy Steel	30%	Pistons/rods/wear strips	30%	General Machine	20%
Steel Plates	30%	Filter bag	40%	Machine Tools	20%
Carbon Steel	30%	CNC system parts	30%	Most Textile	10%
Alloy Stainless	30%	Gaskets	40%	Fertiliser Project	0%
Steel tubes	30%	Ring/rackup ring/		Refinery Project	0%
Seamless tubes			40%		
and pipes		rod seal			
Varnishes	30%	Forgings	30%	Power Projects	20%

The machinery chapters 84 and 85 have not been simplified by unifying rates where possible. The number of exemptions has not only not been reduced but even increased. This will not facilitate clearance of goods but, rather, lead to delay and even avoidable harrassment.

Chapter 9

EXPANDED DEFINITION OF MANUFACTURE

In this chapter it is suggested that on the basis of the latest judgement of the Supreme Court on the concept of an expanded definition of manufacture, it is possible to define fixation of a brand name or getting a brand name affixed as manufacture.

On 30th March 1995 a Bench of the Supreme Court delivered a judgement reported in 1995 (77) Excise Law Times 49(SC)in the case of S.D.Fine Chemicals which has wide ramifications in matters concerning excise duty. The implication of this judgement is that if some amendment can be made in the Central Excise Law regarding the definition of manufacturer, it will be possible to plug avoidance of excise duty to a very large extent. For a long time this was not legally permissible but now with this judgement it is permissible.

The Entry 84 of List 1 of Seventh Schedule of the Constitution empowers levy of excise duty on production and manufacture of goods. The definition of manufacture has always been a matter of controversy. By an amendment of Section 2(f) of Excise Act, the Government called the process of dyeing, printing, mercirising, water proofing etc. as manufacture. The matter was challenged in the Supreme Court and in the famous Empire Industries case reported in 1985 (20) E.L.T. 179(SC), the issue was decided, which ruled that these processes are manufacture and therefore are covered under Entry 84. Thereafter, the Supreme Court made a further observation that if the amendment is not covered under entry 84, then it is covered in any case under Entry 97, which is a residual entry in the List I. This observation was made mainly to uphold the amendment.

Later on in the Ujagar Industries case reported in 1988 (38) Excise Law Times 535 (SC), the Bench which considered the validity of the Empire Industries Judgement, made the same observation that the processes which are treated as "manufacture" by definition in the

Central Excise Act are covered under Entry 84 and, if not 84, then under 97. For a long time, no action was taken on these observations to bring in any artificial definition in the excise tariff, and now after a number of years, in 1995, the Supreme Court in the case of S.D. Fine Chemicals, has once again given its ruling on this issue. It has said that "definition of the expression, manufacture, under Section 2(f) of the Act is not confined to the natural meaning of the expression 'manufacture' but is an expansive definition. Certain processes which otherwise may not amount to manufacture are also brought within the purview of and placed within the ambit of the said definition by the Parliament. Not only processes which are incidental and ancillary to the completion of manufactured products but also those processes as specified in relation to any goods in the section or chapter or chapter notes of the schedule to the Central Excise Tariff Act 1985 are also brought within the ambit of the definition.

.....

It would not be right as pointed out in the case of Ujagar Prints to try to restrict the sweep of the definition with reference to Entry 84, List 1 of the Seventh Schedule to the Constitution. Since the constitutionality of the said definition has been repeatedly upheld with reference to both Entries 84 and 97 of List 1 (Empire Industries and Ujagar Prints), the definition must be understood in terms it is couched."

From the said judgement of the Supreme Court, it is now quite clear that the definition of "manufacture" need not be natural and need not be limited to what in truth is manufacture, but it can be an extended or expansive or artificial definition. If not Entry 84, at least Entry 97 will validate it.

Now we come to the question of whether the affixation of brand name either by the firm itself or by another firm on its behalf, could be treated as manufacture. Firms such as Bata and Bajaj Electricals (the owners of the brand name) are regularly getting things made by smaller firms and asking them to affix the name of Bata or Bajaj Electricals and sell the goods back to them. Sometimes brand names are affixed by Bata or Bajaj Electricals themselves after they have purchased the goods manufactured by small firms, and sometimes brand names are affixed by the small firms. In either case, there are numerous judgements which say that affixation of brand names is not manufacture. Even the Supreme Court has

upheld this view. Three such judgements of the Supreme Court are discussed here:

1. Joint Secretary, Government of India v. Food Specialities Limited, 1982(22) ELT 324 (SC). Here Nestle's was getting milk powder etc. manufactured by Food Specialities Limited. The brand name was owned by Nestle's. The Excise Department wanted to charge the duty on the assessable value at which Nestle's was selling them to the market since the Department considered Nestle's as the manufacturer. However, the Supreme Court held that Food Specialities was the manufacturer and not Nestle's and therefore the price at which Food Specialities sold the goods to Nestle's would be the assessable value and not the price at which Nestle's sold them to the market.

2. UOI v Cibatul, 1985 (22) ELT 302 (SC). In this case Ciba Geigy (India) was purchasing goods such as Areldite manufactured by Ciba. Areldite is the brand name of Ciba Geigy. The Excise Department held that since Ciba Geigy was the owner of the brand name, it should be held as the manufacturer and that the assessable value should not be the lower value at which Cibatul sold the goods to Ciba Geigy, but the higher value at which Ciba Geigy sold them in the market. This view has not been accepted by the Supreme Court which has held that, since the transaction between Ciba Geigy and Cibatul is on a principal to principal basis, Cibatul should be taken as manufacturer and not Ciba Geigy. In that case the price at which Cibatul sold the goods to Ciba Geigy would be the assessable value.

3. Sidhasons vs. UOI 1986 (26) ELT 881 (SC). Sidhasons was manufacturing goods with the brand name of Bajaj Electricals and selling them to Bajaj Electricals who were, in turn,selling them at a higher price in the market. The Supreme Court held that Bajaj Electricals cannot be held as the manufacturer, although they were the brand name owners. Accordingly, the price at which Sidhasons sold the goods to Bajaj Electricals should be the assessable value and not the higher value at which Bajaj Electricals sold the goods to the market. While only these three judgements of the Supreme Court are cited here, there are numerous other judgements by the High Courts/Tribunals; all of which uphold the following view.

When one firm A gets goods manufactured by another firm B, (unless it is proved that firm B is a dummy or a camouflage), even if the firm B uses the brand name of firm A and

sells the goods back to firm A, it is firm B which is the manufacturer and not firm A. Therefore the price at which firm B sells the goods to firm A will be the assessable value for paying excise duty and not the higher value at which firm A finally sells the goods to the market.

The net loss here is in terms of collection of the excise duty, which is being collected at a lower assessable value. This has been a contentious issue for a very long time and the Excise Department has always lost because affixation of brand name has been held by the Supreme Court as not amounting to manufacture.

One particular case deserves special mention. This is the well-known case of Bata. The Government of India issued the notification No.18/77 on 9th May, 1977 stating that where footwear manufactured by small firms is affixed by the brand name or trade name of any manufacturer or is purchased by another manufacturer, it shall be deemed to have been manufactured on behalf of such manufacturer. This was done in the form of a notification and not by amending Excise Act,Section 2(f). Amendment of 2(f) was not possible because treating affixation of brand name as manufacture would have been an artificial definition which would have been countered by Entry 84 of the Constitution. The Patna High Court held in this case that so long as 2(f) is not amended to permit affixation of brand name to be considered as manufacture, defining of manufacture in the notification by the Government was ultra vires of the Constitution.

This particular observation of the Patna High Court gave an indication that Section 2(f) could be amended to include affixation of brand name as manufacture. Now we can define affixation of brand name, either by itself or by another firm as manufacturer. If Section 2(f) of the Excise Act is amended to include this definition, then it will not be hit by Entry 84 because at least Entry 97 will now validate it. The latest judgement of the Supreme Court in the S.D. Fine Chemicals case, will give validity to this amendment. It is agreed that defining affixation of brand name as manufacture, will be an expansive definition of manufacture. But expansive definition is now permitted by the Supreme Court in the judgements already discussed. If this amendment is introduced, the net result would be the following.

In all cases where firms such as Bata, Ciba Geigy, Bajaj Electricals and Nestles are getting goods manufactured by other firms, it is not necessary to prove that the latter are their dummies. Even if these are principal to principal transactions, there will be no two manufacturers. The firm which manufactures the goods will pay the excise duty on the wholesale price at which they are sold to the brand name holder such as Bata, Bajaj Electricals etc. (That is what is going on currently). Thereafter, the brand name holders will be held as manufacturer once again because of the new definition of manufacture. They will once again pay duty on the higher value at which the goods are sold by them and get modvat credit on the duty paid by the other manufacturer. This way it will be possible to collect the excise duty on the value addition. Thus the net gain in collection of excise duty will be quite high. The calculation of gain in duty is not practicable. This can be calculated only if the Commissioners are asked to send the data to the Tax Research Unit in the CBEC, but it can be reasonably assumed that it will be in terms of hundreds of crores of rupees.

Chapter - 10

RULE 2(a) OF INTERPRETATIVE RULES IN CENTRAL EXCISE

It is suggested that Rule 2(a) of the Central Excise Interpretative Rules is redundant and should be deleted. The Rule is reproduced here:

"2(a). Any reference in a heading to goods shall be taken to include a reference to those goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. It shall also be taken to include a reference to those goods complete or finished (or falling to be classified as complete or finished by virtue of this rule), removed unassembled or disassembled."

Rule 2(a) on the central excise side is the same as Rule 2(a) on the customs side. Whereas on the customs side it has relevance, in the central excise side it has no such relevance. This point can be made by discussing an example of cars.

When cars are imported in completely knocked down/semi knocked down (ckd/skd) condition, the question arises what should be the rate of duty.

If the cars are imported in ckd condition, then they will have to be taken as parts (subject to Rule 2(a) second sentence)and appropriate duty will have to be paid by them on the customs side and counterveiling duty also as on parts. According to Rule 2(a) if all the parts are presented in unassembled or disassembled form then they will be treated as a complete item.

If the cars come in a semi-assembled condition to the extent that, though they are incomplete, they still have got the essential character of a car, then what should be the rate of duty? Obviously, following rule 2(a) the import duty will be for a complete car and the countervailing duty will also be for a car. The question that next remains (which is a pertinent question) is whether central excise duty for a car will again have to be charged when the goods are assembled. One view is that since import duty has already been charged

on the goods as complete cars, the government cannot once again charge central excise duty on it. This view would have been correct, but for the fact that the definition of manufacature in Note 6 of Section XVII which says that completion of incomplete goods (which have got the essential character of complete goods) will amount to manufacture. Because of this definition, central excise duty also will have to be charged on the assembled car. However, the importer will get the modvat credit of the counterveiling duty paid.

Note 6 of the Chapter Note in section XVII is reproduced as below:

"In respect of goods covered by this Section, conversion of an article which is incomplete or unfinished but having the essential character of the complete or finished article (including 'blank', that is, article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into the finished article or part), into complete or finished article shall amount to "manufacture."

From Note 6 it is clear that it is only in respect of conversion of articles which are covered by this section,that is, vehicles, aircraft, vessels and other transport equipment that conversion from incomplete (but having the essential character of complete or finished article) to finished or complete article will amount to manufacture. If this definition was not there, then it would not amount to manufacture. Moreover, in respect of articles which are not covered by Section XVII, this job of completion from incomplete to complete would not amount to manufacture. The fundamental position therefore, is (leaving out the definition of manufacture given in Note 6), that in central excise when the goods are manufactured in a factory there is no such concept of incomplete goods which are having the essential character of complete goods. For such goods are not sold in the market. Not being marketable they are not goods. Therefore it is only the finally manufactured goods which are marketable which are regarded as manufactured. Rule 2(a) is completely irrelevant for central excise. Both Rule 2(a) and Note 6 need to be eliminated.

The importer of a car which is incomplete but has the essential character of the complete car can argue that once it has paid the customs duty and countervailing duty as

complete car, it will be quite incongruous to charge excise duty treating it as incomplete car and its conversion to complete car as manufacturer. In order to remove this anomaly, Note 6 which has been introduced. Therefore, No.6 as well as Rule 2(a) of the Central Excise can be deleted.

Chapter 11

GOODS ASSEMBLED AT SITE

There has been a great deal of controversy regarding the charging of central excise duty on goods which are assembled at site. In the last two decades, the Central Board of Excise and Customs has issued several circulars (nearly a dozen of them) but the manufacturers are still facing show-cause memos on one ground or the other which are totally unsustainable. The issues involved in this connection are as followings.

a. whether parts assembled at the factory are manufactured goods;

b. whether parts assembled at site are manufactured good; and

c. whether structurals made at site are goods.

There are several judgements that are relevant to the issue which need not be discussed here. But the conclusion derived from these judgements may be mentioned here.

When goods are cleared from a factory, if they are parts of such items which are to be finally assembled at site, (such as boiler, lift, elevator), then duty has to be charged on the parts at the rate of duty for parts. But if the parts at the time of clearance are such that they have the essential characteristics of items which are meant for fixing on earth such as a lift, elevator, or boiler, or if the parts are such that they are a complete unit in skd/ckd condition, then they have to be charged to duty on the whole item and not as parts. Since these overhead lifts, boilers etc, cannot be cleared in fully assembled form but only in skd/ckd condition, it has to be ascertained from the factory as to what the contract for sale is. If the sale is for a full boiler or a full elevator, then the duty is to be charged on a boiler or an elevator, (even if a few parts are bought out and supplied directly to the factory), on the full value of the goods as in the contract, including the price of the bought out items, even if the clearance from the factory is of parts in several despatches.

Now when they are assembled at the site, if certain things are fabricated such as structurals which came into being as identifiable goods (such as chimney, tank, scrubber, tower, hopper) before they are assembled at site, then they can possibly be charged to duty because at that stage they are not immovable property. An overwhelming number of tribunal judgements, however, hold that fabrication and creation of structurals at site do not constitute manufacture, since they are coming into existence in the process of making the plant and machinery which are immoveable property and they are not marketable goods in any case. So these structurals are also not dutiable. The whole product which is assembled and embedded in the earth is immoveable property such as a factory's plant and machinery, a bridge or a dome of a planetarium or a building or an effluent treatment plant, on which no duty can be charged. These are assembled and installed at site and are firmly affixed to the ground and normally are not intended to be moved. They are also not intended for sale even though there may be some cases of transfer of ownership or even dismantling and sale. They are immoveable property and are not therefore 'goods'.

However if the affixing on the ground is of a loose or superficial nature by bolting to a prepared foundation which is merely to stop the vibration of the machine while working, it cannot be called as permanently affixed to the ground and such goods though assembled at site can be called goods. One has to consider (a) the degree or mode of attachment, and (b) the object of such attachment.

The Board may therefore issue a clear circular under Section 37B in the following terms:

i. Assembly of parts constitutes manufacture in a factory (even if some or all the parts have been either manufactured in the factory or bought out) so long as the assembled product is a new commodity known in the market as 'goods'.

ii. No duty is to be paid on plants and machinery assembled at site if they are immoveable property being permanently affixed to the earth.

iii. The parts which constitute the plants have to pay duty when they are cleared from the factory as parts.

iv. If items are cleared in skd/ckd condition after being fully manufactured as goods meant for fixing to the earth such as lift, boiler, elevlator, they have to pay duty as on the whole unit at the factory gate, since that is how they are manufactured and sold.

v. It is not necessary that every time a factory manufactures,say, a crane, it has to disassemble it to sell it as ckd pack. Once the process of manufacturing has been established and tested, it should be allowed to be sold as a ckd pack. Duty will be charged on the complete ckd pack of a crane though cleared from the factory part by part in several despatches. So long as all the parts, including the bought out items, would constitute a crane when assembled at site, and the contract is for the sale of a crane, and the sale is for all the parts of the crane, duty is to be charged on the whole item as a crane and not as parts of a crane.

vi. Structurals which come into being in the process of making plant and machinery which are fixed on earth, are not dutiable as they are not marketable goods.

vii. Those machines which are permanently fixed on earth are immoveable property but not those machines which, for the sake of reducing vibration, are fastened to a foundation in the earth by a loose arrangement made up of nuts and bolts.

Chapter 12

DEFINITION OF WASTE AND SCRAP

There has been a spate of cases recently in respect of the definition of waste and scrap. The Supreme Court laid down in the case of Khandelwal Metal and Engineering Works v. Union of India reported in 1985 (20) ELT 222 (SC), that waste and scrap are also commodities which are excisable goods because they are marketable. This idea was well established. However, in a recent judgement in the case of U.O.I. v. Indian Aluminium Co. reported in 1995 (77) ELT 268 (SC) the Supreme Court said that although dross and skimmings are sold in the market for some price they cannot be taken as marketable goods and therefore they cannot be regarded as excisable goods. After this judgement many manufacturers have now started agitating that the waste and scrap which they are producing are in fact not waste and scrap but refuse. This has led to a large number of appeals at the appellate stage and also at the tribunal stage. It is, therefore, necessary that waste and scrap in the tariff list should be clearly defined so that the controversy ends. The definition should be worded in such a way that whatever comes out as waste and scrap in the course of manufacture, if they are or are capable of being sold in the market for a price, they will be regarded as waste and scrap for central excise purposes. The word 'marketable' should not be used. This definition should be incorporated in the Chapter Notes so as to remove doubts. This will be an artificial definition but would be permissible under the law as there are other artificial definitions also in the tariff. The Supreme Court's judgement in the case of S.D. Fine Chemicals reported in 1995 (77) ELT 49(SC) has permitted such an extended definition.

Chapter 13

INTEREST ACCRUING ON SECURITY DEPOSITS

When the manufacturers of big items such as cars, tractors and turnkey projects take deposits from customers, the interest that accrues from this money deposited with the manufacturers is added to the value of the goods for the purpose of central excise duty. The legality of this process cannot be challenged because the Supreme Court has upheld such a levy but only when there is nexus between the interest and price. However, there are immense practical difficulties in arriving at the correct amount. Considering this, it is necessary that an exemption be given so that the amount of interest is not added to the value while charging excise duty on the goods. The reasoning is given below.

In the case of Metal Box India v. Collector of Central Excise reported in 1995 (75) ELT 449 SC, the Supreme Court has held that the price charged by Metal Box (manufacturer) cannot be said to be the normal price because of favoured treatment given to Ponds (a large customer) on account of advances given by Ponds. Metal Box depressed the prices by 50% due to the interest it earned on the advances. The Supreme Court approved loading the price with the notional value of interest on the advances. The same issue was earlier considered in the case of UOI v. Laxmi Machine Works Ltd. reported in 1995 (57) ELT 211 (Mad), by the Madras High Court, which observed that the benefit of interest that accrues to the assessee out of the advance can be loaded on the price, considering that there is proof in an individual case that there is a nexus between the interest and the price. Now, therefore, it is the job of the Central Excise Officer to find out how much benefit has accrued owing to the interest-free loan to the manufacturer and whether there is a nexus or not. It is not an easy job. Even the circular issued by the CBEC in this connection (215/49/96-CX) dated 27.5.96 has not been able to give any clear instruction as to how to calculate how much benefit has been derived by the manufacturer out of such advance deposits. In fact the circular does not mention the nexus issue at all which means it does not correctly depict the legal position as given in the Laxmi Machine and Metal Box judgements.

In order to find out the correct position, the Central Excise Officer has to know the following.

i. What are the prices charged by other manufacturers who have taken the deposit vis-a-vis the prices charged by those who do not take deposits.

ii. Whether the advance taken is purely a security deposit or whether its nature is more than that.

iii. Sometimes there is a condition in the contract that 5% to 10% of the money to be paid by the customer to the manufacturer will not be paid until all claims are settled and until the guarantee period is over. This is done again to settle the liquidated damages on account of delays or to guarantee the performance of the contracted deal. The loss of interest due to this provision has to be balanced against the gain accruing from the interest derived from the deposits taken by the manufacturer from the customer. CBEC's instruction does not clarify as to whether this adjustment is permissible or not.

iv. Conceptually one can not always distinguish between security deposit and advance payment for procuring raw material. Even in a case where the goods are of specialised nature and are tailor made and the deposit has been taken to guard against refusal of the deal, in effect some of this money taken as deposit may be utilised for procuring raw material. One does not know whether the money which has been utilised for buying the raw material is from the deposit or from the general fund, available to the company in its own account.

v. While the manufacturer of a turnkey project takes such a deposit from the customer, it has itself also to give certain deposits to the manufacturers of certain specialised parts which it has to buy itself for manufacturing this turnkey project. For example while a company may take 10% deposit from Orissa State Electricity Board it may have to give 10% security deposit to,say, Phillips to buy certain electrical parts. There is need for an adjustment in respect of these also. But there is no clear understanding whether it can be done or not.

vi Sometimes deposits have been returned after some time to the purchaser because of the cancellation of the deal. The interest accrued on such deposits can not be attributable to the other commodities which are sold. If the total interest amount is received by them from all advances and pooled, then again it becomes another controversy as to whether such pooling of interest can be done.

vii In the case of goods such as cars, machines which are sold at a uniform price to a large number of people, there cannot be any scope of adding the interest to the price of cars.

viii When contracts are won by International Competitive Bidding (ICB), it is not possible to establish any nexus easily.

Considering all the above complications the Central Excise Officers cannot finalise the assessment without elaborate examination of the books of account for a period of time for which they are neither technically competent nor can they really do it because the issues are still not clear. The Supreme Court and the High Court upheld only the principle that if there is a nexus between interest and price, the price can be loaded. But in practical terms it is virtually impossible to work out the amount which should be added to the value in each case without hurdles being faced by both the officer and the manufacturer. A considerable amount of litigation as well as dissatisfaction have been caused by these requirements. Already a large number of judgements by the Tribunal has been reported in the legal journals and many cases are pending at the Commissioner's and Tribunal's level. Many cases have been remanded by the High Court for re-examination.

Valuation is already a highly litigated subject in central excise. While legally the principle may be correct, considering the complication involved and the small amount of revenue which would accrue from adding interest on security deposits to the value of the goods, it is recommended that if the nexus can be proved, an exemption be given specifically laying down that the interest accruing from such deposits will not be added to the value of the goods. The loss of revenue in this respect will not be considerable. The

gain to the government on the other hand, in respect of attaining simplicity of valuation and avoiding harassment to manufacturers will be much greater than whatever loss of revenue is caused. In any case the government is getting more revenue (estimated to be nearly Rs 250 crore in one year) by amending the valuation section in the 1996-97 Budget. Therefore this simplification by which probably a few crores will be lost will not matter much from the revenue point of view.

Chapter - 14

UNIFORM AND BINDING RULING BY THE CENTRAL BOARD OF EXCISE AND CUSTOMS

Section 151A of the Customs Act and Section 37-B of the Central Excise Act empower the CBEC (or Board) to issue rulings on classification of goods for the purpose of ensuring uniformity. The sections are reproduced here.

"Section 151A. Instructions to officers of customs. - The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions."

"Section 37-B. Instructions to Central Excise Officers. - The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board:

Provided that no such orders, instructions or directions shall be issued-

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate functions."

Fear of Demand Notice

Though classifications and valuations are finalised by officers by issuing an order, the law provides that such assessments can be reopened. Therefore, in order to remove all uncertainty and bring finality to the situation, any manufacturer or importer should be able to approach the Board to give a ruling under 37-B or 151A. The Board may not issue it without considering the opinion of other people making similar products. But it should, within a reasonable period of about three months, issue a ruling under these sections and remove all uncertainty, so that no junior officer is able to issue a demand in future. At present there is no such system. So the importers suffer from uncertainty. It should be laid down in the excise and customs law that if a probable or actual manufacturer/importer approaches the Board for an actual or advance ruling, it must give such a ruling and cannot say that the party should approach the Commissioner for clarification. At present, the manufacturer /importer approaches the Commissioner; the Commissioner sends him to the junior officer and so on. He may never get a final ruling and in any case, if any classification is given by an Assistant Commissioner, it can always be revived after five years (as the law stands at present).

There are far too many cases of demand issued under the proviso of Section 11-A. This proviso allows the Department to invoke a period of five years in case there is misdeclaration or collusion by the party. The fact that there is an enormous number of such cases only goes to show that whenever any mistake is detected (which should have been detected by the officers of the Department earlier, because they visit the factory often), the

officers merely put the blame on the manufacturer and issue a demand for the last five years. This has been sought to be remedied by the Board by providing that the commissioner shall approve the show cause notices in these cases. But this does not solve the problem, because even the commissioners do not want to take the risk of dropping the demand before issuing them. They prefer the safer course of issuing the demand and allowing the party to go to the Customs and Excise (Gold Control) Appellate Tribunal where he gets relief. The total number of demand cases pending with assistant commissioners and commissioners under Section 11-A and its proviso was 38,683 as on 1 January, 1995. The only way in which the issuing of too many demands, including those for alleged misstatements by manufacturer/ importer can be reduced, is by laying down the proviso in the Central Excise Law itself that whenever a manufacturer approaches the Board for a ruling either in advance of manufacturing/importation, or after manufacturing/importation, the Board must always give a ruling within three months under Section 37-B regarding classification. There will then be no question of issuing any further demand for either the last six months or the last five years. This will bring finality to the classification and will give safety and protection to the manufacturer/importer, which is very necessary for further expansion of import activity.

Uniformity in Classification

Since excise and customs are indirect taxes, simplicity, certainty and early finality of the taxes are more important than a doctrinaire attitude.

In order that industry grows smoothly, what is important is to bring in uniformity in respect of classification, even if it means that sometimes, higher rates of duty are charged. At present, the system is such that it only increases litigation rendering it a paradise for lawyers. It is understood that 50,000 cases pending before the Tribunal. Yet, in the normal course, a case comes up for hearing only after 6 years to 7 years. Thereafter, in each case, the manufacturer/importer asks for stay of operation of the order and sometimes the Department asks for postponement. So each case now becomes two cases, because first, it goes for stay and then finally comes up again for hearing. With such awesome pendencies, the assessee is often tempted to make compromises with the officers rather than fight out his case though it is genuine. The situation can be remedied only by a complete change of

attitude towards the whole matter. Merely writing long orders and giving too many hearings does not solve the problem. An overdose of the quasi-judicial and judicial approach must now be stopped and finality should be incorporated in the structure of the Act itself. For this purpose, Section 37-B and 151A should be amended and proviso (b) of both 37B and 151A should be deleted. Whereas Section 37-B and 151A introduced the power of the Board to give directions for classification, the proviso says that the Commissioner (Appeal) will not be bound by it. This has led to a serious anomaly in that, while the Commissioners (Jurisdictional and Judicial) are bound by it, the Commissioner (Appeal), who is also a similar commissioner, is not bound by it. The result is that the Commissioner (Appeal) can continue to give different judgements ignoring the orders of the Board under 37-B/151A and the Commissioner (Judicial) may keep on filing appeals in the Tribunal, resulting in uncertainty and stalemate. The junior officers who really do the assessment in the field do not know what to do. Such situations are not imaginary, but are real, and all too frequent. There are even instances where Assistant Commissioners face disciplinary proceedings and are even suspended, because they have followed the order of the Commissioner (Appeal). One officer approached the Central Administrative Tribunal and argued that all he did was to follow the order of the Commissioner (Appeal). Finally, the charge sheet was dropped, but in the process the whole administrative machinery was unnerved. Therefore, the solution to the problem lies in making suitable legal provisions by deleting proviso (b) to Section 37-B/151A and making further suitable legal provisions. Once the ruling is issued by the Board under 37-B/151A, anybody aggrieved can go to the Tribunal to change that order. But everybody under the Board should be bound by that order, including the Commissioner (Appeal). At present the Law Ministry may not agree to such a provision because it may hold that the quasi-judicialness of the proceedings will suffer. But in reality, quasi-judicialness will not really suffer. In the proceedings before the Commissioner (Appeal) the latter can give his independent decision regarding classification where there is no ruling. If the party feels that the order of the assessing officer is already as per the decision of the Board under Section 37-B/151A, he can go to the Tribunal straightaway, without wasting any time by involving junior officers.

If this suggestion is implemented, the total number of unnecessary litigations will be substantially reduced and uniformity will be established.

Uncertainty about Classification

Uncertainty about classification can be removed if advance and actual rulings are given in a large number of cases under Section 37-B/151A. At present, some rulings are being given as advice but not many under this Section. In fact, a very large number of rulings have been given over the years, but they have not been catalogued. Such old rulings have now become obsolete, because the tariff itself has changed. It is therefore necessary to declare all rulings given earlier as void and only those which are now valid can be re-issued as rulings under Section 37-B/151A.

Ruling - the Methodology

The situations under which an order passed under Section 37-B/151A can be changed are discussed here:

1. The Tribunal can set aside an order passed under 37-B/151A on an appeal being made by an aggrieved person. An aggrieved person is one who is a manufacturer or importer now, and even one who is likely to import/manufacture. This point has to be made clear, otherwise the Tribunal will not entertain requests to review the order under 37-B/151A from any other person except those who are now manufacturers/importers.

2. The Board can itself change rulings under Section 37-B/ 151A which have been given by it earlier. The Board obviously can change it suo motu. This provision is necessary because often it may come to the notice of the Board that a ruling which has been given, is not correct and needs change.

3. The Comptroller and Auditor General can write to the Board to change the ruling of the Board under 37-B/151A, but so long as the Board does not do so, the ruling will prevail.

Position vis-a-vis the Comptroller and Auditor General

The CAG should be able to challenge the reasoning of the ruling, but it should not raise an audit objection on an individual assessment. However, if on a reference of the CAG the ruling is changed by the Board, then its ruling will have a prospective effect and it cannot be given retrospective effect. At present the position is that when a ruling is issued, short levy demands are issued for the last six months. This should not be done. The new ruling should have effect from the date of its issue.

Effect of the Tribunal Setting Aside the Ruling

Another important point that must be settled is, what happens when the Tribunal sets aside a ruling, but the Board has not changed the ruling either because of some delay or because the Board has taken up the matter with the Supreme Court by filing an appeal. The decision should be that so long as the Board has not changed the ruling, the existing ruling should be binding on the field formations. This is necessary for the following reasons:

1. The field formations are bound by the Board's 37-B/151A rulings and should continue to abide by them. They need not be concerned regarding which judgement has gone against the ruling under Section 37-B/151A. That will practically extend the right of disobeying the rulings of the Board to the field officers. Moreover, sometimes Tribunal judgements are not very clear about whether the ruling has been set aside or not. The Tribunal rulings may merely give a judgement from which one can infer certain things, but the same inference may not be drawn by all the officers in the field. Since uniformity and certainty are the major principles for purposes of reform, it is necessary that the Assistant Commissioners should be discouraged from trying to find out from the judgements of the Tribunal whether something has gone against a 37-B/151A order or not. They will also not be aware whether a stay order against a Tribunal judgement has been obtained or not. The same confusion will again prevail if we allow the field formations to find out from the Tribunal's judgements whether a 37-B/151A order has been partially or

fully set aside. The facts may not be similar in all the cases. Whereas they will be free to make a reference to the Board asking whether there should be a change of the 37-B/151A ruling, the field formations should only act on the basis of the existing 37-B/151A ruling as long as it has not been changed.

2. The Board should also not take too long in settling such issues. If the Board does not agree with the Tribunal rulings, it should immediately go to the Supreme Court. If the Board is not able to get a stay from the Supreme Court on the Tribunal's judgement, then the Board should immediately change the 37-B/151A ruling. In sum, the position will be that the existing ruling of the Board under 37-B/151A will continue even if the Tribunal has given a judgement against it until the matter is brought before the Supreme Court and a stay obtained. If the stay is given, then the 37-B/151A order will continue till the Supreme Court's final decision is given. If the Supreme Court does not give a stay, then the Board should immediately change the ruling and wait for the decision of the Supreme Court.

Directorate of Ruling

A practical problem may arise when there are many requests for rulings from manufacturers/importers or prospective manufacturers/importers. To begin with, there will be a large number of such requests. It may be that a large number of requests will continue to come once the manufacturers/importers are convinced about the benefits of such rulings. The practical problem which has been raised by some of the officers is that it may not be physically possible for the Board to give so many rulings quickly enough. This problem is not insurmountable. A Directorate of Ruling can be created, which can work under the Board for the purposes of processing all such cases.

Officer-Oriented Directorate

This Directorate should be manned by one Commissioner and three Deputy Commissioners and several Assistant Commissioners. It should be an officer-oriented unit like TRU (Tax Research Unit under the CBEC), so that it can function efficiently. TRU has

a large number of senior officers. Notings are done only by the Assistant Commissioners, who are adept at using computers. The Directorate of Rulings can be created on a similar line. There should not be much of ministerial staff. Only a bare minimum of ministerial officers should be posted for administrative work. But all technical work should begin with the Assistant Commissioner. That will maintain a higher level of efficiency of the Directorate of Ruling. Once the old system of writing notes by ministerial staff is introduced, efficiency would go down. Therefore, one must be careful not to commit this mistake right from the inception of the Directorate.

Rulings by the Full Board

All rulings under 37-B/151A should be handled by the Member (Budget) to begin with, but the final decision should be given by the full Board. The Board should give rulings after a detailed inquiry and after obtaining reports from the Commissioners, Chief Chemists, and other experts and, if necessary, also after discussions with importers/manufacturers of the products. Not only the manufacturer/importer who has approached the Board but even other manufacturers/importers can be heard through their association or individually by getting their addresses from the association. It is not necessary to hear them but it will be enough to consider their representations in writing. This can be made clear in the law. The issue can also be discussed at Commissioners' conferences. The Board should ensure that the rulings are such that they need not be changed often. Extreme care should be taken in looking into all aspects of the matter before such rulings are given, so that they acquire permanency.

A ruling given by the full Board can be changed only by a Tribunal bench of at least three members.

A question has been raised by some Commissioners whether it will be legal for the Commissioner (Appeal) to be bound by the Board's ruling. It is felt that there will be no violation of judicial propriety since the parties will still have two courses of appeal - one before the Tribunal and one before the Supreme Court. If a Commissioner (Judicial) passes an order, the party has the option of only two appeals. So there will be no discrimination;it will be perfectly legal.

Chapter 15

NATIONAL CLASSIFICATION CODE

At present the importers and exporters have to use different code numbers which are not uniform or same. There is no actual harmonisation among the different code numbers. All these codes are based on the Harmonised System (HS), but in effect they have become different as is explained below:

i.	Customs Code	-	6 digits
ii.	Central Excise Code	-	6 digits
iii.	Indian Trade Classification (of DGCIS)	- -	8 digits (last two digits not H.S.based but uses numbers 1,2,3,4).
iv.	Import Policy(of DGFT)	-	8 and 10 digits (all H.S.based such as 10, 20, 30).
v.	Drawback Schedule	-	4 digits.

Importers have to use different types of codes and a separate number for the exemption notifications. This same item is not written in a similar manner for Indian Trade Classification and Import Policy. Drawback schedule has 4 digits. Therefore there is always a mismatch. In any case, the system is not user-friendly. The users are importers, exporters and customs officers. The disadvantages of the above mismatch are the following:

i. Importers and exporters have to see 5 books and so many notification numbers.

ii. Separate headings have to be entered into computers making the functioning of EDI more complicated.

iii. The DGCIS follows H.S.system upto 6 digits in which the numbering system is 1, 2, 3, 4, etc., while DGFT follows H.S. system upto 8 digits in which the numbers are like 10, 20, 30, etc. The result is that there frequently is a

mismatch of products. For example, what is 2505.10.01 for the Indian Trade Classification will be 2505.10.10 for Import Policy. The same product in Drawback Schedule will only be 2505.

The solution to the problem is that there should be a common code which will be the same for Customs, Central Excise, DGCIS, DGFT and for Drawback Schedule. The advantage of that will be the following:

a. Proper harmonisation can be obtained;
b. There will therefore be no mismatch;
c. It will be user-friendly; and
d. It will be EDI-friendly.

The question now is what should be the code. Whether it should be 4 digits, 6 digits, 8 digits or 10 digits.

From the statistical point of view 8 digits are necessary. In the U.S. and Canada there are 14 digits but such detailed data are not required in our country. For trade and licence purposes eight digits will be enough. In any case, the import policy has not used 10 digits in most cases. The choice therefore is between 6 digits and 8 digits. Whereas for the purpose of Customs and Excise 6 digits are enough, for the purpose of trade and import policy, 8 digits are more convenient. There is one advantage of 8 digits namely, that a large number of notifications can be eliminated if 8 digits are used. The balance of convenience then is in favour of 8 digits. The common code has to be acceptable to all the departments which are under the Ministry of Finance and the Ministry of Commerce. The bureaucrats and ministers of both ministries may sit together and adopt the code. However, whatever is chosen should be finally implemented by all concerned, namely, Customs, Central Excise, Drawback Schedule, Indian Trade Classification and Import Policy. This common code will be known as the National Classification Code.

Chapter 16

RETROSPECTIVE EFFECT OF BENEFICIAL NOTIFICATION

A notification for giving benefits should be issued by the Government of India and given retrospective effect on the pending cases by express provisions in the notification. In order to remove problems in some cases where the intention of the government is to give benefits, it should be made clear in the notification, that all pending cases would benefit by it. This means that only beneficial notifications should be given retrospective effect by a specific mention in the notification. Notifications which are issued to deny certain benefits should not be given retrospective effect. If nothing specific is mentioned in the notification, they will have no retrospective effect, as is the position now.

Legally, there is no bar in extending retrospective effect to a notification. Often notifications are amended to clarify certain issues and to either restrict or enlarge the scope of the notifications. If the intention is to enlarge the scope of the notifications, it is better to make clear in the notification itself that the idea is to give benefit retrospectively. If this is not done, the audit (both internal and external) will hold the view that for earlier periods, the benefits are not admissible.

In a typical case, when audit objection was raised about interpreting the word articles in relation to wires of precious metals, the notification was changed to enlarge the scope to give the benefit to wires also, which was always the intention. But the present manufacturer (for whom the question was raised) will not get the benefit for the past period, the audit says, although the intention always was to give the benefit.

Another example is about the amendment of Rule 57D(2) of the Central Excise Rules. This Rule was amended by Notification No.17/95-CE(NT) dated 18th May 1995 by which it was provided that modvat credit would be allowed in respect of inputs for electricity or steam used in the manufacture of final products within the factory of production. After this amendment the Central Excise Department disallowed modvat credit for the period previous to the date of amendment that is, May 1995, although it had been allowed earlier. Thus the

amendment effectively implied as if it was not allowed earlier. That it was allowed earlier could be seen from several judgements in the Tribunal and Courts. The Revenue Department however felt that since there were some litigations going on at different levels, it would be better to issue a clarificatory amendment. It was believed that this clarificatory amendment being procedural in nature would have retrospective effect, as is well settled in a judicial view. However, the desired result has not materialised. Even where this benefit was being given, it was subsequently withdrawn and show cause memos issued in pending cases. This issue was taken up with the officers of external audit at very senior levels. The view that has emerged from discussions is that beneficial notifications should specify whether they would have retrospective effect for pending cases. If the intention is not to give any benefit, then of course there need not be any such mention.

Distinguishing between beneficial notifications and other notifications is a legally valid proposition. As a matter of fact, the Supreme Court in a number of cases has held that promotional exemptions (beneficial in nature) should be interpreted liberally and other exemptions strictly. [CIT v. Strawboard Manufacturing Company Ltd. 1989 Supp. (2) SCC 523 and Tata Oil Mills v. CCE 1983 (43) ELT 183 (SC). So, such a distinction between the two types of notifications in fiscal law is valid.

Chapter - 17

REMAND

It has been found that in a large number of cases, the appellate authorities such as Commissioner(Appeal) and Tribunal are remanding cases back to the original adjudicating officer. The grounds on which the remands are made are usually the following:

a. The party has been denied natural justice mostly because a sufficient number of hearings were not granted which were asked for by the parties, though some hearings were given.

b. Original documents which were not produced at the time of the adjudication have not been produced before the Appellate Commissioner(Appeal).

It has been observed that frequently cases are remanded by the Commissioner (Appeal) to the Assistant Commissioner or Deputy Commissioner on the grounds given above. The parties are therefore back to square one in respect of the cases which are yet to be decided. They come back to the original adjudicator to get an order. Quite often the order is the same and the parties are once again back to the appellate stage. There have been instances where some cases have been repeatedly remanded and for years together they have not been finally disposed of.

It was some time in the mid 1970s that the Excise Department (appellate authorities) started disposing of cases by remanding them. Before that it was regarded not legally permissible. Once the remanding became legally permissible, there was a flood of remand cases. It gave two advantages to the appellate authorities. First, their disposals were higher and second, they did not have to decide anything specifically. Decision-making became a rarity. Even now the same tendency continues. Discussions with several chambers and associations of trade and industry revealed their intense displeasure and frustration at the nature of disposal of the appellate authorities. The government may not be able to give any direction to the Tribunal in this regard, but so far as the Commissioners (Appeal) are

concerned, the government can certainly give direction to them not to remand cases unnecessarily. The nature of the instruction can be as follows:

1. In regard to cases where the adjudicating officer is supposed to have denied natural justice to the party, no remand should be resorted to unless the party makes a specific request for it. Even if he does make a request, (because he may be interested in delaying the disposal of the case), the appellate authority should refuse to do so if he is convinced that a hearing by the appellate authority itself would serve the purpose of natural justice.

2. In case an original document is produced before the appellate authority at the appellate stage, the case should not be remanded merely on the ground that it was not produced at the adjudicating stage. The original documents are usually in the nature of the following:

i. Short shipment certificates showing that the goods were not loaded in the port of export. On the basis of the certificate the importer claims waiver of penalty under Section 116 of the Customs Act, that is, for not bringing the goods to India even though they were shipped.

ii. Even if such short shipment certificates are produced it is possible for the Commissioner (Appeal) to dispose of this appeal finally by accepting the short shipment certificate. All that is necessary is to ask the Assistant Commissioner MCD (Manifest Clearance Department) to give a note recording his opinion whether the certificate is genuine or not. This simple procedure can as well be carried out at the appellate stage itself. After all, the Assistant Commissioners in the Custom House work not only under the Commissioner I but also under the Commissioner (Appeal). There is no reason why the Commissioner (Appeal) cannot get a note from the Assistant Commissioner (MCD). This used to be the procedure earlier in the Custom Houses, before the system of remanding became common.

iii. Sometimes the parties contend that the market enquiry report shows that the goods are known as a particular item in the market. If the Commissioner (Appeal) has to find out whether it is correct or not, there is no reason to remand the case back to the Assistant Commissioner. He can as well ask the concerned Assistant Commissioner to verify whether the market enquiry report is correct or not and on the basis of his report, the Commissioner (Appeal) can finally dispose of the case.

iv. There are cases where a test report by the Deputy Chief Chemist is required which was not considered necessary. Sometimes the cases are adjudicated even without receiving the test report. Later on the test report might reveal some new factors and the parties may produce them at the time of the appeal. Here also it is not necessary that the cases are remanded back to the Assistant Commissioner to reconsider the test report. The Commisioner(Appeal) may also consider the report and on the basis of its contents decide the case himself.

The substance of the suggestion is that the Commissioner(Appeal) should be clearly told by the CBEC that remanding cases is an unacceptable practice. Disposals should be final disposals. During discussions with the various Commissioners and Commissioners (Appeal) it was found that there were quite a number of Commissioners (Appeal) who hardly ever remanded cases back to the original adjudicator, while there were others who resorted to remanding very frequently. Frequent remanding of cases shows the unwillingness of the officer concerned to take a decision. It is therefore incumbent on the part of the CBEC to issue clear instructions to the Commissioners to put a stop to this practice

Chapter - 18

ORDER OF THE COMMISSIONER (APPEAL)

The Chambers of Commerce as well as importers, manufacturers and some officers of the Department complain that far too often orders passed by the Commissioner (Appeal) are not implemented. While there is a provision in the Central Excise Act and Customs Act that if the orders are wrong and improper they may be reviewed, too many cases are taken up for review although, ultimately, a few cases are sent for review to the Tribunal. In the meantime, the Commissioner(Appeal)'s orders are not implemented for a long time. Therefore, instances exist where Assistant Commissioner (Directorate of Revenue Intelligence) has gone to the extent of giving notice to the importer asking him to show cause why the Commissioner (Appeal)'s order should not be quashed.

Excess on both sides is bad. While importers and manufacturers should not commit any illegalities, officers of the Department also should not flout the orders of the Collector (Appeal). There are many cases where in spite of the Commissioner (Appeal)'s order to release the goods unconditionally,Custom Houses have been asking importers for bonds and bank guarantees. This unsatisfactory state of affairs has damaged the credibility of the system whereby, by going to the Commissioner(Appeal), an importer or a manufacturer should be able to get his grievances redressed.

Instructions have been issued by the Central Board of Excise and Customs that the Commissioner (Appeal)'s order should be implemented. However such orders are often ignored so that the number of such review petitions has enormously increased in recent times. It is very important now for the CBEC to review the situation once again and restore the confidence of importers and manufacturers in the Commissioner (Appeal). This can be done by a strict monitoring of all cases which are considered for review and also finally sent for review. It is also necessary for the Board to tell all the officers under it that only a small number of cases involving very important issues and large amounts of revenue should be sent for review.

Chapter 19

PROSECUTION

The CBEC has been laying down guidelines for prosecution. Prosecution is to be launched in cases involving more than Rs 5 lakhs. It is also laid down that a person who is a repeated offender can be prosecuted. It is however found that in many cases prosecutions are resorted to even when the amounts are much below Rs 5 lakh when the offences are purely technical and when there is no repeated violation. It is also well known that in the case of an important importer, dozens of prosecutions were launched even before the cases were adjudicated. Such excesses on the part of the Department appear to be manifestations of capriciousness and vindictiveness,while others may reflect callousness and, in some cases, pressure from above.

A distinction must be made between gold and silver smuggling cases on the one hand and import and export cases on the other. Established importers, exporters and manufacturers are not likely to run away, so there is no justification for filing prosecutions even before the cases are adjudicated. In fact no action should be taken until the cases are decided in appeal. The Chief Commissioners and Commissioners also should be advised to maintain uniformity of approach and not file prosecution just by taking out one case out of a thousand. It is common knowledge that cases involving several lakhs or crores of rupees are pending without prosecution whereas some procedural cases of modvat involving just a couple of lakhs of rupees are taken to the court for prosecution. The CBEC also should call for all the data on prosecution cases filed and see to it that such vindictive prosecutions are not resorted to.

However, as pointed out earlier, cases of clandestine smuggling of gold, silver etc. are on a different footing and prosecution should be launched without a show-cause memo being issued in such cases.

Chapter - 20

LITIGATION

An efficient system of conducting litigation is necessary in order to realise hundreds of crores of revenue which are blocked in court cases. Conducting of litigation in the Department has been one of the most difficult experiences for its officers. The Commissioners have the responsibility of realising the revenue and they tend to be asked too many questions if revenue realisation falls short of the target. However, they cannot even appoint a lawyer to follow up the case in the court of law. Delay in the court of law is well known. On top of that, the Commissioners usually get only the junior lawyers appointed by the Law Ministry. Only the Law Ministry can make a panel of lawyers and appoint the lawyers in a particular case. If the Commissioner asks for lawyer A, the Law Ministry may appoint lawyer B and further appoint the junior of lawyer C. The result is that the junior of lawyer C does not go and brief the other lawyer B since he is not his senior. Conducting legal cases has therefore always been a weak point in the absence of power given to Commissioners to appoint lawyers of their own choice and also pay their fees.

Since the lawyers are appointed by the Law Ministry in particular cases, they care more for the Law Ministry than for the concerned Commissioner because the latter can neither appoint nor pay their fees. It is therefore not surprising that the importers and manufacturers get away with interim injunctions which are not vacated for years together. Those Commissioners who try to fight out such cases in all seriousness are subjected to the wrath of the incompetent lawyers, non-cooperating law ministry officials and law violating importers and manufacturers. These dedicated officers only fight an unequal battle against great odds. Many a time Commissioners have asked for the power to appoint lawyers and pay their bills. This has not been agreed to by the Government.

It is, however, necessary that this demand be recognised. At least for the Ministry of Finance the exception has to be made that the Commissioners should be able to appoint lawyers and pay their fees. The expenditure involved will not increase, since the money in any case is being paid by the Law Ministry. However, this change will give more clout to Commissioners in fighting court cases in which hundreds of crores of revenue are blocked.

Chapter 21

ASSISTANT COMMISSIONER (REFUND)

In cases of importation when the assessment is made by the appraiser and countersigned by the Assistant Commissioner, the present arrangement is that the importer can go to the Assistant Commissioner (Refund). Thereafter, in case they are still aggrieved,they can file an appeal before the Commissioner(Appeal). Then again they can go to the Tribunal. This situation is not desirable for the following reasons:

i. It is not necessary to get three opportunities for relief when only two are enough because all other types of cases are allowed only two appeals.

ii. It is also a source of delay in finalising cases.

iii. Even legally, the countersigning of import documents by the Assistant Commissioner at the stage of releasing the goods is in order. Therefore an appeal should straightaway be filed to the Commissioner (Appeal).

The system therefore should be changed so that wherever the Assistant Commissioner has put his signature on the import documents even by way of countersigning, it should be treated as if he has passed an order. Obviously, he would have applied his mind while countersigning. This cannot be treated as anything but an order under the Customs Act.

Chapter - 22

POWER TO MAKE FUNDAMENTAL CHANGES THROUGHOUT THE YEAR

One reason why too many changes have to be made during budget time is that the Finance Minister does not have any powers to make any fundamental changes in between two budgets. Here we are not referring to changes in the tariff rates of duty. The Ministry should at least be able to change the Chapter notes and Section notes of the tariff, giving definitions etc. with the permission of the Finance Minister. If this is allowed, then continuous controversies which are settled only at budget time, can be settled as and when they arise. At present what is happening is that if such controversies arise where the solution lies in changing the definitions in the tariff, then it can be done by changing the Section note only at the time of the Budget. In between, clarifications are given by the Board, which are quite often challenged in the Tribunal and also by the Accountant General's (AG's) office. The AG's office having audit power is usually not bound by clarifications of the Board. This power to change the Section notes and the Chapter notes in the tariff, if not the tariff rate itself, can be introduced by suitable legislative sanction in the Finance Bill. This requirement must be emphasized when any reforms are discussed.

Chapter - 23

TRIBUNAL

It is important that the disposal of cases by the Tribunal is expedited so that the assessees get justice without undue delay. This will prevent them from going to the High Court or the Supreme Court. In the High Court they take the plea that although the alternative remedy of going to the Tribunal is available, since mostly the old cases are being heard, they do not have any means of getting quick justice in the Tribunal.

After discussions among Tribunal persons of different ranks associated with and working in the Tribunal on how to increase the disposal of appeals pending in the Tribunal without compromising on quality, the consensus that has emerged is that more matters should go before a single bench in order to reduce the pressure on the two or three member benches who give final disposal of cases.

There are also reasons why there should be more appeal cases made available for disposal by single benches. There are always vacancies either on the judicial side or on the technical side. The number of technical members and judicial members are effectively never the same. Moreover at any given time several members are on leave. Thus there are always a few single members available but not always a group of two (one judicial and one technical). If single members are allowed to take up cases as single member benches, then disposal will be much faster.

The following are some suggestions for creating more cases for single member benches.

1. The limit of Rs 10 lakh should be extended also to cases involving classification and valuation.

National Institute of Public Finance and Policy had given a suggestion in a previous report called MODVAT - Short Term Administrative Reform, submitted in March 1996,

that the power of the Single Tribunal Bench should be increased from Rs. one lakh to Rupees 10 lakh. However, the amendment that was introduced in the last budget (1996-97) raised the limit to Rs 10 lakh for all other matters excepting classification and valuation. The result is that in respect of classification and valuation, the same limit of Rs 1 lakh continues. The more important and numerous matters that come up before the Tribunal are in respect of classification and valuation, therefore the increase in monetary limit should also be extended to such cases by a suitable amendment of the law.

An objection that may be raised against this suggestion is that classification and valuation being more important matters, a single bench decision may become a precedent even when the decision is not correct. This view however is not tenable for the following reasons:

i. Each member of the bench is experienced and is well aware of the decisions given by the Tribunal over a period of years. It is unlikely that the Tribunal members will make a mistake just because they sit singly.

ii. In several High Courts, there are single benches even for writ jurisdictions.

iii. So far as the law of precedence is concerned, if there are wrong judgements given by single benches there will be several judgements of two member benches on the same issue. Judgements given by two member benches will have precedence over the judgements given by the single benches. The judgements of the single benches therefore will only be of application for those individual cases.

2. Some short matters also should go to single benches.

The present two member benches spend almost half the time in dealing with short matters such as stay applications, waiver of pre-deposit of duty and penalties, references to the High Court, rectification of mistakes, prayers for early hearing and admissibility of additional grounds. If the short matters are given to single benches then the disposal of

cases by the Tribunal will be much faster. Each item is discussed below:

i. Stay of pre-deposit - only a prima facie case has to be established. A decision given here is not laying down any principle.

ii. Early hearing - requests for early hearing also need short hearing. No decision is involved. These also can be given to single benches.

iii. Admissibility of additional grounds - these cases also do not need any decision on principle, so they can be decided by single benches.

iv. Rectification of error - this has to continue with two member benches in case the original decision was given by a two member bench.

3. Suggestions to increase disposals.

In order to increase disposals, cases should be bunched, that is, cases on the same issue can be bunched together so that there can be several disposals on one decision. It is understood that there is a software available which has been adopted in the Supreme Court by which it is possible to find out which cases relate to the same issue. It is also understood that because of this there has been a very large number of disposals by the Court and the pendency has come down substantially. It is necessary that the same type of software is adopted by the Tribunal so that it will be possible to find out what cases will be affected by a particular judgement thus ensuring higher disposal rates.

So long as this computer framework is not introduced, this job can be done manually either by the Tribunal itself or through the agency of the Chief Departmental Representative. This work has not been seriously attempted so far, but there is no reason why it should not succeed. These are the following ways in which the grouping can be done:

i. The Commissioner should be asked to group the cases relating to his jurisdiction according to the issues not only on a broad aspect like valuation

but in respect of the specific Section and sub-Section of the valuation law or specific tariff items.

ii. At the same time in the office of the Chief Departmental Representative the files can be examined on the basis of the issues involved and bunched together.

We do not recommend any extra officers for Tribunal at any level. If the work can be rationalised, the disposals will be faster. If the general rationalisation in tariff that has been suggested earlier is implemented, litigation will also be substantially reduced.

Chapter - 24

PLAIN LANGUAGE NOTIFICATION

At present too much legalistic language is used in writing notifications and rules. In the budget of 1996-97, one notification was written in plain language. It is suggested that all notifications now be redrafted and rewritten in plain language. A small group of officers may be given this task to rewrite the rules in simple language which will be more comprehensible to trade as well as to officers.

Chapter 25

DATE OF EFFECT OF NOTIFICATION

There has been an on-going controversy concerning the date of effect of a notification. Often a notification is printed on a particular day while it is issued after a few days and then it takes more time to reach different places of our geographically large country. The notification reaches different places at different times. Importers and manufacturers claim that the date of effect of the notification should be when they come to know of it. One party in Mumbai claimed that it should be effective in Mumbai only when the notification is first sold in Mumbai. Similarly one Londoner claimed that the concerned notification should be effective when it is first available in London.

At the level of High Courts, the opinions were divided. The following judgements held that the date on the official gazette is the date of effect of the notification.

A. General Fibre Dealers v. U.O.I. 1986 (26)ELT 494(Cal).

B. C.I.T. v. Shilaben Kanchan Lal Rana 1980 (124) ITR 420,431(Guj).

Other judgements which have held that the date of effect is when the notification is released and made available, are mentioned below:-

A. U.S.Awasthy v. I.T.Appellate Commissioner 1977 (107) ITR 796(All)

B. Kishen Lal v. C.I.T 1983 (142) ITR 312 (All)

C. Asia Tobacco Company v. U.O.I 1984 (18)ELT 152(Mad)

D. GTC v. U.O.I. 1988 (33) ELT 83(Bom)

E. R.Narayana Reddy v. State of Andhra Pradesh 1969 (1) An W.R.77.

In the last mentioned case Justice Chenappa Reddy observed on the claim that delegated legislation comes into effect on the day they are printed in the Official Gazette, "It has with it a strong odour of totalitarians and of gestapo, is repugnant to the principles of justice, freedom, equality and fraternity cherished by all lovers of democracy and enshrined in our Constitution. The very idea is revolting to natural justice and civilised thought."

After confusion reigned for a long time, a Supreme Court judgement in the case of Pankaj Jain reported in 1994 (72) ELT 805(SC) ruled that the notification came into effect on the date it was published in the Gazette. The Gazette of India in which the notification appeared was dated 13th February 1986 but the Gazette was available in Mumbai on 19th February 1986. The Supreme Court ruled that the first date, namely 13 February, was the date of publication and the date on which the notification would take effect.

This judgement is reiterated by an earlier judgement of the Supreme Court in the case of B.K.Srinivasan v. State of Karnataka reported in 1987 (1) SCC 658. In this case under the Karnataka Town and Country Planning Act 1961 the Supreme Court has made the following observation: "It is necessary that subordinate legislation in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by parent statute or not. It will then take effect from the date of such publication or promulgation".

The Supreme Court has said clearly that the effect will be from the date of publication, but it must be admitted that the controversy about the date of circulation to the public versus the date of publication was never under consideration before the Supreme Court. The Supreme Court in the Pankaj Jain case however relied on the previous judgement in the case of B.K.Srinivasan. This decision in Pankaj Jain case has ended a long drawn out controversy resulting from the conflicting opinions of the High Courts.

A weighty argument was given by the Calcutta High Court when it ruled in favour of date of publication in the official gazette as the date of effect of notification in the case of the General Fibre Dealers' case reported in 1986 (26) ELT 494(Cal). The High Court

observed that published notifications are available at different places at different times. This is a consideration which no other High Court has taken into account. India is a vast country and it will be on many different dates that an official gazette will hit the book stands in various nooks and corners of the country. If we go by the criterion of when the gazette is available to the public then the dates will vary and there will be a perpetual state of uncertainty. Therefore the view enunciated by the Calcutta High Court and endorsed by the Gujarat High Court and finally upheld by the Supreme Court seems to be based on sound practical reasoning.

The matter is not yet settled since in different fora people started pointing out an earlier judgement of the Supreme Court in the case of State of Madhya Pradesh v. R.R.Prasad AIR (1979) SC 888 which was not brought to the notice of the Supreme Court when it delivered the judgement in the Pankaj Jain's case. This judgement in the case of State of Madhya Pradesh v. R.R.Prasad said that publication is an act of rendering something accessible to public scrutiny and this is possible when it is actually brought to the notice of the public. Thereafter two fresh cases have been admitted by the Supreme Court on the issue,one as civil appeal No.254 of 1991 reported in ELT Vol.83 Part 3 A188 and SLP No.16228-9 of 1993 reported in ELT vol.81 Part 2 Page A96. This shows that the issue is still open in the sense that the Supreme Court has admitted this issue once again. Had it been regarded by the Supreme Court to be a settled law, it could have closed the matter by allowing the petition straightaway in limine. We may avail of the judgement of the Supreme Court to settle the issue once and for all quite probably in line with Pankaj Jain's case.

It would be much better though, to put the matter beyond doubt by mentioning it in the Customs Act as well as in the Central Excise Act , that the date of effect of a notification is the date which occurs in the official gazette in which it is printed. It is suggested therefore that below the sub-Section (1) of Section 25A of the Customs Act and below the sub-Section (1) of the Section 5A of the Central Excise Act, Explanation is inserted thus. "For the purpose of the above sub-Section the date of the official gazette containing the notification will be the date of effect of the notification". The word 'publication' is to be avoided because that is what has raised all the controversy.

Chapter - 26

EXECUTIVE POWER OF REVIEW

When the improper and illegal orders are passed by Assistant Commissioners, Deputy Commissioners and Commissioners in the normal course, the remedy lies in the parties' filing an appeal. Whereas the pendency before the Commissioner (Appeal) is not very high, the pendency before the Tribunal is so high that sometimes cases come up after 5 years or more.

Under the circumstances, merely asking the parties to file an appeal becomes an infructuous exercise, particularly when the goods are under detention. In some cases, where it has been found that the goods were clearly within the purview of an exemption notification, the Commissioner has, under some misapprehension, passed an adjudication order denying the exemption. The parties have brought it to the notice of the CBEC but the Board can only advise the parties to file an appeal. In the meantime, the goods are under clearance and the importers will have to pay a higher rate of duty. They may get the refund after many years. Before the Customs Excise and Gold Control Appellate Tribunal came into being in 1982, the Board and the Commissioner both had powers to review under the Customs Act. If an Assistant Commissioner passed a wrong order and it was an urgent matter, rather than asking the party to file an appeal, the Commissioner could review the order of the Assistant Commissioner. Similarly, the Board could review the order of the Commissioner. The two systems of review and appeal were available side-by-side. There was therefore no difficulty at all because the review power was not exercised in all cases. Only in those cases where the impropriety and illegality were palpable and where urgency was called for, were these powers exercised. An example which can be cited, relates to an Assistant Commissioner who confiscated copies of the Encyclopedia Britannica owing to some misunderstanding. When the Commissioner came to know about it, he merely called the file and wrote in the file that the order of the Assistant Commissioner be set aside. The goods were released immediately. The Commissioner no longer has this power. Now the situation is that the case has to go to the Commissioner (Appeal) on an appeal being filed either by the party or by the Commissioner. The latter can only file an appeal to the

Commissioner (Appeal) as he does not have the power to pass the review order himself. When the Tribunal came into being, these powers of review by the executives were withdrawn. It has been widely felt by the Commissioners and many other senior officers that this power should be restored. The law needs to be amended accordingly to restore the power of the executive to review the orders of his officers as it was before 1982.

One cannot argue that before 1982 since the Tribunal was not there the situation was different. This contention is not correct because even before 1982 though there was no Tribunal, the appellate procedure was available. It was merely in a different form. Revision application before the Ministry and appeal before the Tribunal are merely two different forms of appeal.

From 1878 when the Sea Customs Act was enacted, until 1982, that is to say for 104 years, the situation of parallel appeal procedure and executive power to review continued. There is no reason why it should not be restored now.

Chapter 27

ADMINISTRATIVE RESTRUCTURING OF THE DEPARTMENT OF EXCISE AND CUSTOMS

The Indian economy is rightly called an over-regulated bureaucrats' paradise. Some of this attribute may stick to the Customs and Excise Department also.

In the last several years, the number of senior officers at the Group A level in Indian Customs and Excise Service recruited has been very high. Some of the batches consist of nearly 65 officers. These officers, given the present structure of the Customs and Excise Department will probably retire as Deputy Commissioner and not even as Commissioner. From the very beginning, they become aware of the limitation in their promotion prospects and this makes them passive,if not worse. It has to be seriously considered whether there should be a large Department with passive and indifferent officers or whether a smaller Department with officers having more initiative and zeal would be better. It is generally believed that if the number of people in all Government Departments is reduced by half, then corruption also will become half. There is much truth in this. Therefore, so far as the Customs and Excise Department is concerned, the proposal is that we should downsize not only to reduce corruption but also to increase the initiative and enthusiasm of the officers.

Some concrete suggestions for restructuring are given here, beginning with an example and followed by some generalisations.

One hundred Class A posts can be created by giving up 300 Class B posts because the pay and perks of 300 Class B posts would equal the pay and perks of 100 Class A posts. Similarly, 200 Class C posts can be abolished to make 100 Class B posts. Within Class A itself, 300 junior level posts of Assistant Commissioners can be abolished to make 100 Deputy Commissioners. In this way, the number of such senior officers who can do better supervisory work with the help of computer can increase and at the same time the total number of junior officers could be reduced. This will downsize the Department. Once this is done, the system of signing a document, countersigning it by another officer and further signing by still another officer could be replaced by one officer approving a document.

Several proposals like this have been earlier worked out by different service associations in a piecemeal manner. It is therefore necessary that a proper decision is taken to downsize the Department in number by upgrading several junior posts to give them 1/3 the number of the senior posts. In the process 2/3 of the posts are abolished while the expenditure remains the same.

It is to be understood that the government posts particularly Class A level posts are not meant for merely creating employment. There are just about 1100 Assistant Commissioner posts in the Customs and Excise Department. If it is reduced to 550, 550 persons will lose their jobs but the Department will certainly become more efficient. The same can be done for Groups B, C and D. A careful attrition policy would have to be worked for this, however.

It is generally assumed that when the work is not done efficiently then the best thing to do is to recruit more people to do the job. This is possibly a natural attitude in an overpopulated country such as ours where government as an essential employer. It has to be understood that a government department is not the place to create employment, however, in today's interconnected world. A smaller number of government officers, better paid and working with a better computer system to monitor performance, will be in consonance with the idea of reform. The reform being thought of now is to loosen the grip of the Department on the assessees, while at the same time keeping a check from a distance through post-audit, collection of intelligence and targeting investigation. The whole lot of appraising staff in Custom Houses who have been raising vague queries such as, produce catalogue, explain classification etc. could be employed much better , after the goods have been cleared, to analyse the data and find out if there has been any mistake or evasion. The present system of sitting tight over goods and raising query after query, signing and countersigning all documents before they are released must stop in order to bring it in consonance with reform.

In this report, we have chosen to write about corruption directly because it has become almost impossible to go and attend meetings and conferences where some importers, exporters and manufacturers are present, without hearing from them liberal doses of

references to corruption by the departmental officers. There is no point in hiding the truth any more and be reticent about discussing the matter to find a solution. It is better to call a spade a spade. Only then we may be able to find out a solution to the problem.

It is suggested in this report that a decision in principle must be taken by the Ministry of Finance to downsize the Department in the interest of reform. The modality can be worked out in greater detail with all the figures in the possession of the Ministry, once this principle is agreed upon.

Chapter 28

SUMMARY OF RECOMMENDATIONS

1. A Self-Removal Procedure should be introduced in respect of importation of goods. Classification of customs duty and valuation of the goods ought to be done by the importers themselves, who will pay duty on that basis and clear the goods. There should not be examination of the goods at the stage of clearance except in those cases where there have been intelligence reports or suspicion.

There should be a group of officers for targeting such consignments which are to be examined. The rest of the goods should be cleared without examination. If any licence or end-use bond has to be produced it can be submitted at the time of clearance of the goods. Post-auditing can be done on all the bills of entry which will be in the computer. Adjudication of duty which may be demanded due to mis-classification or wrong valuation can be done by issuing a show-cause memo. All this will be expedited with the help of the Electronic Data Interchange (EDI) system. The EDI system should be introduced in all the Custom Houses at one time. The cost in this connection will be more than realised by increased efficiency in customs clearance and its impact on production and economic growth. More emphasis will now be placed on the collection of intelligence and study rather than on examination of the goods. To begin with, this can be limited to the major customers and not traders. However, in the case of traders while the classification and valuation will be done by the Custom Houses, examination of the goods will not be done except where intelligence reports indicate the need for such an examination.

The system of signing of documents by two or three officers should be done away with. Clearance of cargo should be continued for 24 hours of the day and on all days of the year.

2. While it is known that there is undervaluation of imports, the studies made to assess the extent of it have not given very clear estimates. However, from the picture that emerges it is necessary that special attention be given to analyse the valuation data and collate them

in a centralised manner. Once the self-removal of imported goods is introduced, the need for a centralised valuation organisation will become all the more necessary. A Valuation Directorate should be in the Custom House Bombay and not as a separate directorate under the Ministry.

3. Most of the end-use bonds should be done away with. Only a declaration will do. The system which has been recently introduced to authorise the Assistant Commissioner of Central Excise to monitor end-use has led to unnecessary harassment of manufacturers. This should be done away with.

4. Merchandise should be allowed to be imported along with baggage by passengers. They should be classified as merchandise.

5. The export procedure in all the Custom Houses has remained slow and manually operative. It is only in Delhi airport that the latest method of EDI has been introduced. This has made a lot of difference, improving upon the old system. It is now possible to detect the existence of fraudulent exporters with the help of the computer generated data base. This should however be implemented immediately in all other Custom Houses also. The cost involved will be far less in comparison with the benefit received in the form of promotion of exports.

6. The problem of import-export nexus which is plaguing the clearance of goods in customs can be solved if (a) specific licences are issued, and (b) the concerned notification is amended.

7. In the latest Import Policy Book, April 1996 to March 1997, the Commerce Ministry has indicated the items that are permissible and those which are not permissible or important. At the same time, it has specified which items are consumer goods and which are not. This has only increased the scope for controversy and, with it, for litigation. So long as the Commerce Ministry indicates in the finance policy which item is liable for import and which is not, there is no need to specify which is a consumer good and which not. In order to decrease litigation it is necessary that the concept of consumer good is abandoned. If the

Ministry of Finance is convinced about this, the Commerce Ministry can be persuaded to think likewise.

8. Restructuring of tariff rates - Simplification of procedure must be accompanied by restructuring. On the customs side, there has been a reduction from 23 rates in 1993-94 to 9 rates in 1997-98. For 1998-99 it is proposed that on the customs side the number be brought down to five rates, namely, 30%, 20%, 10%, 3% and nil, and on the central excise side similarly, to four rates,namely 30%, 20%, 10%, and nil, so that transparency is obtained and controversies are removed.

In general the anamolies have not yet been fully removed.

One of the major recommendations on the customs side is to make all machinery and metal rates equal to 20%. This will also include ball bearings and computers. The machinery Chapters 84/85 should be simplified by moving towards one rate to the extent possible. The number of exemptions should have been reduced instead of increased in the last Budget 1997-98. This is essential for faster clearance and prevention of avoidable harassment.

9. The definition of manufacture in central excise can be amended, introducing the concept of affixing of a brand name as manufacture. It is an artificial definition but it will be legal and practical.

10. Rule 2(a) of the Central Excise Interpretative Rules should be deleted along with Note 6 of the Chapter Note in Section XVII.

11. Goods assembled at site are not manufactured goods. On-going controversies for decades should be set at rest by issuing a clearly worded circular, as enunciated in Chapter - 9.

12. Definition of waste and scrap should be laid down in the tariff.

13. On the central excise side, it is legal to add to the value of the product the interest accruing from the deposits taken by the manufacturer from the consumer. However since there are immense practical difficulties in arriving at the correct amount, an exemption should be given so that the amount of interest is not added to the value of the product. The revenue loss will be minimal but the gain in simplicity of procedure and goodwill from the manufacturers will be substantial.

14. At present there is too much uncertainty and lack of uniformity in the classification of goods both on the customs side as well as on the excise side. Although there is a provision under Section 37B of the Central Excise Act and 151A of the Customs Act for issuing instructions to officers of customs. The present provision is not being fully utilised in the way in which it should be. The Section also needs to be amended to make all officers who come under the Board bound by these instructions. The Commissioner (Appeal) will also be bound by these instructions. Once a ruling is given it should be binding on everybody including the Accountant General (AG) working under the CAG. If CAG wants to question the ruling then he can enter into correspondence with the Board but cannot raise an objection for a particular consignment where classification has been done in accordance with the ruling. So long as the Board does not change the ruling even after correspondence with the CAG, the ruling of the Board will prevail. The Central Excise Gold (Control) Appellate Tribunal can set aside the ruling of the Board only when such ruling is given by Tribunal by a bench of three. However, if the Board is dissatisfied it can go to the Supreme Court for a stay. If the stay is not granted then the ruling should be amended. Until that time so long as the Board does not change the ruling, that ruling of the Board must prevail.

The idea is to bring uniformity and certainty to the whole system. Trade and industry are in conformity with this idea. They prefer uniformity and certainty. They have pointed out that customs and excise taxes being indirect taxes, so long as it is certain that everybody is to pay the same tax, it is much more desirable even if slightly higher or lower taxes are collected. Uncertainty of classification and consequent litigation are highly detrimental to the growth of industry. A system of certain and uniform ruling is what is required.

The ruling has to apply not only to those who are manufacturing and importing the goods but also to those who are intending to manufacture or import the goods. To ask for a ruling it is not necessary for a person to face a show-cause memo or to actually become an aggrieved person. A person can ask for it for the sake of obtaining certainty and uniformity. In order to cope with extra work, it may be necessary to have a Directorate of Ruling working under the Member (Budget). He can place the ruling before the full Board and get the approval before issuing such a ruling.

15. At present the same code is not used for Customs, Excise, DGCIS, DGFT and Drawback Schedule. Customs and Excise use six digits, Drawback Schedule four digits, Indian Trade Classification eight digits (the last two digits not being based on the harmonised code) and Import Policy eight to ten digits (the last 2 or 4 digits based on the harmonised code). These different codes result in a mismatch of products. Also importers and exporters have to use different codes and the officers have to check many different codes. We suggest that there should be one common code which should be six digits or eight digits . If an eight digit code is chosen then many exemption notifications will be abolished, because the rates can be mentioned in the tariff itself. This common code will be user-friendly as well as EDI-friendly. This matter has to be decided jointly by the Ministry of Finance and the Ministry of Commerce. The common code should be known as the National Classification Code.

16. Beneficial exemption should be given retrospective effect by specific mention in the notification.

17. Remanding of the cases at the appellate stage should be drastically reduced. Disposal should be a final disposal. The importers and manufactures should not be sent back to square one.

18. The Appellate Collector's orders should be implemented and not given scant regard as is now the order of the day.

19. Prosecutions sometimes seem to be launched in a vindictive and capricious manner.

It is suggested that in the case of smuggling prosecution can be launched even before the show-cause notice is issued. However, in the cases involving issues such as in appraising cases, normal import and export cases, and central excise cases involving classification and valuation, prosecution should not be launched before the case is established and adjudicated.

20. In order to conduct litigation it is necessary to give powers to Commissioner to appoint and make payments to the lawyers. At present this power is with the Law Ministry. The result is that the Commissioner has responsibility but no power.

21. The Assistant Commissioner (Refund) should not hear appraising cases where the bills of entry have already been countersigned by another Assistant Commissioner. Such cases should straightaway go to the Commissioner (Appeal).

22. The Finance Ministry should have the power to make fundamental changes throughout the year rather than only at the time of the Budget.

23. In order to increase the rate of disposal of cases filed before the Tribunal it is suggested that single member benches should be able to hear cases where the disputed amount is up to Rs 10 lakhs in respect of classification and valuation. At present this limit is only for cases other than those of classification and valuation. It is also suggested that short matters such as stay of operation, early hearing and admissibility of additional grounds should be heard by single member benches. This will release the two member benches from such work and allow them to devote more time to final judgements. If cases are grouped together according to subject, disposals can be increased. For this the computer software which has been already introduced in the highest court should also be made use of by the Tribunal.

24. Notifications should be issued in plain language. In the 1996-97 budget one such notification has already been approved by the Law Ministry. It is suggested that all the existing notifications be taken up, rewritten in plain language and introduced in the next budget.

25. The controversy regarding the date when a notification takes effect can be definitely set at rest by incorporating an explanation at the end of sub-Section (1) of Section 25A of the Customs Act and the sub-Section (1) of Section 5A of the Central Excise Act to the effect that the date of the official gazette containing the notification will be the date of the effect of the notification. The word, publication, is to be avoided.

26. Before the Tribunal came into operation in 1982, the executive had power to review the powers of the junior officer. At that time, the appellate remedy as well as the executive remedy ran in tandem with each other. When the Tribunal came into being in 1982, the executive power of government was abolished. This in effect, made the executive quite powerless. If the parallel provision of review and appeal could continue for more than hundred years there is no reason why it cannot be introduced once again.

27. The Customs and Central Excise Department should be restructured by downsizing manpower. Several lower posts can be given up to create some higher posts. At the same time some vacancies need not be filled. This will ensure a slimmer but more efficient Department which will have better promotion prospects.