Report of the Comptroller and Auditor General of India

for the year ended March 2009

Union Government

(Indirect Taxes –Customs)

(Compliance Audit)

No. 14 of 2009-10

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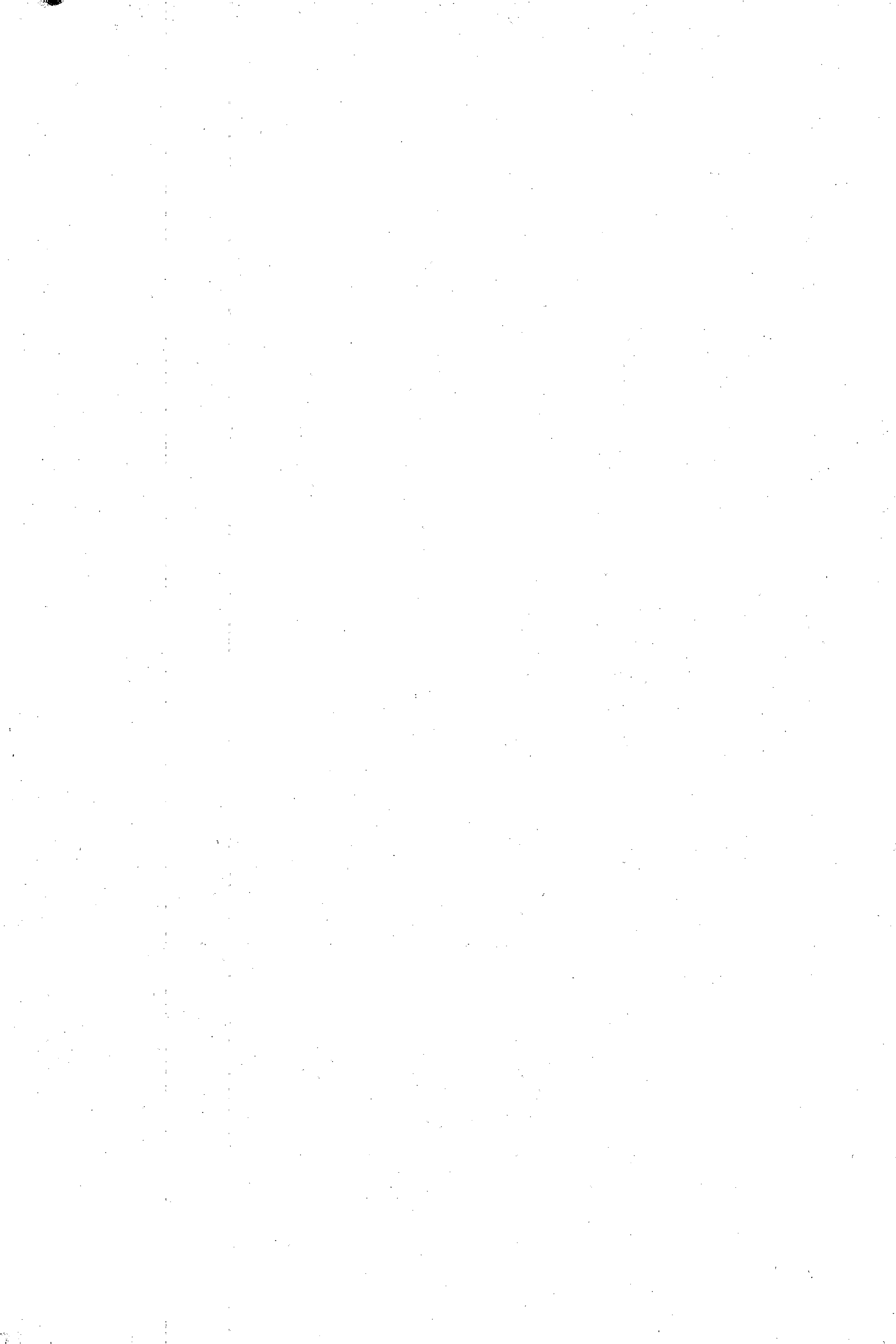
PREFACE

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

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

This report presents the results of audit of receipts of customs duties.

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



EXECUTIVE SUMMARY

The report has a total revenue implication of Rs. 54.09 crore covering 112 paragraphs. The Ministry/department has accepted, till January 2010, the audit observations in 80 paragraphs (71 percent of the paragraphs featured) with a money value of Rs. 31.64 crore. The total recovery effected at the instance of audit upto January 2010, is Rs. 16.54 crore.

Chapter I: Customs receipts

- **Budget estimate for 2008-09 was pitched at Rs. 1,18,930 crore and revised estimate at Rs. 1,08,000 crore. Actual co llection of Rs. 99,879 crore, however, fell short of both the budget and revised estimates as the duty rates were reduced for some of the major commodities.**

{Paragraphs 1.1 & 1.3}

- **Duty foregone under various export promotion schemes during the year 2008-09 was Rs. 61,174 crore which was approximately 61 per cent of the total receipts of customs duty.**

{Paragraph 1.4.1}

- **The expenditure incurred on the collection of customs duty during the year 2008-09 as a percentage of customs receipt was higher than that incurred in the previous year.**

{Paragraph 1.5}

- **Customs revenue of Rs. 5,136.29 crore was not realised by the department at the end of financial year 2008-09. Of this, an amount of Rs. 1,947.81 crore was not recovered for over ten years, despite being undisputed.**

{Paragraph 1.6.2}

Chapter II: Duty exemption schemes

- **Revenue of Rs. 24.30 crore was due from exporters/importers who had availed of the benefits of the duty exemption schemes but had not fulfilled the prescribed obligations/conditions.**

{Paragraphs 2.1 to 2.7}

Chapter III: Incorrect assessment of customs duties

- **Incorrect assessment of customs duty totalling Rs. 10.50 crore was detected in audit. These arose mainly due to non-levy of anti-dumping duty, non-recovery of drawback paid, adoption of incorrect assessable value, non-levy of National Calamity Contingent duty etc.**

{Paragraphs 3.1. to 3.12}

Chapter IV: Exemptions

- **Duty of Rs. 9.72 crore was short levied due to incorrect application of exemption notifications.**

{Paragraphs 4.1 to 4.3}

Chapter V: Classification

- **Duty of Rs. 7.05 crore was short levied due to misclassification of goods in 24 cases.**

{Paragraphs 5.1 to 5.11}

Chapter VI: Non-levy/short levy of additional duty

- **Additional duty totalling Rs. 2.52 crore was not levied or short levied on goods imported by 52 importers.**

{Paragraphs 6.1 to 6.3}

Glossary of terms and abbreviations

Expanded form	Abbreviated form
Advance licensing committee	ALC
Basic customs duty	BCD
Bill of entry	BE
Customs tariff heading	CTH
Central Board of Excise and Customs	CBEC
Central Excise tariff heading	CETH
Container Freight Station	CFS
Cost Insurance Freight	CIF
Commissionerate of central excise	Commissionerate
Countervailing duty	CVD
Customs, Excise & Service Tax Appellate Tribunal	CESTAT
Director General of Foreign Trade	DGFT
Duty Entitlement Pass Book	DEPB
Duty Free Credit Entitlement Certificate	DFCEC
Duty Free Replenishment Certificate	DFRC
Excise Law Times	ELT
Export obligation	EO
Export Oriented Unit	EOU
Export Performance	EP
Export Promotion Capital Goods	EPCG
Export Promotion Zone	EPZ
Free on Board	FOB
Foreign Trade Policy	FTP
Goods transport agency	GTA
Hand Book of Procedures	HBP
High speed diesel	HSD
Harmonised system of nomenclature	HSN
High sea sale	HSS
Inland Container Depot	ICD
Joint Director General of Foreign Trade	JDGFT
Letter of permission	LOP
National calamity contingent duty	NCCD
Net Foreign Exchange Earning as a Percentage of Export	NFEP
Non tariff	NT
Marine gas oil	MGO

Regional licensing authority	RLA
Retail sale price	RSP
Show cause notice	SCN
Served from India scheme	SFIS
Software technology park	STP
Target plus scheme	TPS
The Ministry of Finance	the Ministry
Vishesh Krishi gram udyog yojana	VKGUY
Value added tax	VAT
Export outstanding statement	XOS

CHAPTER I
CUSTOMS RECEIPTS

1.1 Budget estimates, revised budget estimates and actual receipts

The budget estimates, revised budget estimates and actual receipts of customs duties, during the years 2004-05 to 2008-09, are exhibited in the following table and graph:-

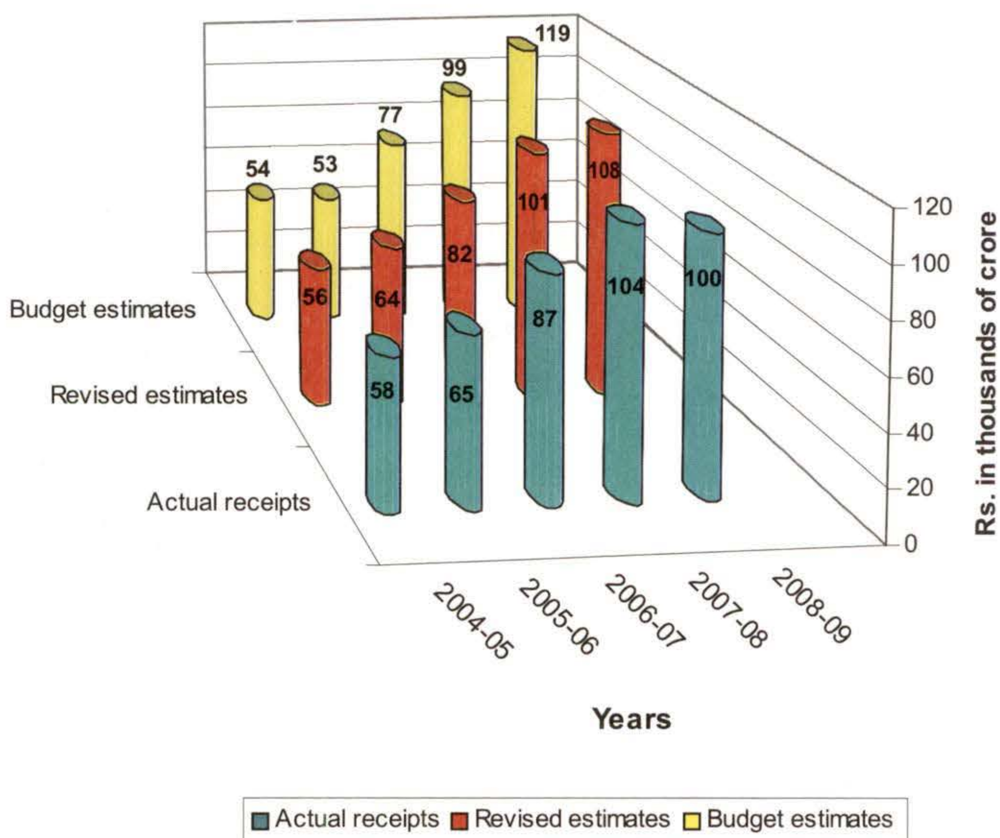
Table no. 1

(Amounts in crore of rupees)

Year	Budget estimates	Revised budget estimates	Actual receipts*	Difference between actual receipts and budget estimates	Percentage variation
2004-05	54,250	56,250	57,610	3,360	6.19
2005-06	53,182	64,215	65,067	11,885	22.35
2006-07	77,066	81,800	86,327	9,261	12.02
2007-08	98,770	1,00,766	1,04,119	5,349	5.42
2008-09	1,18,930	1,08,000	99,879	(-) 19,051	(-)16.02

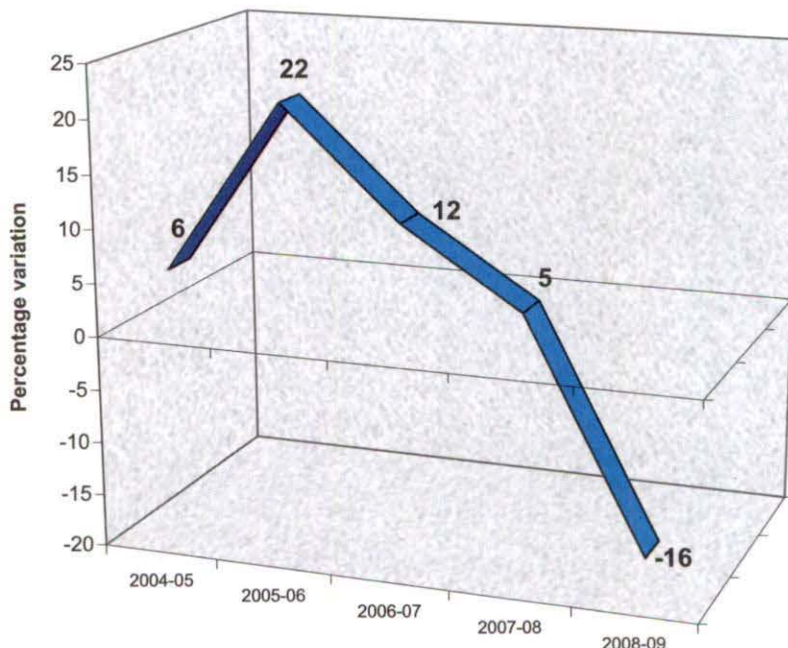
* Figures as per Finance Accounts

Graph 1: Customs Receipts – Budget, Revised and Actual



The actual receipts were more than both the budget and revised estimates during 2004-05 to 2007-08. However, the actual collection fell short of both the budget and revised estimates in 2008-09, primarily due to the reductions in the duty rates for major items such as crude oil and vegetables oils. The percentage variation of actual receipts over the budget estimates during the years 2004-05 to 2008-09 are depicted in the following graph:-

Graph 2: Percentage variation of actual receipts over budget estimates



1.2 Trend of receipts

A comparison of total year-wise imports with the corresponding net import duties collected during 2004-05 to 2008-09 has been shown in the following table:-

Table no. 2

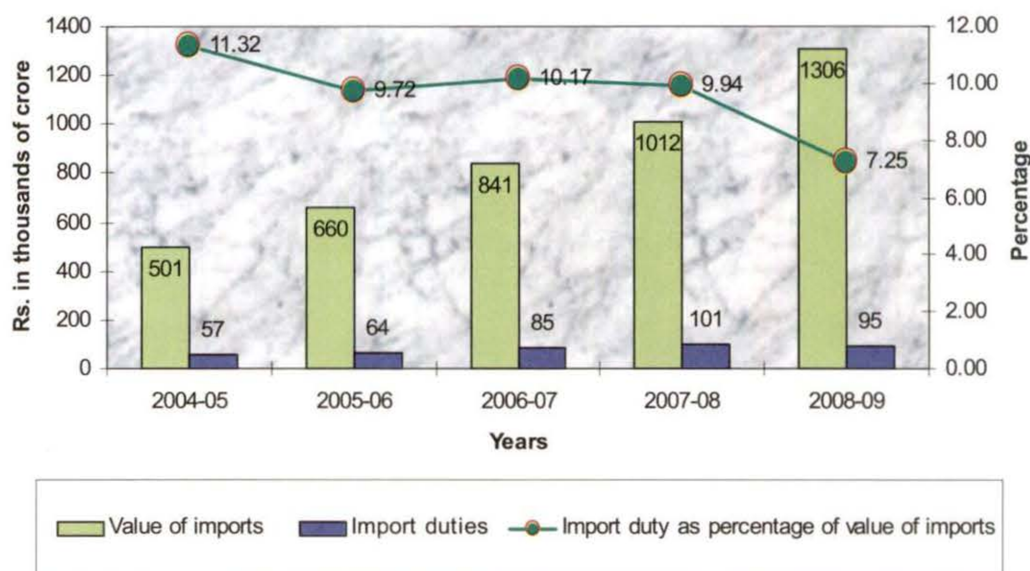
(Amounts in crore of rupees)

Year	Value of Imports*	Import duties*	Import duty as percentage of value of imports
2004-05	5,01,065	56,745	11.32
2005-06	6,60,409	64,201	9.72
2006-07	8,40,506	85,440	10.17
2007-08	10,12,312	1,00,635	9.94
2008-09	13,05,503	94,583	7.25

Source -*Directorate of Data Management, New Delhi

While the value of imports has recorded a growth of 116 per cent over the last five years, the corresponding import duties, had increased by 67 per cent.

Graph 3: Import duty as percentage of value of imports



1.3 Commodities yielding major import duties

Commodities which yielded major import duties during the year 2008-09 alongwith corresponding figures for the year 2007-08 are mentioned in the following table:-

Table no. 3

(Amounts in crore of rupees)

Sl. No.	Budget Head No.	Commodities	Import duties realised		Percentage variation in 2008-09 over 2007-08	Percentage share in total import duties collected	
			2007-08	2008-09		2007-08	2008-09
1.	7	Crude oil	9053.82	2767.93	(-)69	09	03
2.	52	Gold	847.80	673.66	(-)21	01	01
3.	10,11,17	Chemicals	8346.10	8617.32	03	08	09
4.	9	Other mineral fuels, oils, waxes	2229.23	2576.91	16	02	03
5.	28 to 32	Iron and Steel	8155.92	8635.81	06	08	09
6.	8	Refined Petroleum oils	6862.59	5829.33	(-)15	07	06
7.	6	Ores, Slag and Ash	2061.68	1697.18	(-)18	02	02
8.	18	Plastics	3875.23	3752.88	(-)03	04	04
9.	20	Paper, pulp, etc.	1193.41	1167.56	(-)02	01	01
10	3	Vegetable oils	3554.96	343.82	(-)90	04	0.5

Source- Directorate of Data Management, New Delhi

The above table indicates that there was overall decline in the collection of import duties on major commodities. The commodity 'Vegetable oils' had shown a major decline (90 per cent) of revenue (compared to previous year),

while the customs revenue from crude oil had dipped by 69 per cent during the year 2008-09. Resultantly crude oil's percentage contribution to the total import duties has declined by six per cent.

1.4 Duty foregone

1.4.1 Export promotion schemes

The break-up of customs duty foregone on various export promotion schemes viz., advance licence, DEPB, EPCG, EPZ, EOUs and refund of duty under drawback and other schemes, for the period from 2005-06 to 2008-09, is shown in the following table:-

Table no. 4

(Amounts in crore of rupees)

Year	Customs duty collected	Advance licence & others*	EOU/ STP	Duty drawback	EPCG	DEPB	SEZ	Total (of col. 3 to 8)	Duty foregone as a percentage of customs receipts (Col.9 over percentage of Col.2)
1	2	3	4	5	6	7	8	9	10
2005-06	65,067	13,361	10,278	3,235	5,333	5,651	2,471	40,329	62
2006-07	86,327	23,596	10,948	6,057	9,069	4,789	1,654	56,133	65
2007-08	1,04,119	20,481	18,759	9,015	8,933	4,986	1,848	64,022	62
2008-09	99,879	18,403	13,401	12,116	7,833	7,092	2,329	61,174	61

*Includes DFRC/DFECC/TPS/VKUY/DFIA/Focus product schemes

Source – Directorate of Data Management, New Delhi

1.4.2 Other duty foregone

Duty foregone under sections 25 (1) and (2) of the Customs Act, 1962 (other than for export promotion schemes vide paragraph 1.4.1) during 2005-06 to 2008-09 is shown in the following table:-

Table no. 5

(Amounts in crore of rupees)

Year	No. of notifications issued under 25(1)*	No. of total notifications issued under 25(2)**	Total No. of notifications issued	Duty foregone under 25(1)*	Duty foregone under 25(2)**	Total duty foregone
2005-06	29	49	78	40,667	15	40,682
2006-07	453	7	460	28,394	99	28,493
2007-08	317	38	355	28,060	505	28,565
2008-09	62	**Not furnished by the department**				

* General exemption ** Adhoc exemption

Source – Directorate of Data Management, New Delhi

1.5 Cost of collection of customs receipts

The expenditure incurred on the collection of customs duty during the year 2008-09 as a percentage of customs receipt was higher than that incurred in the previous year as mentioned in the following table:-

Table no. 6

(Amounts in crore of rupees)

	2007-08*	2008-09*
Expenditure on revenue cum import/export and trade control functions	165.40	234.56
Expenditure on preventive and other functions	759.71	989.28
Transfer to Reserve Fund, Deposit Account and other expenditure	13.91	11.65
Total	939.02	1235.49
Customs receipt	1,04,119	99,879
Cost of collection as percentage of customs receipts	0.90	1.24

* Figures as per Finance Accounts

1.6 Arrears of customs duty

1.6.1 The amount of customs duty assessed up to 31 March 2009 which was still to be realised as on 31 December 2009, was Rs. 6,839.84 crore.

1.6.2 Customs revenue of Rs. 5,136.29 crore demanded up to March 2009 was not realised by the department at the end of the financial year 2008-09. Of this, Rs. 1,947.81 crore was undisputed. However, even this amount had not been recovered for a period of over ten years. There is a need to strengthen the recovery mechanism of the department. The information is abstracted in the following table:-

Table no. 7

(Amounts in crore of rupees)

Sl. No.	Commissionerate	Amount under dispute			Amount not under dispute			Grand Total
		Over five years but less than ten years	Over ten years	Total	Over five years but less than ten years	Over ten years	Total	
1	2	3	5	5	6	7	8	9
1.	Central Excise	1602.05	484.11	2086.16	994.88	283.91	1278.79	3364.95
2.	Customs	752.96	282.60	1035.56	409.39	239.36	648.75	1684.31
3.	Service Tax	66.38	0.38	66.76	20.12	0.15	20.27	87.03
	Total	2421.39	767.09	3188.48	1424.39	523.42	1947.81	5136.29

Source – Central Board of Excise & Customs, New Delhi

1.7 Demands of duty barred by limitation

The statistics of demands barred were not received despite protracted pursuance with the Central Board of Excise and Customs.

1.8 Duty written off

Customs duties written off, penalties waived and ex-gratia payments are shown in the following table:-

Table no. 8

(Amounts in crore of rupees)

Year	Amount
2005-06	43.41
2006-07	247.73
2007-08	100.54
2008-09	**Not furnished by the Department**

Source-- Central Board of Excise & Customs

1.9 Results of audit

This report contains 112 audit paragraphs, featured individually or grouped together, with revenue implication of Rs. 54.09 crore. The Ministry/department has accepted the audit observations in 80 paragraphs involving revenue of Rs. 31.64 crore. Of the total 112 paragraphs, 41 cases involving revenue of Rs. 14.29 crore have been grouped under the heading 'other cases' appearing in each chapter. These include 20 accepted cases (out of 80), where full remedial action has been taken by the Ministry/department. The remaining 71 paragraphs involving revenue of Rs. 39.80 crore have been reported individually. The Ministry/depar tment has effected a total recovery of Rs. 14.43 crore in response to the audit observations including Rs. 12.46 crore where full remedial action has been taken.

In 21 other cases of underassessment pointed out by audit but not reflected in this report, the field formations of the department had accepted the observations and reported recovery of the entire short levy of Rs. 2.11 crore. Brief details of these cases have been provided separately to the Ministry. Therefore, the total recovery effected by the Ministry/department at the instance of audit upto January 2010, is Rs. 16.54 crore.

1.10 Impact/follow-up of audit reports

1.10.1 Revenue impact

During the last five years (including the current year's report), the audit reports had included observations totalling Rs. 693.70 crore in 843 audit paragraphs. Of these, the Government had accepted (till January 2010) the audit observations in 707 audit paragraphs involving Rs. 274.85 crore and had recovered Rs. 68.19 crore. The details are shown in the following table:

Table no. 9

(Amounts in crore of rupees)

Year of Audit Report	Paragraphs included		Paragraphs accepted						Recoveries effected					
			Pre printing		Post printing		Total		Pre printing		Post printing		Total	
	No.	Amt	No.	Amt	No.	Amt	No.	Amt	No.	Amt	No.	Amt	No.	Amt
2004-05	256	355.79	178	45.41	76	17.41	254	62.82	122	4.13	77	9.95	199	14.08
2005-06	139	63.22	74	25.92	38	6.84	112	32.76	49	11.69	36	5.93	85	17.62
2006-07	133	121.99	94	105.18	7	2.24	101	107.42	57	7.32	20	1.86	77	9.18
2007-08	182	96.50	137	37.83	2	0.27	139	38.10	80	9.85	2	0.92	82	10.77
2008-09	133	56.20	101	33.75	Not applicable		101	33.75	68	16.54	Not applicable		68	16.54
Total	**843**	**693.70**	**584**	**248.09**	**123**	**26.76**	**707**	**274.85**	**376**	**49.53**	**135**	**18.66**	**511**	**68.19**

1.10.2 Status of action taken notes

Public Accounts Committee in their ninth report (eleventh Lok Sabha) had desired that remedial/corrective action taken notes (ATNs) on all the paragraphs in the reports of the Comptroller and Auditor General, duly vetted by audit, be furnished to them within a period of four months from the date of laying of the audit report in Parliament.

Review of outstanding action taken notes on paragraphs included in the earlier audit reports indicated that the Ministry had not submitted remedial action notes relating to 136 of these paragraphs. Of these, the earliest paragraph was from the audit report for the year 1996-97. The pendency of ATNs is abstracted in the following table:

Table no. 10

Sl.No.	Period since when ATN is awaited	No. of Audit paragraphs
1	Up to 1 year	69
2	1-3 years	42
3	3-5 years	8
4	More than 5 years	17
	Total	**136**

CHAPTER II
DUTY EXEMPTION SCHEMES

The Government may exempt wholly or part of customs duties for import of inputs and capital goods under an export promotion scheme through a notification. Importers of such exempted goods undertake to fulfil certain export obligations (EO) as well as comply with specified conditions, failing which the applicable normal duty becomes leviable. A few illustrative cases where duty exemptions were availed of without fulfilling EOs/conditions, are discussed in the following paragraphs. The total revenue implication in these cases is Rs. 24.30 crore. These obse rvations were communicated to the Ministry through 42 draft audit paragraphs. The Ministry/department has accepted (till January 2010) the audit observations in 31 draft audit paragraphs with a revenue implication of Rs. 14.07 crore, of which Rs. 3.53 crore has been recovered.

2.1 Export oriented units (EOUs)/Export processing zone (EPZ) scheme

Short/non-levy of education cess on DTA clearances

Education cess was imposed on imported and indigenous goods with effect from 9 July 2004 in terms of section 91, 92 and 94 of Finance Act, 2004. It is levied on imports as duty of customs (customs education cess) at two stages on (i) additional duty of customs (CVD) and (ii) on total duties of customs consisting of basic customs duty (BCD) and CVD plus customs education cess on CVD at (i) above. It is also levied as duty of excise (central excise education cess) on clearances of excisable goods at the same rate on total excise duty.

Further, as per section 3 (1) of the Central Excise Act, 1944, the total excise duty in the case of sale of goods by 100 per cent export oriented unit (EOU) in domestic tariff area (DTA) shall be equal to the aggregate of duties of customs leviable under the Customs Act, 1962, as if the goods were imported into India. The duties of customs consisting of BCD, CVD and customs education cess in two stages at (i) and (ii) above, thus shall be the aggregate duties of customs, to be collected in terms of the aforesaid section 3 (1) of the Central Excise Act as excise duty and on this central excise duty education cess is leviable.

2.1.1 M/s South Asian Petrochem Ltd. and M/s Manaksia Ltd. the two EOUs under the jurisdiction of the Development Commissioner (DC), 'Falta Special Economic Zone (FSEZ)', sold their goods (PET resin and foils/coils/sheets of aluminium) in DTA during the financial year 2006-07, while availing of the concessional BCD in terms of notification no. 23/2003-CE dated 1 March.2006 (as amended), read with paragraph 6.8 of the Foreign trade policy (FTP) 2004-09. The goods were cleared by paying the BCD, the CVD and customs education cess in the above two stages. However, the education cess at stage (ii) as mentioned above was not considered for calculation of aggregate duties of customs while collecting the same as total excise duty on

which central excise education cess was also leviable in terms of Finance Act, 2004. This resulted in short levy of education cess of Rs. 1.01 crore.

On this being pointed out (June 2008), the department issued (November/December 2008), two show cause notices to the EOUs for recovery of education cess short levied. Further progress has not been intimated (January 2010).

The matter was reported to the Ministry (August 2009); its response has not been received (January 2010).

2.1.2 M/s Jain Irrigation Systems, Jalgaon, an EOU under Santacruz electronic export promotion zone (SEEPZ), Mumbai was issued 'Letter of permission (LOP)' in March 2006 to manufacture 'extruded, moulded, and fabricated plastic goods including micro irrigation products/systems'. The EOU had cleared goods in Domestic tariff area (DTA) valued at Rs. 191.15 crore during the period April 2005 to March 2008. Audit scrutiny revealed that the goods were cleared by paying the BCD, the CVD and customs education cess in the above two stages. However, education cess was not levied on the aggregate duties of customs while collecting the same as total excise duty on which central excise education cess was also leviable in terms of Finance Act, 2004. This resulted in short levy of education cess of Rs. 86.95 lakh.

The matter was reported to the Ministry (September 2009); its response has not been received (January 2010).

2.1.3 M/s Responsive Industries Ltd. an EOU under SEEPZ, Mumbai was issued LOP in February 2002 to manufacture 'PVC Vinyl flooring/PVC leather cloth/PVC film sheet etc'. The EOU had cleared goods in DTA valued at Rs. 177.79 crore during the period April 2005 to March 2008.

The duty paid by 100 per cent EOUs for making clearance into DTA was the duty of excise, the education cess and higher education cess was payable. Audit scrutiny of the DTA sales invoices revealed that the education cess on aggregate duties i.e. excise duty arrived at was not paid. This resulted in non-levy of education cess amounting to Rs. 57.88 lakh.

On the matter being pointed out (February 2009), the department stated (May 2009) that 'Show cause notices (SCN)' have been issued to the unit, for the months of January 2008 to February 2008 and also for subsequent periods. However, the department also stated that SCN could not be issued covering the extended period of limitation since the licencee is availing benefits under the notification 23/2003 CE dated 31 March 2003 from time to time.

The department was informed (June 2009) that its contention was not tenable as in the case of EOUs, the department could raise demand for the extended period by invoking the provisions of the bond executed by the EOU. Its further response had not been received (January 2010).

The matter was reported (October 2009) to the Ministry; its response has not been received (January 2010).

2.1.4 M/s Meghmani Organics Ltd. (Agro Division, Unit-II), a 100 per cent EOU falling under Surat-II central excise commissionerate, paid excise duty of Rs. 7.60 crore on DTA clearances of Rs. 46.44 crore made between

May 2005 and April 2007. Audit scrutiny revealed that education cess was not levied on the excise duty collected. This resulted in non-levy of education cess of Rs. 16.33 lakh.

On this being pointed out (August 2008), the department reported (March 2009) that a SCN demanding education cess of Rs. 32.65 lakh for the period May 2005 to January 2008 has been issued to the importer. Further progress has not been intimated (January 2010).

The matter was reported (September 2009) to the Ministry; its response has not been received (January 2010).

Incorrect reimbursement of 'Central Sales Tax'

As per paragraph 6.11 (c) of the FTP 2004-09, EOUs are entitled to full reimbursement of 'Central Sales Tax (CST)' on purchases made from DTA for production of goods. In terms of clause 2 (a) of Appendix 14-I-I of the Hand Book of Procedures (HBP) Volume-1, admissibility of the reimbursement is subject to the condition that the supplies from DTA must be utilised by the EOU for production of goods meant for export and/or utilised for export products.

2.1.5 M/s South Asian Petrochem Ltd. and two other EOUs functioning under the jurisdiction of the DC, FSEZ, Kolkata (Airport) commissionerate were granted reimbursement of CST amounting to Rs. 10.46 crore on raw materials/consumables procured and utilised by these assessees in production of PET resin/hawai chappal sheet, coil and dust of aluminium between 2005-06 and 2007-08. However, this amount also included reimbursement of Rs. 3.67 crore on sale of finished products back in DTA. This resulted in excess reimbursement of CST amounting to Rs. 3.67 crore.

On this being pointed out (August 2009), the Ministry of Commerce, concurring with the comments of the FSEZ authorities stated (December 2009) that the FTP allowed reimbursement of CST on procurement of goods manufactured in India and did not impose any restriction on goods cleared in the DTA. Further, it was stated that clause 2 (a) of Appendix 14-I-I of the HBP used the phrase 'meant for export' and not actual export. It further added that use of the expression 'and/or' between 'meant for export' and 'utilised for export production' in the said clause indicated that the intention to use indigenous raw material for manufacture of goods intended for export was sufficient to avail of reimbursement of CST.

The FSEZ added that the ambiguity in the policy paragraph 2 (a) & (b) of Appendix 14-I-I was taken care of in the FTP 2009-14 incorporating necessary changes thereby allowing benefits to supplies from DTA for production of goods instead of allowing benefits for exports. Accordingly, the refund of CST allowed earlier to the EOU was not warranted.

The reply of the Ministry/department is not tenable because the Board, through its circular nos. 74/01 (cus) dated 4 December 2001 and 10/09 (cus) dated 25 February 2009, had clarified that all the deemed export benefits were to be extended on the principle that the goods were used in the manufacture of finished products which were subsequently exported. In the case of subsequent sale of finished goods back into DTA, the circulars also prescribed the refund of the deemed export benefits already availed of against goods

procured from indigenous sources. Moreover, the reimbursement of CST was made for DTA clearances during the period 2005-06 to 2007-08 under the then prevalent FTP provisions and the changes made in FTP 2009-14 were not applicable to those DTA clearances.

2.1.6 Audit scrutiny revealed that M/s Meta Copper & Alloys Ltd. Upasnagar, Goa, an EOU, received CST refund amounting to Rs. 8.20 crore on the material procured and utilised for the entire production during the period from 2001-02 to 2007-08. The unit was also permitted to sell 50 per cent of the f.o.b. value of goods in DTA. During the period from 2001-02 to 2007-08, it made DTA sales of Rs. 549.39 crore, and exports worth Rs. 1,391.33 crore. As the reimbursement of CST was permissible only in respect of the exported goods, excess reimbursement of CST amounting to Rs. 2.32 crore on DTA sales was recoverable.

On the matter being pointed out (August 2009), the Ministry of Commerce, concurring with the comments of SEEPZ, Mumbai authorities, stated (December 2009) that the reimbursement of CST for the supply of goods from DTA to EOU was without distinction, whether the goods were used for export or for clearances in DTA.

The Ministry further stated that the ambiguity in the policy paragraph 2 (a) & (b) of Appendix 14-I-I was taken care of in the FTP 2009-14 incorporating necessary changes thereby allowing benefits to supplies from DTA for production of goods.

The Ministry/department's reply is not tenable as reimbursement of CST is admissible only in respect of goods meant for export and not in respect of goods produced for DTA sales. Moreover, the changes made in FTP 2009-14 are not applicable to the DTA clearances of the period 2001-02 to 2007-08.

Non-achievement of net foreign exchange earning/non-fulfilment of export obligation

As per paragraph 6.5 of the FTP read with paragraph 6.10.1 of the HBP Vol.-I, EOU shall be positive Net Foreign exchange (NFE) earner and it shall be calculated cumulatively in blocks of five years, starting from the commencement of production. As per paragraph (3) (d) (ii) of notification No. 52/2003-Cus dated 31 March 2003, in case of failure to achieve the said positive NFE, the duty forgone proportionate to the ratio of unachieved portion of NFE to the positive NFE is to be recovered alongwith interest. In addition, the unit is liable to pay penalty under section 11 (2) of the Foreign Trade (Development and Regulation) Act, 1992.

2.1.7 M/s Vibgyor Paints Pvt. Ltd. Thane, an EOU under the DC, SEEPZ, Mumbai was issued a LOP in July 2001 for manufacture of industrial paints, decorative paints and resin. The unit imported raw materials worth Rs. 12.11 crore during 2001-02 to 2005-06, while the FOB value of exports during 2002-03 to 2005-06 was Rs. 13.92 crore. However, scrutiny of the annual performance report for the year 2005-06 revealed that export proceeds amounting to Rs. 4.69 crore were outstanding for realisation. This resulted in non-achievement of positive NFE, the shortfall amounted to Rs. 2.88 crore. As per provisions of the aforesaid notification, the duty foregone proportionate to the shortfall in positive NFE was Rs. 1.13 crore.

On this being pointed out (October 2007), the department confirmed a demand (December 2008) of Rs. 1.13 crore. However, the unit went in appeal (January 2009) against the order. Ou tcome of the case is awaited (January 2010).

The matter was reported (September 2009) to the Ministry; its response has not been received (January 2010).

2.1.8 M/s Mizoram Venus Bamboo Products Pvt. Ltd. Aizawl an EOU under Shillong commissionerate was issued a LOP by the licensing authority, Kolkata in July 2003 for setting up a 100 per cent EOU by importing/procuring from indigenous sources, capital goods valuing Rs. 30.07 lakh with the obligation to manufacture and export its entire production and achieve positive NFE for a period of five years from the date of commencement of production. The LOP was revised subsequently in May 2004, enhancing the value of capital goods to Rs 3.69 crore. Against this revised limit, the unit imported/procured between September 2003 and November 2006, capital goods valued at Rs. 6.45 crore with duty foregone amounting to Rs. 2.79 crore. Except for an unsuccessful trial run in the year 2006, the unit could not put to use the capital goods for manufacture of any export product. The unit was accordingly liable to pay duty of Rs. 2.79 crore alongwith applicable interest.

On this being pointed out (November 2008), the Customs department intimated (March 2009) that a SCN demanding duty of Rs. 2.79 crore besides interest was being issued. The DC, FSEZ issued (April 2009) a show cause notice to recover penalty under Foreign Trade (Development and Regulation) Act, 1992. Further progress has not been intimated (January 2010).

The matter was reported (September 2009) to the Ministry; its response has not been received (January 2010).

2.1.9 M/s Peedee Dyechem Industries Pvt. Ltd. an EOU under SEEPZ, Mumbai was issued a LOP in June 2002 to manufacture and export 'Reactive black', 'Reactive navy blue', 'Reactive gold yellow' and 'Reactive orange'. Against the duty free import of raw materials worth Rs. 5.72 crore, the unit exported goods worth Rs. 9.37 crore and was allowed to debond in April 2007 by the Development Commissioner SEEPZ without the levy of any penalty considering the achievement of positive NFE. Audit scrutiny revealed that out of goods exported worth Rs. 9.37 crore, an amount of Rs. 4.28 crore was not realised by the unit. Accordingly, there was shortfall in positive NFE of Rs. 62.57 lakh on which customs duty of Rs. 24.53 lakh was recoverable.

On this being pointed out (October 2007), the department stated (July 2009) that the unit had achieved positive NFE as there was no provision in the FTP and HBP regarding deduction of unrealised foreign exchange amount from the FOB value of exports for the purpose of calculation of NFE.

The reply of the department is not tenable because as per guidelines for monitoring the performance of EOU units (Appendix- 14 IG of the HBP, Vol.-I) read with RBI regulations, the DC will monitor foreign exchange realisation in co-ordination with the concerned General Manager of the RBI. Further, the RBI regulations provide that export proceeds are required to be realised within a period of six months. Non-realisation of foreign exchange at the time of

debonding in effect means that the EOU was not a positive net foreign exchange earner.

This was communicated to the department in August 2009; its response has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

2.1.10 M/s Milsoft Technology Ltd. Kochi, a STP unit under customs commissionerate, Kochi having a private bonded warehouse licence, imported capital goods worth Rs. 25.36 lakh (March 2002/January 2003) without payment of duty under 100% EOU Scheme. The warehouse licence had expired on 20 November 2003. The unit had neither renewed the licence nor installed the imported machinery in the bonded premises of the unit as stipulated in the notification no. 52/2003-cus dated 31 March 2003. The company also failed to achieve the prescribed export obligation within a period of five years. As the company had violated all the stipulated conditions, it was liable to pay duty foregone amounting to Rs. 14.41 lakh and interest of Rs. 14.58 lakh (upto September 2009).

On this being pointed out (June 2004/July 2008), the department stated (November 2008) that a demand notice had been issued (July 2007) for non-fulfilment of export obligation and violation of licence condition and another show cause notice was also issued (November 2008) for non-installation of the capital goods in the bonded premises.

Further progress has not been intimated (January 2010).

The reply of the Ministry has not been received (January 2010).

Irregular DTA sale

As per clause (f) and (g) of Appendix 14-I-H of the HBP Vol.-I, an EOU may be permitted advance DTA sale subject to certain terms and conditions. Such sale may be made on monthly basis as per clause (c) of the said Appendix, if the EOU has the status of a Premier Trading House as defined in paragraph 3.5.2 of the FTP.

2.1.11 M/s Tara Holdings Pvt. Ltd. an EOU, was issued a LOP in March 2005 by the DC, FSEZ for manufacture/export of polyethylene (PE) compounds, 'Hawai Chappal' etc. using imported/indigenous raw materials. Advance DTA sale permission for Rs. 5 crore was given by the DC, FSEZ in July 2007. Against advance DTA sale permission, the unit cleared entire production of 'Hawai Chappal' valued Rs. 19.10 crore in DTA on monthly basis (as a premier trading house) during the period from April to July 2008, on payment of central excise duty at concessional rate in terms of notification no. 23/2003-CE dated 31 March 2003 (serial number 4) read with paragraph 6.8 (a) of the FTP. This resulted in excess DTA sale of Rs. 14.10 crore on which central excise duty of Rs. 99.67 lakh was recoverable.

On this being pointed out (June 2008), the DC and the Excise department justified the duty concession (August and October 2008) on the ground that it was covered under permission for advance DTA sale, which was granted to the EOU in July 2007. The reply is not tenable because there was excess DTA clearance over that permitted and these have not been adjusted against subsequent entitlements.

The reply of the Ministry has not been received (January 2010).

Irregular DTA clearance of surplus/obsolete capital goods

As per paragraph 6.15 (b) of the FTP 2004-09, an EOU may dispose off the obsolete/surplus capital goods and spares in DTA on payment of applicable duties. Further, in terms of paragraph 6.35 of the HBP Vol.-I, clearance of capital goods including second hand goods in DTA was allowed as per FTP under the EPCG Scheme. However, according to paragraph 6.18 (d) of FTP, an EOU may be permitted by the DC to clear the capital goods on payment of duty under the prevailing EPCG scheme only on exit from the EOU scheme, as a one time option.

2.1.12 Audit scrutiny revealed that M/s Bosch Ltd. an EOU in Nasik was issued LOP in November 2004 for manufacture of 'Common Rail Injector Parts and components' by the DC, SEEPZ, Mumbai. In February 2007, the unit was allowed to debond surplus capital goods on payment of appropriate duty by the assistant commissioner of central excise & customs, Nasik. The unit had cleared capital goods, including spare parts worth Rs. 3.09 crore at concessional rate of five percent under EPCG scheme. Since the unit did not exit from the EOU scheme under one time option as provided under paragraph 6.18 of FTP, the grant of EPCG benefit was not in order. This resulted in undue benefit of Rs. 81.62 lakh.

On this being pointed out (June 2008), the department stated (March 2009) that the provisions of paragraph 6.18 (d) are not applicable in the case because there was no intention of the unit to exit from the EOU scheme. The department further added that surplus capital goods were cleared as per paragraphs 6.15 (b) of the FTP and paragraph 6.35 of the HBP, which allowed clearance of surplus capital goods in DTA on payment of the applicable duties and clearances were also allowed under the EPCG scheme respectively.

The reply of the department is not tenable because DTA clearances under paragraph 6.15 (b) were allowed only on payment of applicable duties which were applicable as in the instant case DTA clearances were made on a concessional rate of duty. Further, clearances under paragraph 6.35 could only be made as per the FTP under the EPCG scheme by those EOUs which exercised one time option to exit from the scheme. Since the unit did not exercise this option to exit from the scheme, the grant of EPCG benefit was irregular. This was communicated to the department/Ministry in June/October 2009; their responses have not been received (January 2010).

Irregular DTA sale of waste generated during manufacturing process

In terms of first proviso to paragraph 3 of notification no. 52/2003-cus dated 31 March 2003, as amended, where non-excisable finished goods including waste produced by an EOU are allowed to be sold in the DTA, no exemption shall be available in respect of inputs utilised for manufacture of such finished goods including waste. Further, paragraph 6.8 (j) of the FTP 2004-09, provides that in the case of DTA sale of goods manufactured by an EOU, where basic duty and additional duty of customs (CVD) are 'nil', such goods shall be treated as non-excisable for the purpose of payment of duty.

2.1.13 M/s Pacific Cotspin Ltd. an EOU under the commissionerate of customs (Air), Kolkata, manufacturing cotton yarn from an admixture of

indigenous raw cotton with duty-free imported raw cotton, was allowed to clear 'cotton waste' (arising out of the production process) in DTA between 6 September 2004 and 31 March 2008 under the notification no. 23/2003-CE dated 31 March 2003 at 'nil' rate of central excise duty. Since effective basic duty and CVD under the notification were 'nil' for DTA sale, cotton waste was non-excisable in terms of paragraph 6.8 (j) of the FTP 2004-09. Therefore, customs duty was leviable on the imported inputs (raw cotton) utilised for production of non-excisable finished goods and resultant bye-products (cotton waste) under the notification no. 52/2003-cus dated 31 March 2003 as amended. The incorrect grant of exemption resulted in non-levy of duty of Rs. 56.25 lakh.

On this being pointed out (June 2008), the department stated (July 2009) that it was issuing a demand notice.

The reply of the Ministry has not been received (January 2010).

Excess import of inputs in violation of 'Standard input output norms (SION)'

According to SION, for the manufacture and export of one MT 'Polyester (PET) Chips (high pressure moulding grade/Bottle grade)', import of 0.3350 MT of 'Ethylene Glycol/Monoethylene Glycol (MEG)' is permitted.

2.1.14 M/s South Asian Petrochem Ltd. an EOU under the Kolkata (Airport) commissionerate was issued a letter of permission by the Ministry of Industry in January 1998 for manufacture of 'Polyester chips'. The unit during the period July 2007 to March 2008 had consumed 36,239.99 MT of duty free 'MEG' against the permissible quantity of 35,823.34 MT of 'MEG' as per SION, for production of 'bottle grade polyester chip'. This resulted in excess consumption of 416.65 MT of 'MEG' on which customs duty amounting to Rs. 52.50 lakh was recoverable alongwith interest.

On this being pointed out (June 2008), the Assistant DC, FSEZ reported (April 2009) that the excess quantity of 1.28 MT consumed was adjusted from the permissible quantity of import during subsequent period.

The Ministry in its response stated (December 2009) that a show cause notice demanding duty of Rs. 52.50 lakh had been issued.

Details of recovery had not been received (January 2010).

Incorrect grant of exemption

As per paragraph 6.2 (b) of the Export Import Policy (EXIM) 2002-07, an EOU may import or procure from the DTA without payment of duty, all types of goods including capital goods required for its activities with the permission of the Development Commissioner.

2.1.15 M/s Elpro International Ltd. an EOU under SEEPZ, Mumbai was issued a LOP in May 2001 for manufacture of 'zinc oxide discs'. The LOP was amended (October 2001) to allow indigenous procurement of the export product i.e. 'zinc oxide discs' without the payment of central excise duties. The unit had procured 2.98 lakh 'zinc oxide discs' of assessable value of Rs. 2.63 crore during the period from 2002-03 to 2006-07 on which duty of Rs. 42.12 lakh was forgone. As the LOP was issued to the unit for

manufacture of 'zinc oxide discs', indigenous procurement of the same product was not in order and amounted to the violation of policy provisions. This resulted in loss of revenue of Rs. 42.12 lakh.

On this being pointed out (October 2007), the Assistant DC, SEEPZ stated (June 2009) that indigenous procurement of zinc oxide discs was allowed to execute an export order for manufacture of "Surge Arrester" (a broadband product) by October/November 2001 which is an assembly of various items including 'zinc oxide disc.' The department further stated that unit's trial production of 'zinc oxide disc' was to start from December 2001, while the export order was to be executed before it.

The department's reply is not tenable because:-

➢ There is no provision in the policy to grant permission for procurement of goods, which were allowed in the LOP for manufacturing and export.

Further, as per provisions of paragraph 6.34 of the HBP Vol.-I, the DC may permit broad banding for similar goods and activities mentioned in the LOP or to provide for backward or forward linkages to the existing line of manufacture. In this case, manufacture had not even started in October 2001 and hence, the broad banding permission given before the start of trial production was not in order.

➢ Moreover, the unit continued to procure 'zinc oxide discs' indigenously upto 2006-07 during which the unit's 'zinc oxide disc' manufacturing unit was working. Hence, the justification on grounds of export urgency as cited by the department is unacceptable.

The reply of the Ministry has not been received (January 2010).

2.2 Advance licencing scheme

Non-fulfilment of export obligation on finalisation of adhoc norms

As per paragraph 4.7 of HBP Vol.-I, 2004-09, advance authorisation shall be issued, where SION are not fixed, based on self declaration and an undertaking by the applicant for a final adjustment as per adhoc norms/SION fixed by the 'Advance Licensing Committee (ALC)'.

In terms of paragraph 4.24 of HBP Vol.-I (2004-09), the advance licence holder has to submit the documents in fulfillment of the export obligation (EO) within two months from the date of expiry of the EO period. According to paragraph 4.28 of HBP, Vol.-I, in the case of default in fulfillment of export obligation, the licencee is required to pay to the customs authorities, the customs duty on value of the unutilised imported material alongwith interest.

2.2.1 M/s Niyaz Apparels, Chennai was issued an advance authorisation (September 2005) under self declared norms for the import of 100 % cotton twill printed fabric (6, 18,800 Sq. Meters) and 100 % cotton twill peach fabric (1,76,800 Sq. Meters). The self declared norm was approved by the ALC in their meeting held on 24 November 2005. The licencee applied for the import of 6,12,000 yards of 100 per cent 'Cotton tapes' as the third item of import in the licence. The licensing authority allowed the third item in the import list and amended the c.i.f. value of the licence to Rs. 5.27 crore and the FOB value

to Rs. 6.93 crore. Accordingly, the adhoc norms based on two items of import, approved earlier in November 2005, were rejected and the licencee was directed (December 2006) to surrender the licence to incorporate the amendment. But the licencee did not surrender the licence.

Audit scrutiny revealed that the RLA neither informed the customs authority about the rejection of the norm nor took any further action to regularise the case under paragraph 4.28 of the HBP. The export obligation period expired on September 2007. The licencee neither applied for extension of the EO period nor submitted the documents for fulfillment of export obligation.

On verification of the import details at the Chennai sea customs commissionerate, it was noticed that the licencee had registered the licence with it and had imported raw materials total valued at Rs. 3.60 crore before rejection of approval by the ALC. For these imports the licencee was liable to pay a duty of Rs. 73.37 lakh alongwith interest.

On this being pointed out (November 2008), the department reported (July 2009) that the firm had been placed under denied entity list (July 2009). Further progress has not been intimated (January 2010).

The matter was reported (October 2009) to the Ministry; its response has not been received (January 2010).

2.2.2 M/s Futura Polyesters Ltd. (Futura fibres division), Chennai was granted two advance authorisations (November 2005 and February 2006) under self declaration norms by the RLA, Chennai for a total c.i.f. value of Rs. 21.61 crore for import of six items of raw materials against the export of 4,000 MT of 'Polyester Chips (High Pressure Moulding Grade)'. The adhoc norms for these licences were approved by the ALC which allowed the import of these items as per SION H206. The amended norms allowed import of three items only with lesser quantity than that allowed in the advance authorisations.

Verification of records at Chennai (sea) commissionerate revealed that the licencee had actually imported 1,41,400 kgs of 'Monoethylene Glycol' and 879 kgs of 'Antimony Trioxide' in excess of the quantity permissible under SION H206 and was accordingly liable for payment of duty of Rs. 20.22 lakh alongwith interest.

On this being pointed out (October 2009) to the Ministry of Commerce, the Zonal JDGFT, Chennai on its behalf reported (December 2009) that the licencee had regularised excess import of one item while refuting excess import of other two items against the licence. The matter was under examination. In respect of another licence, the ZJDGFT stated that the licence has been redeemed after prescribed EO was fulfilled.

2.3 Export promotion capital goods (EPCG) scheme

Non-fulfilment of export obligation

According to paragraphs 6.11 and 6.12 read with paragraph 6.19 of the HBP Vol.-I, 1997-02, an EPCG licencee is permitted to import capital goods at concessional rate of customs duty and required to achieve the prescribed block

wise proportionate export obligation over the specified period. For monitoring of its export obligation, the licencee should submit to the licensing authority block wise report, periodically, on the progress made in fulfillment of the export obligation. In the event of failure to discharge a minimum of 25 per cent of the export obligation prescribed for any particular block of two years for two consecutive blocks, the licencee will be liable to pay forthwith the whole duties of customs alongwith applicable interest.

2.3.1 M/s Sun Fibre optics, an erstwhile EOU unit, on conversion was issued (February 2001) an EPCG licence by the RLA, Bangalore to import capital goods worth Rs. 1.05 crore with an EO of Rs. 5.23 crore to be fulfilled within a period of eight years. The licencee imported (February/April 2000) capital goods worth Rs. 1.04 crore under the EOU scheme and saved duty amounting to Rs. 52.62 lakh on coming over to the EPCG scheme. Audit scrutiny revealed that the licencee did not furnish all the prescribed block wise reports for fulfillment of export obligation, even after two months of the expiry of the validity (April 2009) of the licence. Accordingly, the licencee was liable to pay the customs duty foregone amounting to Rs. 52.62 lakh and interest of Rs. 65.12 lakh (upto May 2009).

On this being pointed out to the Ministry of Commerce (August 2009), the JDGFT, Bangalore reported (December 2009) on its behalf that the licencee had submitted export documents towards fulfillment of export obligation and the case was under examination.

2.3.2 M/s Rubber wood (India) Pvt. Ltd. Kottayam, Kerala was issued (August 2000) an EPCG licence by the RLA, Cochin with a c.i.f. value of Rs. 1.17 crore against an export obligation of Rs. 5.83 crore to be fulfilled within a period of eight years. The EO was later revised to Rs. 6.05 crore against the actual import of goods worth Rs. 1.21 crore. Audit scrutiny revealed that the licencee failed to fulfill the prescribed block wise export obligation for the 3rd & 4th block years. The licencee exported goods worth Rs. 1.83 crore against the prescribed EO of Rs. 6.05 crore till the expiry of the validity (August 2008) of the licence. Accordingly, it was liable to pay the proportionate customs duty foregone amounting to Rs. 16.92 lakh alongwith interest.

On the matter being pointed out (September 2008), the RLA stated (March 2009) that a show cause notice had been issued (October 2008) for non-fulfillment of EO. The department further added (March 2009) that the unit being under a World Bank aided project, was fully exempt from the payment of customs duties on import of capital goods and the licencee had already approached the policy relaxation committee (Committee), New Delhi for waiving the EO, a decision on which was pending (April 2009).

The reply of the department is not tenable because for availing of exemption under the world bank aided project, the project has to be approved by the Government of India (GOI) and the importer has to produce at the time of clearance of such goods a duty exemption certificate from an officer not below the rank of deputy secretary to the GOI, regarding usage of these goods for execution of the project. These conditions have not been fulfilled in the instant case. Additionally, outcome of the request made to the Committee has also not been intimated (January 2010).

This was reported (August 2009) to the Ministry; its response has not been received (January 2010).

Incorrect redemption of the licence

Notification 28 (RE-2003)/2002-07 dated 28 January 2004 stipulates that the licencee can opt for re-fixation of the balance EO based on eight times of the duty saved amount for the c.i.f. value in proportion to the balance EO under the scheme.

2.3.3 The exports through third party were allowed, provided the name of the EPCG licencee is mentioned on the shipping bills. The Bank realisation certificate (BRC), GR declaration, export order and invoice should be in the name of the third-party exporter. If the licencee fails to discharge the EO, he is required to pay the applicable duties of customs in addition to interest (paragraph 5.14 of the HBP Vol.-I).

M/s Abhinandan International Pvt. Ltd. Kolkata was issued (November 1999) an EPCG licence by the JDGFT, Kolkata to import capital goods for c.i.f. value of US$ 2,53,261 under zero duty EPCG scheme for use in the manufacture and export of 'Ready-made garments' with EO of US$ 15,19,566 (six times the c.i.f. value) to be discharged over a period of six years. The licencee imported (December 1999) 19 items of capital goods valued at US$ 1,88,396 through the commissionerate of customs (Port), Kolkata, and claimed fulfillment of EO of US$ 11,30,376 calculated on the basis of actual c.i.f. value utilised. The licence was redeemed in February 2007.

Audit scrutiny, however, revealed that the licencee had imported (December 1999) another consignment of eight items of capital goods worth US$ 42,372 but did not declare the fact to the licensing authority. The total value of imports was actually US$ 2,30,768 instead of US$ 1,88,396, as declared by the licencee. Accordingly, the correct EO worked out to US$ 13,84,608 instead of US$ 11,30,376 arrived at incorrectly, reckoning utilisation of the lower c.i.f. value. Further, the EO of US$ 11,30,376 fulfilled included third-party exports of US$ 3,22,547 for which valid export documents were not available and, therefore, these exports became ineligible for the fulfillment of EO. As a result, the actual value of the eligible exports was US$ 8,21,767.38, which was 59.35 per cent of the EO (US$ 13,84,608). This resulted in short fulfillment of EO by 40.65 per cent. Accordingly, the duty saved amounting to Rs. 22.55 lakh alongwith interest of Rs. 27.48 lakh was recoverable from the licencee.

On this being pointed out (February 2008), the JDGFT, Kolkata withdrew (March 2008) the EO discharge certificate and requested the firm to pay customs duty with interest. Subs equently, audit scrutiny (March 2009) revealed that a circular for refusal of further licence alongwith show-cause notice for penal action under section 9 and 11 of the Foreign Trade (Development & Regulation) Act, 1992 had been issued to the firm in December 2008.

2.4 Vishesh krishi gram udyog yojana (VKGUY) scheme

In terms of paragraph 3.8.2.2 (c) of the FTP 2004-09, as amended, the exports made by the SEZ units and EOUs during 2006-07 are not entitled for duty

credit entitlement under the VKGUY scheme. Further, in terms of paragraph 3.8.2.1 of the FTP 2004-09, as amended in 2007, the export incentive was extended to EOUs with effect from 1 April 2007, subject to the condition that such units shall not avail of direct tax benefits and also subject to the applicability of other conditions prescribed in paragraph 3.8.2.2.

2.4.1 M/s A.R. Gherkins Pvt. Ltd. Chennai and M/s AVT Natural Products Ltd. Chennai, both 100% EOUs operating under the control of the Development Commissioner, MEPZ were issued nine VKGUY scrips for a total credit of Rs. 30.94 lakh by the RLA, Chennai in consideration of exports made by these units during the period from 1 April 2006 to 31 March 2007. Audit observed that as the exports considered for duty credit benefits had been made by the EOU units during the period 2006-07, the issue of these scrips were not in order in terms of paragraph 3.8.2.2 (c) of the FTP as amended in 2006 and the credit amounting to Rs. 30.94 lakh was recoverable alongwith interest.

On this being pointed out (October 2009) to the Ministry of Commerce, the Zonal JDGFT, Chennai reported (December 2009) on its behalf that in case of M/s A.R. Gherkins Pvt. Ltd. an amount of Rs. 3.92 lakh out of Rs. 26.42 lakh had been adjusted. Further progress in recovery of the balance Rs. 22.50 lakh has not been intimated (January 2010).

In respect of M/s AVT Natural products, the Zonal JDGFT, Chennai stated that on the firm's request, the JDGFT, Cochin had been directed to adjust an amount of Rs. 4.52 lakh alongwith interest from the claims submitted to them (JDGFT, Cochin) by the firm.

2.4.2 As per notification no. 15 (RE – 2006)/2004-2009 dated 27 June 2006 read with notification no. 45 (RE – 2006)/2004-09 dated 9 February 2007, pulses and Skimmed milk powder were placed under negative list for exports with immediate effect respectively.

Audit scrutiny revealed that in the case of a VKGUY scrip issued (August 2007) to M/s C.M.S. Balan & Co by the RLA, Madurai and another VKGUY scrip issued (August 2008) to M/s Omviskar Exports, Chennai by the RLA, Chennai, the duty credit included credits of Rs. 11.13 lakh sanctioned for export of pulses made through 18 shipping bills (SBs) after a prohibition was imposed on their export, resulting in irregular sanction.

Similarly in the case of a VKGUY scrip issued (July 2007) to M/s Hatsun Agro Product Ltd. Chennai by RLA, Chennai, the duty credit included Rs. 6.18 lakh sanctioned for the export of skimmed milk powder made through three SBs during February 2007, after a prohibition was imposed on the export of skimmed milk powder resulting in irregular sanction.

On these being pointed out (October 2009) to the Ministry of Commerce, the RLAs (Madurai & Chennai) stated (May/November 2009) on its behalf that in respect of VKGUY scrips issued for pulses, Rs. 10.18 lakh had been recovered from the two exporters by adjusting the amount sanctioned in other VKGUY scrips. Details of recovery of the balance duty credit of Rs. 0.95 lakh from M/s Omviskar Exports, Chennai was awaited. In respect of VKGUY scrip issued for skimmed milk powder, it was stated (February 2009) that a letter

had been issued to the licencee for repayment of credit of Rs. 6.18 lakh alongwith interest. Further progress had not been intimated (January 2010).

2.5 Project imports

Non-levy of education cess

The Board's circular no. 521/192/91 Cus (TU), dated 8 March 1994 stipulates that short recovery of duties, if any, noticed in respect of provisional assessment cases, should be realised without waiting for final assessment.

2.5.1 M/s Orissa Hydro Power Corporation Ltd. Bhubaneswar and M/s Vemagiri Power Generation Ltd. Rajahmundry had registered licences under Project Import scheme, 1986 to import machinery and equipment for the expansion of the existing 360 MW power project and for setting up combined cycle power project at Vemagiri and Rajahmundry respectively. The two licencees had imported 13 consignments of goods during January 2005 to May 2006. These goods were provisionally assessed without levying education cess on the additional duty. This resulted in non-levy of education cess of Rs. 36.98 lakh which was recoverable alongwith interest of Rs. 21.37 lakh.

On this being pointed out (August 2007), the department stated (September 2008) that Rs. 19.41 lakh was recovered from M/s Vemagiri Power Generation Ltd. and demand notices were issued to M/s Orissa Hydro Power Corporation Ltd. for Rs 17.57 lakh in respect of remaining 10 BEs.

The reply of the Ministry has not been received (January 2010).

2.6 Duty entitlement passbook (DEPB) scheme

Irregular grant of DEPB scrip

Paragraph 4.3.1 of the FTP 2004-09, stipulates that DEPB scrip shall be available against such export products and at such rates as may be specified by the DGFT by way of public notice. However, as per DEPB code 90/22D, in the absence of any notified rate by the DGFT, the DEPB scrip at the rate of one per cent shall be available for the export products packed in any packing material.

The SION has been prescribed for export of variants of 'Guar' gum and menthol.

2.6.1 Audit scrutiny of DEPB authorisations issued by the JDGFT, Jaipur revealed that in 34 cases the JDGFT had issued DEPB authorisation for export of such variants of guar & menthol, which were not covered under SION descriptions. This has resulted in irregular grant of DEPB credit amounting to Rs. 16.98 lakh.

On this being pointed out (February 2009), the department stated (February 2009) that the firms had been asked to comply with the audit observation. Further progress has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

2.7 Other cases

Eighteen other cases of non-fulfilment of export obligation, excess grant of credit, non-payment of duty despite receipt of insurance claimed, incorrect redemption of the licences, ineligible imports, etc, having total financial implication of Rs. 3.90 crore, were pointed out in audit. The department had accepted (till January 2010) observation in 15 cases and reported recovery of Rs. 3.19 crore in 12 cases.

CHAPTER III
INCORRECT ASSESSMENT OF CUSTOMS DUTIES

A few cases of incorrect assessment of customs duties noticed in test check, having an implication of Rs. 10.50 crore, are described in the following paragraphs. These observations were communicated to the Ministry through 25 draft audit paragraphs. The Ministry/department has accepted (till January 2010) the audit observations in 18 draft audit paragraphs with revenue implication of Rs. 4.74 crore, of which Rs. 1.61 crore has been recovered.

3.1 Non levy of anti-dumping duty

As per section 9A of the Customs Tariff Act, 1975, where any article is exported from any country to India at less than its normal value, then upon the import of such article into India, the Central Government may, by a notification, impose an anti-dumping duty. Accordingly, anti-dumping duty was imposed from time to time on goods like colour picture tubes, PVC resin, Vitamin 'A' etc. when these were imported from specified countries like China, Korea, Malaysia, Thailand etc.

3.1.1 Audit scrutiny revealed that 43 consignments of such goods imported from these specified countries were cleared without levying of the applicable anti-dumping duty of Rs. 2.39 crore.

On the matter being pointed out, the Ministry/department admitted non-levying of entire anti-dumping duty of Rs. 2.39 crore and reported recoveries totalling Rs. 1.09 crore in respect of 18 consignments. The recovery status relating to the remaining 25 consignments has not been received (January 2010).

3.2 Unintended financial gain

In terms of section 46 read with section 48 of the Customs Act (CA), 1962, the importer is required to present a bill of entry (BE) in respect of imported goods unloaded for home consumption or for warehousing and take clearance of goods within thirty days from the date of unloading or within such extended time as the department may allow. The rate of duty and tariff valuation applicable to imported goods should be the valuation in force on the date of presentation of BE {section 15(1) of the CA, 1962}. The Central Board of Excise & Customs, New Delhi (Board) vide their circular dated 15 June 2001, directed that import of edible/food products should be allowed only after receipt of the test report from Public Health Organisation (PHO). Pending receipt of test report, such imports may be allowed to be stored in warehouses under section 49 of the aforesaid Act.

3.2.1 M/s Madhya Pradesh Glychem Industries and two others imported two vessels of edible grade Soyabean Oil and unloaded these at the Customs(Port), Kolkata between 2 March 2004 and 2 April 2004. On obtaining 'Pumping Guarantee Bond' the department permitted the importers to store the goods temporarily in a warehouse under section 49 of the CA Act, 1962, subject to production of mandatory fitness test certificates from PHO required for human

consumption of these goods. However, even after receipt of PHO certificate within 30 days from the date of unloading, the importers did not present any BE. Subsequently, after a lapse of 88 to 151 days, the importers presented 19 BEs (between 2 June and 30 August 2004) for taking clearance. The department assessed these goods in terms of section 15 (1) (a) of the CA, 1962, on the tariff rate of US $ 628 per tonne prevalent on the dates of presentation of the BEs (June-August 2004) rather than on the tariff rate (US $ 710 per tonne) prevalent during the period of thirty days from the dates of unloading of the imported goods (March-April 2004), applying the procedure prescribed under section 48 for clearance of non-warehoused goods. Belated action of the department, thus, enabled the importers to circumvent the provisions of temporary storage under section 49 without any valid reason, to submit BEs at later dates and clear the goods at reduced tariff value. This resulted in substantial financial gain of Rs. 1.78 crore due to undue delay in clearance of the imported goods.

On the matter being pointed out (May 2005), the department stated (September 2009) that the matter was being referred to the Board for clarification, since no mechanism had been prescribed in this regard.

Further, the Commissioner (Port) Kolkata during a meeting with the Audit authorities in January 2008 opined that the issue would be referred to the forthcoming Tariff Conference, as this had huge financial implication and was not commissionerate specific. The Commissioner further added that demands in this case could not be raised until a policy decision was taken on the issue. However, the case had not been taken up by them with the Board, till September 2009.

The reply of the Ministry has not been received (January 2010).

3.3 Non-recovery of drawback paid

As per Rule 16A (1) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with section 8 of the Foreign Exchange Management Act, 1999 and Regulation 9 of the Foreign Exchange Management (Export of goods and services) Regulations, 2000, the amount representing the full export value of goods exported shall be realised and repatriated to India within six months from the date of exports. If the export proceeds have not been realised within the period allowed or any extended period, drawbacks sanctioned/disbursed to exporters shall be recovered in the manner prescribed in the rule.

3.3.1 Audit scrutiny of exports outstanding (XOS) statement for the half year ended 30 June 2008 received from RBI, Chandigarh and test check of drawback files in the office of the Assistant Commissioner, Container Freight Station, 'CONCOR' Ludhiana, revealed that the export proceeds in respect of 76 shipping bills for the period 2002-03 to 2007-08 were not realised even after a lapse of more than six months as prescribed in the rules. Accordingly, drawback amounting to Rs. 1.56 crore sanctioned/disbursed to the exporters was to be recovered as required under the aforesaid rules.

The matter was pointed out to the department in September 2008; its reply has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

3.4 Adoption of incorrect assessable value

As per section 14 of the CA,1962 read with rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, value of imported goods for assessment of customs duty shall be the value of such goods for delivery at the time and place of import and shall include (a) the cost of transport of the imported goods to the place of import (b) loading, unloading and handling charges incurred on delivery of the imported goods at the place of import and (c) the cost of insurance. Where the cost of freight and insurance is not ascertainable, such cost shall be 20 per cent and 1.125 per cent respectively of the free on board (FOB) value of the goods.

3.4.1 M/s Tata Steel Ltd. imported a second hand aircraft through Kolkata (Airport) commissionerate in August 2008. The assessable value of the aircraft computed was the invoice price of US $ 35,00,000 plus one per cent thereof as loading and unloading charges. However, the invoice price was not inclusive of the cost of freight and insurance and, therefore, it was to be added as per valuation rules to arrive at the correct assessable value. The correct value worked out to US$ 42,81,769. The incorrect computation of assessable value resulted in short levy of duty amounting to Rs. 72.80 lakh.

On the matter being pointed out (March 2009), the department reported (June 2009) issue of a demand notice to the importer for recovery of Rs. 72.80 lakh short levied. Further progress has not been intimated (January 2010).

The reply of the Ministry has not been received (January 2010).

3.4.2 M/s JBJ Perfumes Pvt. Ltd. and eight others imported various goods on FOB value basis through 'Inland container depot (ICD)', Tughlakabad, Delhi between December 2007 and July 2008, without declaring the cost of actual freight and insurance. As the cost of freight and insurance was not ascertainable at the time of assessment of duty, such cost should have been worked out in accordance with the aforesaid provision. The department assessed these goods without including the cost of freight and insurance in the assessable value which resulted in short levy of duty of Rs. 10.76 lakh.

The matter was reported to the department in September/December 2008; its reply has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

3.4.3 In terms of customs circular no. 65/2001 dated 19 November 2001, import duties are payable on the stores including fuel held by international carriers if they are diverted for operation in domestic sector.

M/s Air India and M/s Indian Airlines, operating flights in the domestic sector were paying customs duty on the stock of Aviation turbine fuel (ATF) held by them in the fuel tank on termination of international trips. Audit scrutiny revealed that while M/s Indian Airlines (assessee) adopted the basic price declared by the BPCL including excise duty for adjusting the rebate of central excise duty, a rate lower than the above rate (basic price) was taken for the purpose of custom duty calculation. The adoption of lower assessable value

by M/s Indian Airlines has resulted in short levy of customs duty of Rs. 23.25 lakh alongwith interest.

On the matter being pointed out (February 2008), the department issued (August 2008) show cause notice to M/s Indian Airlines. In response M/s India Airlines stated that the value adopted /charged by the BPCL is inclusive of tax, freight, other charges and profit margins of the BPCL which could not be included in the value for the purpose of assessment of duty.

The reply of M/s Indian Airlines is not tenable because in terms of Rule 4 of the Customs Valuation Rules, 1988, the transaction value of goods chargeable to duty of customs should be the price actually paid or payable for the goods when sold for export to India. Accordingly, the assessee should have adopted the basic price of ATF supplied by the BPCL.

3.5 Delay in finalisation of provisional assessments

In response to the recommendations contained in the 14th Report, 1996-97 of the Public Accounts Committee, the Board vide its circular dated 19 March 1998, directed that all cases of provisional assessment must be finalised within a period of six months from the date of issue of the order of provisional assessment. In case provisional assessment could not be finalised within six months, an extension of another six months could be granted by the Commissioner. Where assessment could not be finalised within a period of one year, a further extension could be granted for a period found reasonable by the Commissioner/Chief Commissioner depending on the merit of the case. However, the Commissioner/Chief Commissioner will monitor such cases.

3.5.1 M/s Shree Salasar Impex and three others imported five consignments of fabrics between January and August 2001 through Kolkata (Port) commissionerate and declared the goods as polyester fabric, which were provisionally classified and assessed under CTH 5407 61 on execution of test bonds. The results of composition tests, for which samples were sent to Customs House Laboratory at the time of assessment, revealed that the goods were 'knitted pile fabric' in one case, 'fabrics made up of polyester staple fibre' in three cases and 'fabrics made up of viscose staple fibre (dyed)' in the remaining case and were accordingly classifiable under CTH 6001 92 00, 5512 19 00 and 5516 12 00 respectively, involving higher duties. However, in spite of timely receipt of test results indicating liability of the importers to pay differential duties, the department failed to take any action for periods ranging from six to seven years. Moreover, the department has not acted upon an internal office note (October 2007) from the 'Special Intelligence Unit' of the commissionerate to pursue cases of realisable differential duty arising out of adverse test results, for generating additional revenue. This resulted in non-collection of duty amounting to Rs. 28.75 lakh and interest of Rs. 33.05 lakh up to December 2008.

On the matter being pointed out (June 2008), the department reported (June 2009) that in three cases, show cause notices had been issued (November 2008) to two importers demanding duty of Rs. 27.50 lakh and interest of Rs. 29.55 lakh (up to June 2008). Reply for the remaining two cases have not been received (January 2010).

The matter was reported (September 2009) to the Ministry; its reply has not been received (January 2010).

3.6 Short levy of education cess

Sections 91, 92 and 94 of Finance Act, 2004 imposed education cess at the rate of two per cent with effect from 9 July 2004. Further, sections 136, 137 and 139 of Finance Act, 2007 imposed secondary and higher education cess at the rate of one per cent from 1 March 2007. These cesses are levied on imports as duty of customs (education cess) at two stages namely (i) additional duty on customs (CVD) and (ii) total duties of customs comprising basic customs duty (BCD) and CVD plus education cess on CVD as at (i) above.

3.6.1 On imports of 573 consignments of various goods (galvanized plain/corrugated sheet of iron, galvanized iron wire, polyethylene sheets, lay-flat tubes, molasses etc.) by M/s Ever-growing Iron and Finvest Ltd. and others through Panitanki Land Customs Station under West Bengal (Preventive) commissionerate, between August 2006 and March 2008, the department allowed clearance of goods by levy of education cess on CVD only. The education cess on total duties of customs at aforementioned stage (ii) was, however, not levied. This resulted in short levy of Rs. 48.06 lakh.

On the matter being pointed out (July 2008), the department reported (April 2009) recovery of Rs. 9.45 lakh. Further progress has not been intimated (January 2010).

The reply of the Ministry has not been received (January 2010).

3.7 Incorrect assessment of High sea sale

As per rule 4(1) of the Customs Valuation Rules, 1988, transaction value of imported goods shall be the price actually paid or payable. As per public notice no. 145/2002 dated 3 December 2002, high sea charges are taken to be two per cent of the c.i.f. value as a general practice. However, in case the actual high-sea sale contract price is more than "c.i.f. value plus two per cent", then the actual contract price paid by the last buyer is taken as the value for the purpose of assessment. Further the Ministry of Finance, Central Board of Excise & Customs vide its circular no. 32/2004- cus dated 11 May 2004, reiterated that the high sea sale contract price paid by the last buyer would constitute the transaction value under Rule 4 of the Customs Valuation Rules,1988.

3.7.1 Audit scrutiny of records of Visakhapatnam Customs House and ICD, Hyderabad, revealed that M/s PEC Ltd. and two other importers sold their goods on high sea sale basis. The BEs were filed on the invoice values and duties were paid accordingly, even though the 'agreement value' was more than the invoice value. Thus, non-adoption of agreement value for the purpose of assessment resulted in short levy of Rs. 13.84 lakh.

On the matter being pointed out (August/October 2008), the Hyderabad II commissionerate reported (February/March 2009) recovery of the differential duty of Rs. 2.07 lakh including interest, in respect of two importers. The

Visakhapatnam commissionerate stated (January 2009) that the duty was correctly levied by considering service charges of 1.25 per cent for high sea sale charges. The commissionerate further added that the transaction value considered for the imported item was 171 US$ per metric ton (PMT) which includes insurance charges and 1.25 per cent service charges. The unit rate of 190 US$ PMT, based on which the audit pointed out the irregularity was actually a typographical error. The unit price considered by audit was not supported by any evidence that the buyer had paid the amount to the high-sea sale seller.

The fact remains that the service charges were incorrectly levied at the rate of 1.25 per cent instead of two per cent. This was communicated to the department in February 2009, calling for particulars of the payment made by the buyer for verification in audit. Its further response has not been received (January 2010).

The reply of the Ministry has not been received (January 2010).

3.7.2 Audit scrutiny of 39 consignments of imports made on high sea sale basis through Inland container depot (ICD), Tughlakabad, New Delhi revealed that duty on such imports was assessed by the department on invoice value instead of "high sea sale contract price". In all these consignments "the high sea sale contract price" was more than "the c.i.f. value plus two per cent high sea sale charges". This resulted in short levy of duty of Rs. 7.76 lakh

On the matter being pointed out (February 2008 to January 2009), the department reported recovery of Rs. 4.25 lakh in 12 consignments. The reply relating to the remaining 27 consignments has not been furnished (January 2010).

The reply of the Ministry has not been received (January 2010).

3.8 Non-adoption of specific rate of duty

Goods specified as assessable to duty both at ad valorem and specific rate are to be assessed at ad valorem or specific rate which is higher. Accordingly, "Uniforms, T-Shirts, Knitted under Pants, Ties, Fabrics, Gents knitted under wears, etc. classifiable under CTH 54, 55, 58, 60, 61 and 62 are assessable to BCD at ad valorem rate or specific rate whichever is higher.

3.8.1 M/s Jasleen Enterprises and 25 others, imported (May 2007 to February 2009), 29 consignments of aforesaid goods, valued at Rs. 39.02 lakh through Chennai (Sea) commissionerate. Some of these consignments were assessed to customs duty at ad valorem rate instead of specific rate and in respect of other consignments incorrect units were adopted for calculation of the duty at the specific rate. This resulted in short collection of duty of Rs. 16.69 lakh.

On the matter being pointed out (October 2007, January 2008, May 2008 and March 2009), the department reported (December 2007 to March 2009) recovery of Rs. 10.19 lakh alongwith interest of Rs. 0.68 lakh in respect of 15 BEs. Further progress in the cases has not been intimated (January 2010).

The reply of the Ministry has not been received (January 2010).

3.9 Over assessment of customs duty on exports

Education cess of two per cent, imposed from 9 July 2004 vide sections 91, 92 and 94 of the Finance Act, 2004, and Secondary and Higher Education cess of one per cent, imposed from 1 March 2007 vide sections 136, 17 and 19 of the Finance Act, 2007, are both leviable on goods specified in the First Schedule to the Customs Tariff Act, 1975, when imported into India.

3.9.1 Scrutiny of records at Custom House, Paradeep, under the Bhubaneshwar-I commissionerate revealed that Education cess and the Secondary and Higher Education cess were being levied and collected not only on imports, but on all exports too, although export goods are specified in the Second Schedule to the Customs Tariff, and hence do not attract such levies. Incorrect levy and collection of such cess on export goods during the period from July 2004 to January 2009 amounted to Rs. 1.37 crore.

On the matter being pointed out (February 2009), the department stated (March 2009) that it was being done to safeguard Government revenue as the same practice was being followed by the Kolkata commissionerate. Subsequently, while admitting the collection of education cess inadvertently, it stated (August 2009) that the education cess had been levied on the export cess as duty of excise on the aggregate of duties of customs leviable under section 3 of the 'Iron ore Mines, Manganese ore Mines and Chrome ore Mines labour welfare Cess Act, 1976' read with sections 91, 93 and 94 of the Finance Act, 2004 and section 12 of the Customs Act, 1962.

The reply is not tenable because the levies are not backed by any legal sanction. Further, cess under the above mentioned Cess Act, 1976 is leviable as duty of excise only when such ore is used in or sold or otherwise disposed off to any metallurgical factory. Since the goods were specified in the second schedule and cleared for export, they were outside the scope of such levy under the existing provision.

This was reported (September 2009) to the Ministry; its response has not been received (January 2010).

3.10 Excess levy of anti-dumping duty

As per notification no. 96/2001-cus dated 25 September 2001, anti dumping duty was to be imposed on import of sport shoes from China at a rate of the difference between US$ 12.9 per pair and landed value of such import in US$ per pair. However, in terms of clause (5) under section 9A of the Customs Tariff Act, 1975, the anti dumping duty imposed shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition.

3.10.1 M/s Adidas India Marketing Pvt. Ltd. and M/s Sanspareils Greenland Pvt. Ltd. imported 26,655 pair of sport shoes from China at a combined assessable value of Rs. 1.05 crore during February to August 2008 through ICD, Tughlaqabad and ICD, Patparganj, Delhi. The department levied anti dumping duty of Rs. 27.46 lakh thereon as per the aforesaid notification. Audit scrutiny revealed that as the anti dumping duty was not revoked earlier, the above notification was effective upto 24 September 2006 only and

accordingly, the anti dumping duty on these imports should not have been levied. The omission resulted in excess levy of duty of Rs. 27.46 lakh.

On the matter being pointed out (October/November 2008), the Assistant Commissioner, ICD, Tughlaqabad, New Delhi while accepting the observation stated (July 2009) that importer could claim refund of excess duty paid.

The reply of the Ministry has not been received (January 2010).

3.11 Excess grant of reward

As per Board circular no. 13011/3/85-Ad.V dated 30 March 1985, informers and Government Servants are eligible for rewards of up to 20 per cent of the estimated market value of the contraband goods seized. The Board in their circular dated 9 September 1985 clarified that the maximum limit of reward payable would apply separately to the two categories i.e, the informers and the Government servants. However, as per revised guidelines issued in June 2001, the original provisions relating to ceiling for reward amount provided in the earlier guidelines of March 1985, were retained, but after excluding the word 'each' in respect of the informers and the Govt. servants separately. The maximum reward in case of seized 'Ganja' (narcotic drug) is Rs. 80 per kilogram, which is 20 per cent of the illicit price of Rs 400.

3.11.1 In the Shillong commissionerate, rewards amounting to Rs. 24.97 lakh were sanctioned between February 2007 and August 2008, for seizures of 16,337 kilogram of 'Ganja' made between September 2006 and October 2007. The amount of reward payable for disbursement was worked out by applying the rate of Rs. 80 per kilogram for the informers and another Rs. 80 per kilogram for the Government servants separately, instead of limiting it to Rs .80 per kilogram for both informers and Government Servants collectively. This resulted in grant of excess reward to the tune of Rs. 11.90 lakh.

On the matter being pointed out (November 2008), the department justified sanction of reward stating (December 2008/March 2009) that although the ceiling of reward, as mentioned in the revised guidelines, did not explicitly specify that the rates were separate for the informers and the Government Servants, it could be inferred from subsequent paragraphs 4.3 and paragraph 13 of these guidelines, that the rates were to be considered separately and that similar practice was followed by other customs commissionerates.

The department's reply is not tenable because paragraph 4.3 deals with quantum of reward to Government servants in extraordinary circumstances, while paragraph 13 deals with undertaking to be taken from the informers. These provisions, therefore, could not be taken as sufficient grounds for sanctioning rewards in excess of the ceiling specified in paragraph 4.1. The fact remains that as long as the existing provisions of paragraph 4.1 of the revised guidelines remain in force, the department should be guided by these while determining the ceiling for grant of rewards.

The reply of the Ministry has not been received (January 2010).

3.12 Other cases

In four other cases of short levy of Rs. 45.95 lakh due to application of incorrect rate of exchange and incorrect adoption of quantity imported, the department had accepted (till January 2010) all the audit observations and reported recovery of Rs. 24.64 lakh (January 2010).

CHAPTER IV
EXEMPTIONS

The Government under section 25 (1) of the Customs Act, 1962 is empowered to exempt goods either absolutely or subject to such conditions as may be specified in the notification, goods of any specified description from the whole or any part of duty of customs leviable thereon. Some illustrative cases of non-levy/short levy of duties aggregating Rs. 9.72 crore due to incorrect grant of exemptions are discussed in the following paragraphs. These observations were communicated to the Ministry through 14 draft audit paragraphs. The Ministry/department had accepted (till January 2010), the audit observations in 11 draft audit paragraphs with money value of Rs. 9.01 crore, of which Rs. 7.87 crore had been recovered.

4.1 Incorrect grant of exemption

4.1.1 Disposable spinal needles

As per Customs notification no. 21/2002-cus (serial no. 370) dated 1 March 2002, read with notification no. 6/2006-CE dated 1 March 2006, import of specified goods including 'spinal instruments' (serial no. E-9) intended for use as 'assistive devices, rehabilitation aids and other goods for disabled' are exempt from duty.

M/s Kanji Shavji Parekh (Calcutta) Pvt. Ltd. and M/s Surgiplus, Pondicherry imported (between May and November 2007), eight consignments of 'Disposable Spinal Needle' through the Kolkata (Port) commissionerate. The department allowed clearance of the goods at 'nil' rate of duty by extending the benefit under the aforesaid notifications. Audit observed that the goods were in the nature of general surgical instruments for enabling smooth penetration for spinal anesthesia and cerebrospinal fluid collection and not spinal instruments meant exclusively for use as 'assistive devices/ rehabilitation aids' by the disabled/handicapped; hence the exemption was irregular. Thus, incorrect grant of exemption resulted in non-levy of duty of Rs.40.89 lakh.

On the matter being pointed out (April 2008); the department justified (July 2008) the grant of duty exemption on the ground that the importers of similar goods in one of the earlier cases had submitted certificates from various hospitals (including AIIMS, New Delhi) and reputed surgeons to the effect that the imported needles were 'spinal instruments' used for operation procedure.

The contention is not tenable because serial number 370 of the above notification allows exemption to goods for use by 'disabled' and not for goods for general use. Also, the needles in question were 'spinal instruments' for general use for enabling smooth penetration for spinal anesthesia and cerebrospinal fluid collection and not for use by the disabled in particular. Further, the certificates from hospitals and surgeons did not mention the users.

Reply of the Ministry has not been received (January 2010).

4.1.2 RF Telecommunication cable

"RF Telecommunication cable" is classifiable under the Customs tariff heading (CTH) 85444999 and leviable to basic customs duty (BCD) and additional duty (CVD). Further, customs notification 21/2005 dated 1 March 2005 exempt parts, components and accessories of mobile handsets from the levy of BCD and CVD, if the importer follows the procedure under Customs (Import of Goods at Concessional Rate of Duty for the Manufacture of Excisable Goods) Rules, 1996.

M/s Jas Telecom Pvt Ltd. imported (July 2008 to October 2008) three consignments of "RF Telecommunication cable" through Chennai Sea Port. The department classified the imported goods under CTH 85444999 and exempted these from both BCD and CVD under the above notification. Audit scrutiny revealed that the imported items being cables in 'Reel (Reel=1000 meter)'/rolls, could not be considered either as parts or components or accessories of mobile handsets for allowing the exemption benefit. Further, the importer has also not followed the procedure prescribed in Customs (Import of Goods at concessional rate of Duty for the Manufacture of Excisable Goods) Rules, 1996. Accordingly, the exemption availed of under the aforesaid notification was incorrect and resulted in short levy of duty of Rs. 36.93 lakh which was recoverable alongwith interest.

On this being pointed out (December 2008), the department reported (April 2009) that demand notices had been issued. Report on recovery has not been received (January 2010).

This was reported (October 2009) to the Ministry; its response has not been received (January 2010).

4.1.3 Goods not re-exported

In terms of notification no. 158/95-cus dated 14 November 1995, goods which are manufactured in India and re-imported for reprocessing or refining or remaking etc. are exempt from payment of duty, subject to the condition that the goods are re-exported within six months from the date of re-import or such extended period not exceeding a further period of six months. In the event of failure to comply with the prescribed condition, the importer is liable to pay the duty exempted alongwith interest.

Twelve consignments of iron and steel and articles thereof were imported by M/s Metalink and nine others between November 2006 and August 2007 through the Kolkata (Port) commissionerate, availing of the benefit of duty exemption under the above notification. The importers neither submitted any proof of re-export of the goods nor sought any extension of time. The department did not initiate any action to recover the duty leviable but for exemption. The omission resulted in non-recovery of duty of Rs. 26.08 lakh.

This was pointed out to the department and the Ministry in June 2008/September 2009. Their responses have not been received (January 2010). However, subsequent verification revealed that in three out of the twelve cases, the department had issued show cause notices to M/s Metalink, Kolkata, (August 2008) and adjudicated (March 2009) with the order for recovery of the duty of Rs.10.66 lakh together with interest payable by enforcing the Bond and the bank guarantee.

4.1.4 Leased machinery and spares

In terms of notification no. 27/2002-cus dated 1 March 2002, 'leased machinery, equipment or tools' temporarily imported for re-export within six months/one year from the date of import, are exempt from 85 per cent/70 per cent of the aggregate duties of customs. Further, as per judgement of the Supreme Court of India {1997 (96) ELT 214 (SC)}, an accessory when imported with a machine is not eligible for exemption unless it is specifically included in the exemption notification.

M/s Leighton Contractors (India) Private Limited, Mumbai temporarily imported (December 2006 and February 2007) two consignments of machineries such as 'crane barge' and 'utility vessel' alongwith 'spares' on re-export basis through Sikka Custom House under Jamnagar Commissionerate (Preventive). Although spares were not eligible for exemption under the above notification read with the Supreme Court's judgement, yet the department extended the benefit of exemption to them and allowed re-export of the machinery alongwith the spares in August 2007. Th is resulted in incorrect grant of exemption of Rs. 22.63 lakh.

On the issue being pointed out (May 2008), the department, inter alia, contended (between June and November 2008) that notification no. 27/2002-cus dated 1 March 2002 allowed benefit to all items falling under the First Schedule. As 'spares' fall within the Cu stoms Tariff Act, they are eligible for the benefit. The Supreme Court in the case of Hindustan Sanitaryware and Industries Limited versus the Collector of Customs, Calcutta {1994 (114) ELT 778 (SC)} has held that "spare part though fitted to a machine subsequent to its manufacture, to replace a defective or worn out part, becomes a component of a machine, therefore, is a component part".

Reply of the department is not tenable on the following grounds:

- 'Equipment' is a device that typically provides a mechanical advantage in accomplishment of a task not otherwise possible whereas 'spares' means a part or sub-assembly for substitution, that is ready to replace an identical or similar part or sub-assembly. Thus, 'e quipment' is an integral part of the machinery whereas 'spares' are used only for replacement.

- The 1997 judgement of the Supreme Court cited above does not leave any scope for ambiguity as it clearly spells out that any accessory not expressly included in the notification is not eligible for exemption. Further, the notification has selectively included 'equipment' and 'tools' for grant of exemption and 'spares' are not in cluded for any consideration.

- Further, as per judgement of the Supreme Court; 'spare part' achieves the status of a 'component' only after it replaces a defective or worn out part. In the instant case, the spares were not put to use at all, but were re-exported and hence could not be construed as components also.

Reply of the Ministry has not been received (January 2010).

4.1.5 Pop corn (Maize)

Pop Corn (Maize) falling under the CTH 10059000 is assessable to BCD at the rate of 50 per cent ad valorem, under customs notification no. 21/2002 (serial no. 22) dated 1 March 2002. These goods were assessable to 'nil' rate

of BCD as per serial no. 22A of the same notification which was effective from 25 January 2007 to 31 December 2007 in terms of notification 9/2007-cus dated 25 January 2007.

Two consignments of "Pop Corn (Maize)" falling under the CTH 10059000 valued at Rs. 26.66 lakh imported (February 2008) by M/s Goyal International and M/s C.P. Overseas through Chennai (Sea) commissionerate were assessed to 'nil' BCD instead of 50 per cent BCD. This resulted in short levy of duty of Rs. 13.73 lakh.

On this being pointed out (July 2008), the department stated (February 2009) that demand notices for Rs. 8.35 lakh and Rs. 5.38 lakh were issued (July 2008) to M/s Goyal International and M/s C.P. Overseas respectively and were confirmed. The department further stated that aggrieved with the order-in-original, M/s Goyal International had filed an appeal with the Appellate Commissioner and the issue was pending a decision. Further progress has not been intimated (January 2010).

Reply of the Ministry has not been received (January 2010).

4.2 Short levy of duty due to mis-classification and incorrect grant of exemption

4.2.1 "Digital Cameras" are classified under CTH 85258020 and "Video Camera Recorders" are classified under CTH 85258030 and assessed to BCD at 10 per cent. "Digital Still Image Video Cameras" are exempt from BCD vide serial no. 13 of Customs notification 25/2005 dated 1 March 2005. The Central Board of Excise and Customs (Board) clarified vide their Circular no. 32/2007 dated 10 September 2007 that the benefit of entry at serial no. 13 of notification no. 25/2005 would be available to Digital Cameras with still image recording as its principal function and would include Digital Cameras that have the capability of recording moving images for limited period of time. However, Digital Cameras that can take both still images and moving images like "Camcorder" or "Video Recorder" falling under tariff item 85258030 are not covered under said entry.

M/s Panasonic Sales and Services India Pvt. Ltd. imported (July to October 2008) three consignments of "Digital Video Cameras" of models SDR H60, VDR D-50 etc, valued at Rs. 2.28 crore, through Chennai, Sea Port. These goods were classified under CTH 85258020 as "Digital Still Image Video Cameras" and assessed to 'nil' BCD under the notification cited above. Audit noticed that the imported models of Digital Video Cameras were actually "Camcorders" and, therefore, the imported goods were classifiable under CTH 85258030 as per the Board's circular mentioned above and assessable to BCD at 10 per cent. The misclassification and incorrect grant of exemption resulted in short levy of duty of Rs. 20.68 lakh.

On this being pointed out (January 2009), the department stated (April 2009) that they had called for detailed explanation from the importer about the functioning of these cameras because it was not sure whether the camera shoots individual still pictures or shoots continuous video. Further progress has not been received (January 2010).

Reply of the Ministry has not been received (January 2010).

4.3 Others cases

In eight other cases involving short levy of Rs. 8.11 crore, the Ministry/department had accepted (till January 2010) audit observations in seven cases and had reported recovery of Rs. 7.79 crore in five cases.

CHAPTER V
CLASSIFICATION

A few cases of incorrect classification of goods resulting in short-levy/non-levy of customs duties of Rs. 7.05 crore noticed in test check are discussed in the following paragraphs. These observations were communicated to the Ministry through 24 draft audit paragraphs. The Ministry/department has accepted (till January 2010), the audit observations in 15 draft audit paragraphs with a revenue implication of Rs. 2.06 crore, of which Rs. 37 lakh has been recovered.

5.1 Woven fabrics

'Woven fabrics of synthetic staple fibres, containing 85 per cent or more by weight of synthetic staple fibres-unbleached' are classifiable under Custom Tariff Heading (CTH) 55121110, attracting duty at the rate of 10 per cent ad valorem, whereas 'Woven fabrics of synthetic filament yarn – other woven fabrics, containing 85 per cent or more by weight of polyester filaments – other' merited classification under heading 54076900 with applicable rate of duty at 10 per cent ad valorem or Rs. 60 per sq. meter, whichever is higher.

M/s Foreign Trade Agency and nine others imported, between February 2007 and December 2008, through Srimantapur and Agartala land customs stations under the Commissionerate of Customs (Preventive), North Eastern Region, Shillong, fifteen consignments of woven fabrics and declared these as made out of polyester/synthetic staple fibre. Accordingly, the department classified these goods under CTH 551211 and assessed to basic customs duty at 10 per cent ad valorem. However, chemical test reports revealed that the fabrics were made out of synthetic filament yarn and not staple fibre as was declared by the importers. The imported fabrics, therefore, merited classification under CTH 540769. The incorrect classification of these goods resulted in short levy of duty of Rs. 2.41 crore.

On this being pointed out (February 2009), the department stated (March and July 2009) that more reliance was placed on external factors like packing, labelling, merchandising including known use of the goods in the local market. It further added that the goods were un-dyed material containing 85 per cent or more artificial filament yarn and, therefore, correctly classifiable under CTH 540821, instead of the initial classification under CTH 551211 and that the change in classification would not result in levy of differential duty since the duty rate under the two tariff headings were the same. The department further stated that the chemical test reports related only to Azo-dye Test[1] and not for the purpose of classification.

The reply of the department is not tenable because the test reports for Azo-dye test and determination of composition of samples obtained from the Textile testing laboratory indicated that the goods were woven fabrics made up of polyester/synthetic filament yarn only, and not of artificial filament yarn as described in the pasted label, which was relied on by the department for re-

[1] Azo-dye is a forbidden dye which had not been allowed to be used in textiles and garments

classification under CTH 540821. It was also made clear that the goods were not staple fibre as declared by the importers in the import documents. Hence, the imported fabrics are classifiable under CTH 540769 only.

Reply of the Ministry has not been received (January 2010).

5.2 Mobile phones in CKD condition

As per the first schedule to Customs Tariff Act 1975, read with Rule 2 (a) of General Rules for the interpretation of the schedule, all parts/components of Cellular phones imported in single consignment are classifiable under CTH 85171210 treating them as 'complete mobile handset' and are leviable to additional duty of customs to countervail the sales Tax/VAT at the rate of four per cent and National Calamity and Contingent Duty (NCCD) at the rate of one per cent. This position has been reiterated in Board's Circular no. 1/2005 dated 11 January 2005. Customs notification no. 21/2005 dated 1 March 2005 exempts parts of mobile hand sets from the levy of basic customs duty (BCD) and additional duty of customs, if the importer follows the procedure under the Customs (Import of goods at concessional rate of duty for the manufacture of excisable goods) Rules, 1996.

M/s ICOMM Tele Ltd. imported (April and May 2008) 19 consignments of 'All parts of IFWT phone model ACP 1507 (operating on cellular technology)' such as front case assembly, back case assembly, main PCB assembly and hand set assembly for a total value of Rs. 22.45 crore. These goods were classified under CTH 85177090 as 'other parts of phone' and assessed to duty at 'nil' rate under the Customs notification no. 21/2005 dated 1 March 2005. Audit scrutiny, however, revealed that the imported goods were cell phones in completely knocked down (CKD) condition and classifiable under CTH 85171210 as 'telephone for cellular networks or for other wireless networks' and assessable to additional duty of customs and NCCD at the rate of one per cent ad valorem. This mis-classification resulted in short levy of duty of Rs. 1.14 crore.

On this being pointed out (September and October 2008), the department stated (March 2009) that these parts were imported in two or more consignments and required manufacturing operation such as assembly, soldering and testing to use as telephone and therefore Rule 2 (a) of Interpretation of schedule could not be applied.

The reply is not tenable due to the following reasons:

- All the parts such as front case assembly, back case assembly, main PCB assembly, hand set assembly and antenna were imported in sets so as to assemble the required number of telephones.

- The Board after considering that the "telephones" were being imported in disassembled conditions as "parts" had directed the department to classify them as 'complete mobile hand set" under CTH 85252017.

➢ Also several operations such as assembly, soldering and testing which were stated to be carried out, before the goods would be used as a telephone, are nothing but simple assembly operations.

5.3 Video games of a kind used with television receiver

"Video games of a kind used with television receiver" are classifiable under CTH 9504 and attract countervailing duty. However, recorded audio/video CD/DVD classifiable under CTH 8524 is exempted from countervailing duty (Central Excise notification 6/2006 dated 1 March 2006). It was judicially held in the case of M/s Hi-Tech Computers Vs Commissionerate of Customs {2004 (174) ELT 222 (Tribunal-Bangalore)} that video games are classifiable under CTH 9504.

M/s Redington (India) Ltd. Chennai imported (August 2006/March/October 2008) 27 consignments of "video games DVD/DVD/CD for X Box 360" through Chennai (Sea) commissionerate. The department classified one consignment imported in August 2006 under CTH 8524 and assessed duty on these goods on merit. The importer paid (August 2006) duty of Rs. 77.63 lakh, but subsequently applied for exemption under CE notification no. 6/2006. The Commissioner (Appeals) in an ex-parte order (July 2007) directed re-assessment of the bill of entry allowing exemption under Central Excise notification no. 6/2006 (serial no. 22) dated 1 March 2006. The importer was refunded duty of Rs. 46.28 lakh after re-assessment of the BE. The subsequent imports (26 consignments) were classified by the department under CTH 85234090 "Other video CD" and exempted these consignments from countervailing duty under the aforesaid Central Excise notification.

Despite the judicial pronouncement of 2004 classifying the imported goods under CTH 9504, the department erred twice, first in mis-classifying these under CTH 8524 and later on not representing the department appropriately before the Commissioner (Appeals). These actions of the department led to incorrect refund of Rs. 46.28 lakh (one consignment) and short levy of Rs. 27.64 lakh (26 consignments).

On the above being pointed out (February 2008 to April 2009), the department justified the refund and classification in subsequent imports stating that the Commissioner (Appeals) had held these goods as eligible for exemption by classifying them under CTH 8524.

The reply of the department is not tenable because the classification of these goods under CTH 9504 was judicially held as early as in 2004, while the appeal case was decided ex-parte without considering the earlier decision of the Bangalore Tribunal.

The matter was reported (October 2009) to the Ministry; its response has not been received (January 2010).

5.4 Lauryl alcohol/stearic acid

As per CTH 3823, industrial mono carboxylic fatty acid, acid oils from refining and industrial fatty alcohols such as oleic acid/stearic acid/lauryl

alcohol etc. are classifiable under heading 3823 and leviable to concessional rate of customs duty vide notification no. 21/2002-cus dated 1 March 2002, as amended. As per 'Harmonised system of nomenclature (HSN)' explanatory note below chapter heading 38, oleic acid of purity of 85 per cent or more is classifiable under CTH 2916 and other fatty acids of purity of 90 per cent or more are classifiable under 2915, 2916 or 2918 and leviable to concessional BCD at the rate of seven-and-a-half per cent ad valorem under the aforesaid notification (serial no. 553).

M/s Hindustan Unilever Ltd. and 26 others, imported 49 consignments of lauryl alcohol {(fatty alcohol)/oleic acid/stearic acid (other fatty acids)} through JNCH commissionerate, Mumbai between November 2007 and February 2009. Audit scrutiny revealed that the goods were classified under CTH 2905/2915 and assessed to the concessional rate of BCD without drawing and analysing test samples to determine the purity of the imported goods as the concentration of these should be 90 per cent or more to merit classification under CTH 2915 and accordingly be eligible for lower rate of BCD. In the absence of test reports, these were classifiable under CTH 3823 and chargeable BCD at the rate of 15 per cent instead of the seven-and-a-half per cent levied. This resulted in short levy of duty of Rs. 54.03 lakh.

On this being pointed out (June 2008 to September 2009), the department reported (August to December 2008) recovery of Rs. 21.62 lakh in respect of four consignments. Reply in respect of the remaining consignments has not been received (January 2010).

The matter was reported to the Ministry between August and October 2009; its response has not been received (January 2010).

5.5 Perfumery products

In terms of note 1(a) to chapter 44 of the Customs Tariff Act (CTA), 1975, wood in chips, shavings, crushed, ground or powdered form, of a kind used primarily in perfumery, inter-alia, is excluded from the purview of chapter 44 of the CTA, 1975 and is classifiable under the tariff heading of the said Tariff Act.

M/s Jaya Perfumery Works, Kolkata and 28 others imported 146 consignments of 'Joss powder' (bark of litsea tree in powdered form) between February 2007 and March 2008 through Kolkata (Port) and Chennai (Sea) commissionerate. The department classified these goods as 'agarbatti (perfumery product) and other odoriferous preparation,' sawdust, wood waste and scrap under CTH 3307/4401. However, the imported goods being raw material for making 'agarbatti' were correctly classifiable under CTH 1211, as per the aforesaid chapter note. The incorrect classification resulted in short levy of duty of Rs. 51.39 lakh.

On this being pointed (October 2007/March 2008/May 2009), the Chennai commissionerate issued (May/June 2009) demand notices for 108 consignments. However, the Kolkata commissionerate justified (April 2009) the classification under CTH 4401 stating that 'Joss powder' did not have a perfume of its own and, therefore, it could not be used primarily or directly in perfumery and it acted as a binding agent for making incense sticks

(Agarbatti). The contention of the department is not tenable in view of the fact that joss powder though not fragrant by itself, was used in the process of producing perfumed stick and hence classifiable under CTH 1211.

The matter was reported to the Ministry in October 2009; its response has not been received (January 2010).

5.6 Singlets and other vests

'Singlets and other vests' are classifiable under CTH 610990 and leviable to BCD at the rate of 10 per cent or Rs. 50 per piece, whichever is higher. As per section 19(b) of the Customs Act, 1962, goods consisting of a set of articles which are liable to duty with reference to value, are chargeable to duty at the highest of such rates, if they are liable to duty at different rates.

A consignment of different sets of articles namely 'Short pant – synthetic' and 'Singlets and Vests', imported in April 2008 by M/s Saha International through Land Customs Station, Changrabandha under the Commissionerate of Customs (Preventive), West Bengal, were classified under CTH 62046300 and 61079190 respectively and assessed to duty at the rate applicable to 'Vests of cotton' though the consignment contained 'singlets (classifiable under CTH 6109)' which attracted a higher rate of duty. This resulted in short levy of duty of Rs. 22.15 lakh.

On this being pointed out (November 2008), the department reported (March 2009) that show cause notice was being issued to safeguard revenue. Further progress has not been intimated (January 2010).

The reply of the Ministry has not been received (January 2010).

5.7 Plasma Television sets

"Plasma Television sets" are classifiable under CTH 85287390 and assessable to BCD and CVD.

M/s Panasonic Sales and Services India imported (July 2008 to November 2008), 60 "Panasonic brand 65 inch Plasma monitor" (Model TH-65PF10WK)" valued at Rs. 1.16 crore, through Chennai (Sea) commissionerate. The department classified the goods under the CTH 85285100 as "other monitors used in automatic data processing system under CTH 8471" and exempted these from levy of BCD under serial no. 17 of the Customs notification no. 24/2005 dated 1 March 2005.

Audit scrutiny, however, revealed that the imported item "Panasonic brand 65 inch" Plasma monitor (Model TH-65PF10WK) was actually a Plasma television set and not a monitor to be used with the automatic data processing system. Accordingly, the imported goods were classifiable under CTH 85287390 and assessable to BCD at 10 percent. The incorrect classification resulted in incorrect grant of exemption of BCD Rs. 20.44 lakh.

On the matter being pointed out (December 2008), the department reported (April 2009) that the imported goods were not television sets but monitors. The reply of the department is not factual as the product code "Panasonic Model TH-65PF10WK" is also described/advertised as a plasma TV at the

website of the company. Further, the department did not furnish any catalogue or technical write-up to substantiate its claim that the goods in question were monitors.

The matter was reported (October 2009) to the Ministry; its response has not been received (January 2010).

5.8 Air conditioners duct type

Window or Wall type air conditioners, "self contained" or "split system" are classified under CTH 841510 and assessable to BCD and CVD. As per the HSN explanatory notes to sub-heading 841510, central air conditioning systems which utilise ducts to carry refrigerated air from an evaporator to several areas to be cooled are excluded from this subhead. Further, as per serial no. 49 of the table annexed to the Customs notification no. 85/2004 dated 31 August 2004, all goods of Thailand origin, falling under CTH 841510 are exempt from the levy of BCD.

M/s ETA General Pvt. Ltd. imported (June 2007 to August 2008) "Duct type air conditioners" of Thailand origin, valued at Rs. 1.46 crore, in 13 consignments through Chennai (Sea) commissionerate. These goods were classified under CTH 84151090 as "Other air conditioners" and assessed to 'nil" rate of BCD under the aforesaid notification. However, as per the aforesaid HSN note "Duct type air conditioners" were not covered under CTH 841510. The mis-classification and incorrect grant of exemption resulted in short levy of duty of Rs.17.49 lakh.

On the matter being pointed out (May, August and October 2008), the department admitted (July 2009) that as per the HSN explanatory notes the benefit of notification no. 85/2004 could not be extended to the duct type air conditioners. The department further added that the importer during public hearing held on 30 June 2009 reiterated that the duct air conditioners were also split air conditioners. The importers contention was under examination. Further progress has not been intimated (January 2010).

The matter was reported (October 2009) to the Ministry; its response has not been received (January 2010).

5.9 Limestone powder

As per customs notification 21/2002 dated 1 March 2002 serial no. 552, "Limestone Powder Honcal 1T, 2T, 7T" (Calcium carbonates) are classifiable under the CTH 28365000 and leviable to a concessional rate of BCD and CVD.

"Limestone used for manufacture of cement or lime" are classifiable under CTH 25210090 and assessable to BCD at 5 per cent under serial no. 517 of the above customs notification and CVD at 'nil' rate.

M/s Micro Carbonates Pvt. Ltd. and seven others imported (February to September 2008), 31 consignments of 'Limestone Powder Honcal 1T, 2T, 7T (Calcium carbonates)' valued at Rs. 84.85 lakh through Chennai (Sea) commissionerate. The department classified these goods under CTH

25210090 as 'other limestone used for manufacture of cement or lime' and assessed to BCD at concessional rate and exempted CVD extending the benefit under serial no. 517 of the above customs notification. Audit scrutiny, however, revealed that the department assessed similar imports from the same importer under CTH 28365000 (BE 738948 dated 13 May 2008 and BE No. 744105 dated 19 May 2008). Accordingly, the mis-classification resulted in short levy of duty Rs. 16.32 lakh.

On this being pointed out (August/November 2008), the department while prima facie accepting the observation in respect of 19 consignments stated (December 2008) that no samples were drawn since no examination was prescribed for these bills. However, the department issued protective demand notices to the importers. The replies in respect of the remaining 12 consignments have not been received (January 2010).

The matter was reported (September 2009) to the Ministry; its response has not been received (January 2010).

5.10 Helium leak testing machine-twin chamber

Instruments and apparatus for measuring or checking the flow level, pressure or other variables of liquids or gases (eg. flow meters, level gauges, manometer, heat meters etc.) are classifiable under CTH 9026 and are exempted from BCD under customs notification no. 24/05 dated 1 March 2005. Other measuring or checking instruments, appliances and machines not specified elsewhere in the chapter are classifiable under CTH 9031 and are chargeable to BCD at the rate of seven-and-a-half per cent.

Two "Helium leak testing machine twin chamber with recovery system" imported (January 2008) by M/s Tata Toyo Radiator Ltd. through JNCH, Mumbai commissionerate were classified under CTH 9026 8090 and exempted from BCD. Since the imported machinery was not a flow meter, level gauge, manometer or a heat meter but a testing machinery, it should have been correctly classified under CTH 90318090 and was, therefore, not eligible for exemption. The mis-classificati on and incorrect grant of exemption resulted in short levy of duty of Rs. 16.05 lakh.

On the matter being pointed out (June 2008), the department confirmed (March 2009) a demand of Rs. 16.05 lakh against the importer. Further progress has not been intimated (January 2010).

Reply of the Ministry has not been received (January 2010).

5.11 Other cases

In eight other cases of mis-classification involving short levy of duties of Rs. 78.02 lakh, the department had accepted (till January 2010) audit observations in six cases and reported recovery of Rs. 15.84 lakh in three cases.

CHAPTER VI
NON-LEVY/SHORT LEVY OF ADDITIONAL DUTY

According to section 3 of the Customs Tariff Act, 1975, any article which is imported into India will also be liable to additional duty equal to the central excise duty for the time being leviable on a same article produced in India.

A few cases of non-levy/short levy of additional duties totalling Rs. 2.52 crore, noticed in test check of goods imported by 52 importers are discussed in the following paragraphs. These observations were communicated to the Ministry through eight draft audit paragraphs. The Ministry/department had accepted (till January 2010), the audit observations in five draft audit paragraphs with revenue implication of Rs. 1.77 crore, of which Rs. 1.05 crore had been recovered.

6.1 Incorrect exemption of additional duty

Under notification no. 19/2006 dated 1 March 2006, an additional duty of customs to countervail all State taxes including value added tax (VAT) at the rate of 4 per cent of the value of all imported goods was imposed under section 3 (5) of the Customs Tariff Act, 1975. The goods specified with 'free' or 'nil' rates in the Customs Tariff and also exempt from additional duty of customs under notification no. 6/2006-CE dated 1 March 2006, are not liable to such additional duty under section 3 (5) of the Customs Tariff Act, 1975 (notification no. 20/2006-cus dated 1 March 2006).

6.1.1 Garments, fabrics, Printing plates, Teak wood logs, waste papers and Rice processing/milling machineries

Exemption from additional duty under notification no. 20/2006-cus is not applicable on goods which are exempt from the entire customs duty under notifications 26/2000-cus dated 1 March 2000, 85/2004-cus dated 31 August 2004 and 2/2007 dated 5 January 2007.

M/s Zodiac Clothing Co. Ltd. and twenty seven others imported (January 2008 to February 2009), 69 consignments of various goods namely "Garments, different kinds of fabrics, Printing plates, Plain particle boards, conveyor system, Gamma linolenic acid, Teak wood logs, waste papers (Sri Lanka origin), Margarine, and Rice processing/milling machineries" with a total value of Rs. 6.65 crore through Chennai (Sea) commissionerate. The department exempted these goods from levy of additional duty of Customs leviable under section 3 (5) of the Customs Tariff Act, 1975. Audit scrutiny, however, revealed that these goods were not eligible for grant of the exemption as the subheads under which the goods were classified were not included in the exemption notification no. 20/2000-cus or the exemptions were incorrectly allowed as these were covered under customs notification no. 26/2000 or no. 85/2004 or no. 2/2007. This resulted in short levy of duty of Rs. 30.22 lakh.

On this being pointed out (June/October 2008, January /March 2009), the department reported (August 2008, January/April 2009) recovery of Rs. 5.13 lakh alongwith interest of Rs.0.28 lakh in respect of 12 bills of entries.

Further progress on the remaining cases has not been intimated (January 2010).

The reply of the Ministry has not been received (January 2010).

6.1.2 Manufactured cut rag tobacco, Hydrogen peroxide, Cotton knitted fabric and Acrylic –polyester high pile knitted fabric

Serial no. 50 of the table annexed to notification 20/2006-cus, exempts those goods which are chargeable to duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957.

M/s Bommidala Enterprises Pvt. Ltd. and four others, imported (February 2008 to November 2008) 15 consignments of "Manufactured cut rag tobacco, Customs tariff heading (CTH) 2403", Hydrogen peroxide (CTH 2847), Polyester polar fleece fabric, Cotton knitted fabric and Acrylic –polyester high pile knitted fabric, totalling to a value of Rs. 1.86 crore through Chennai (Sea) commissionerate. The imported goods were cleared at 'nil' rate of additional duty of customs under the above exemption notification (serial nos. 50 and 1).

Audit scrutiny revealed that these goods were not eligible for grant of exemption for the following reasons:-

(i) In the case of "Manufactured cut rag tobacco" (CTH 2403) valued at Rs. 42.06 lakh, exemptions were granted (Duty Rs. 4.11 lakh) under serial no. 50 of the above notification, even though these goods were deleted from the list of specified goods mentioned in the first schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957 with effect from 1 April 2007.

(ii) The remaining goods valued at Rs. 1.44 crore which were cleared under the Target plus scheme (TPS) were exempted (duty Rs. 8.67 lakh) under serial no. 1 of the above notification, although the clearance under TPS is not covered under serial no. 1 of the notification no. 20/2006-cus dated 1 March 2006.

Therefore, the total incorrect exemption of Rs. 12.78 lakh granted was recoverable alongwith interest.

On this being pointed out (August 2008 and January 2009), the department reported (December 2008) that "Manufactured cut rag tobacco" are classifiable under heading 24039970 and these are covered under Additional Duties of Excise (Goods of Special Importance) Act, 1957 and hence the grant of exemption was in order.

The reply of the department is not tenable as CTH 2401, 2402, 2403 and the entries relating thereto were omitted from the first schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957 vide Taxation Laws (Amendment) Act, 2007 {M.F. (D.R.) notification no. 1/2007-CST, dated 29 March 2007}. Reply in respect of the remaining consignments has not been received (January 2010).

This was reported to the Ministry in October 2009; their reply has not been received (January 2010).

6.1.3 High speed diesel (HSD)

High speed diesel (HSD) is classifiable under CTH 27101930 and notification no. 21/2002- cus dated 1 March 2002 (serial no. 214) exempts goods imported in connection with petroleum operations, from the levy of Basic customs duty (BCD) and additional duty of customs (CVD). An additional duty of customs at the rate of Rs. 2 per litre was levied under section 116 of the Finance Act, 1999. The Central Board of Excise & Customs (Board) in its circular No. 305/148/2004-FTT dated 11 October 2004 had clarified that additional duty of customs imposed under section 116 of the Finance Act, 1999 is neither specified in the first schedule to the Customs Tariff Act (CTA), 1975 nor levied under section 3 of the CTA, 1975. Accordingly, additional duty of customs at the rate of Rs. 2 per litre was leviable on HSD oil.

M/s National Petroleum Construction Company and one other importer imported (January/April 2008) six consignments of 'Marine gas oil (MGO)' and other capital machineries for oil exploration activities through Custom House, Gujarat Pipavav Port Ltd. (GPPL) Pipavav under Jamnagar Commissionerate. The department classified 'MGO' under CTH 27101930 and exempted it from levy of additional duty; thus, allowing the benefit of custom notification no. 21/2002 in contravention to the above Board circular of October 2004. This resulted in non-levy of additional duty/education cess amounting to Rs. 62.54 lakh.

On this being pointed out (July/August 2008), the department stated (July/August/October 2008) that the 'MGO' is one of the residual fuels having different specification under "BIS:1460:2000" and used by vessels, while HSD is an automotive diesel fuel having different specifications under "IS:1460:2005". Accordingly, additional duty is not leviable on MGO imports under the Finance Act, 1999. The department further stated that the additional duty was exempted under notification no. 21/2002-cus, as provisions of the Customs Act and the rules and regulations made thereunder including refunds/exemptions should also apply in relation to levy of additional duty as prescribed under sub-section 3 of section 116 of the Finance Act, 1999. However, the department issued three show cause notices (July 2008) for Rs. 62.54 lakh, as a protective demand.

The reply of the department is not tenable for the following reasons:-

- The Board's clarificatory letter dated 11 October 2004 categorically specified that additional duty levied under section 116 of the Finance Act, 1999 was neither specified under the first schedule of the CTA, 1975 nor levied under section 3 of the CTA, 1975.

- The item imported although mentioned as MGO in BEs, but was assessed under CTH 27101930 which corresponds to the entry for the item HSD in the Customs tariff.

- Also, the department had levied additional duty in two other cases of similar imports made by another importer in BE No. 03/08-09 dated 4 April 2008 and BE No. 25/08-09 dated 10 May 2008.

The case was reported (August 2009) to the Ministry; its reply has not been received (January 2010).

6.2 Short levy of additional duty due to incorrect computation of assessable value

6.2.1 As per proviso to section 3(2) of the CTA, 1975, the value to be taken for the purpose of calculation of CVD, in the case of imported goods for which provisions of the Standard Weights and Measures Act, 1976 applies is the declared retail sales price (RSP) less the amount of abatement. The notification no. 14/2008 -CE (NT) dated 1 March 2008 specified the rate of abatement as a percentage of RSP on various goods.

In the Chief Commissioners of Customs conference held on 25/26 March 2003 at Visakhapatnam, it was decided that duty may be levied on the basis of transaction value ignoring the RSP, wherever there was evidence that the RSP has been deliberately mis-declared.

M/s Hewlett Packard India Sales Pvt. Ltd. imported (July 2008) 200 'Compaq Presario Note Book' computers through Chennai airport in two consignments for a total assessable value of Rs. 3.74 crore and cleared them by paying a duty of Rs. 21.37 lakh. The importer had declared the RSP as Rs. 32,274 per 'Note Book' for the purpose of assessment of the additional duty. Audit scrutiny, however, revealed that at this rate, the total sale value of the goods imported would be Rs. 64.55 lakh as against the import cost of Rs. 3.95 crore.

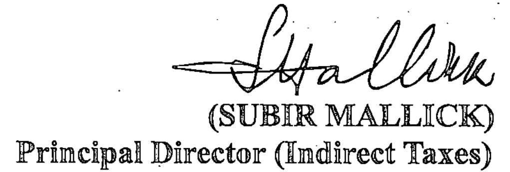
Thus, it was evident that the RSP declared was much below the actual cost and, therefore, attracted the decision taken at the conference of Chief Commissioners of Customs cited above. Non-adoption of the normal transaction value against the deliberate mis-declaration by the importer thus, resulted in short collection of duty of Rs. 41.59 lakh.

On this being pointed out (December 2008), the department, while accepting that the RSP declared was less than the transaction value, stated (February 2009) that a demand notice had been issued (February 2009). Further progress has not been intimated (January 2010).

This was reported (September 2009) to the Ministry; its reply has not been received (January 2010).

6.3 Other cases

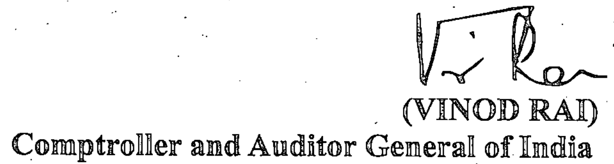
In three other cases of non-levy/short levy of additional duty of Rs. 1.05 crore, the department had accepted (till January 2010), the entire short levy of Rs. 1.05 crore and recovered Rs. 99.40 lakh.



New Delhi
Dated : 26-02-2010

(SUBIR MALLICK)
Principal Director (Indirect Taxes)

Countersigned



New Delhi
Dated : 02-03-2010

(VINOD RAI)
Comptroller and Auditor General of India