

DEMAND AND APPEALS

9.1 DEMAND UNDER CUSTOMS ACT, 1962

The provisions relating to demand under Customs Act, 1962 are similar to the provisions under Central Excise law.

The word “demand” as per Black’s Law Dictionary means assertion of a legal right; an imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act.

9.1.1 Notice for payment of duties, interest etc.[Section 28]

In accordance with the principles of natural justice the customs law rightly provides that before any action is taken against an assessee he must be given reasonable opportunity of presenting his case. One such situation would be that relating to the demand of duty not paid, short paid or erroneously refunded.

The show cause notice is invariable to be issued if the department contemplates any action prejudicial to the assessee. Thus, if on account of an infraction of the provisions of the customs law it is considered appropriate to penalise the defaulter, it is necessary to first issue a show cause notice. The show cause notice would detail the provisions of law allegedly violated and ask the noticee to show cause why action should not be initiated against him. Thus, a show cause notice gives the noticee the opportunity to present his case.

Issue of show cause notice [sub-section (1)]: These provisions are invoked in the following situations:

- (i) when duty has not been levied;
- (ii) when duty has been short-levied;
- (iii) when duty has been erroneously refunded;
- (iv) when interest payable has not been paid;

9.2 Customs

- (v) when interest payable has been part paid; or
- (vi) when interest has been erroneously refunded.

In any of the above situations, the proper officer is authorised to issue a notice under this section asking the assessee to show cause as to why he should not pay the amount specified in the notice.

Time limit for issuance of notice: The time limit for issuance of the show cause notice is as follows:

- (a) In the case of any import made by an individual for his personal use or by the Government or by any educational, research or charitable institution or hospital – within one year from the relevant date;
- (b) in any other case – within six months from the relevant date.

Extended time limit [proviso to sub-section (1)]: The proviso to section 28(1) lays down that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the time period shall be extended to 5 years.

This provision contained in proviso to section 28 is very important because the department seeks to always invoke this provision for getting the benefit of extended time limit and also to levy penalty on the defaults.

The important terms used in the said proviso are fraud, collusion, wilful mis-statement, suppression of fact and very important with an 'intent of evading the payment of duty'.

Fraud may be defined as "Deceit, imposture, criminal deception done with the intention of gaining an advantage".

Collusion may be defined as "to act in concert especially in fraud; a secret agreement to deceive".

Willful mis-statement may be explained as "stating wrongly or falsely **deliberately**".

Suppression of facts may also be explained as "to hold back the facts".

It is very important to note that unlike section 11A of the excise legislation, under section 28 there is no need to prove intention to evade payment of duty where the extended period is invoked as per the decision of the Supreme Court in *ACC Ltd vs CC 2001 (128) ELT 21*.

There are numerous decisions regarding this section and its proviso. Some of them are listed below :

1. Mere inaction or failure to do something does not constitute suppression. There must be something positive to prove suppression - *CCE v. Chemphar Drugs and Liniments* 1989 (40) E.L.T. 276 - (SC) and also in *Padmini Products v. CCE* 1989 (43) E.L.T. 195(SC).
2. Demand against approved classification list only prospective - *CCE v. Cotspun Ltd.* 1999

(113) E.L.T. 353 (SC -LB).

3. Extended period cannot be invoked where classification list is approved. - *Nat Steel Equipment v. CCE 1988(34) E.L.T. 8; Prabhu Steel Industries v. CCE 1997 (95) E.L.T. 164 (SC).*
4. Extended period not invocable when bonafide belief arises out of court judgements - *Cosmic Dye Chemicals v. CCE 1995 (75) E.L.T. 72(SC).*
5. Extended period not invocable when there are conflicting decisions prevailing and non-requirement under law to do something.- *Pushpam Pharmaceuticals Co.v. CCE 1995 (78) E.L.T. 401 (SC).*
6. Proviso to Sec. 11A does not require that notice should be issued within 6 months (now one year) of knowledge of Department. Notice can be issued anytime within 5 years of relevant date. - *Nizam Sugar Factory v. CCE 1999 (114) E.L.T. 429 (T-LB).*
7. Wrongful understanding of law does not constitute suppression - *Vinod Paper Mills Ltd. v. CCE 1997 (91) E.L.T. 245 (SC).*
8. Mere change in opinion regarding classification not sufficient to invoke extended period - *Prabhu Steel Industries Ltd. v. CCE 1997 (95) E.L.T. 164 (SC).*
9. Information not required to be supplied under law when not supplied does not amount to suppression - *Apex Electricals Pvt.Ltd. v. UOI 1992 (61) E.L.T. 413 (Guj).*
10. Department cannot sleep over the matter for years and accuse the assessee of suppression - *Mutual Industries Ltd v. CCE 2000 (117) E.L.T. 578 (T-LB)*

Period of stay to be excluded in computing the time limit [Explanation to sub-section (1)]: Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

Payment of duty and penalty equal to 25% of the duty within 30 days [sub-section (1A)]: An option is being provided to the importer or the exporter or the agent or employee of the importer or exporter to whom a notice has been served by the proper officer for short/non levy or non charging or short payment of interest or erroneous refund of duty and interest by reason of fraud, collusion, or any wilful mis-statement or suppression of facts.

Such person may pay the duty in full or in part as may be accepted by him including the interest payable thereon under section 28AB and penalty equal to 25% of the duty specified in the notice or the duty so accepted by such person within 30 days of the receipt of the notice.

Determination of duty or interest [sub-section (2)]: The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1),

9.4 Customs

shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

However, where such a person has paid the duty in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notices under sub-section (1) have been served shall be deemed to have been concluded in respect of the matters stated therein. The proceedings shall conclude notwithstanding anything contained in sections 135, 135A and 140.

In cases where such person has paid duty in part along with interest and penalty, the proper officer shall determine the amount of duty or interest which will not exceed the amount partly due from such person.

Time limit for adjudication [sub-section (2A)]: Where any show cause notice has been served on a person under sub-section (1), the amount of duty or interest shall be determined

(i) where it is possible to do so, within a period of one year in case where duty or interest has not been levied/paid or has been short-levied/ short-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts; and

(ii) in any other case, where it is possible to do so, within a period of six months from the date of service of the notice on the person under sub-section (1).

Waiver of notice [sub-section (2B)]: Where any duty or interest has not been levied/paid or has been short-levied/ short-paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of show cause notice on him and inform the proper officer of such payment in writing. Such officer, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid.

The proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section and the period of "one year" or "six months" as the case may be, shall be counted from the date of receipt of such information of payment.

However, this facility shall not apply in a case where the short levy, etc. was by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the agent or employee of the importer or exporter.

The interest under section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.

Meaning of relevant date [sub-section (3)]: For the purposes of sub-section (1), the

expression "**relevant date**" means-

- (a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;
- (b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;
- (c) in a case where duty or interest has been erroneously refunded, the date of refund;
- (d) in any other case, the date of payment of duty or interest.

9.1.2 Frequently asked questions on demand

1. When can proceedings be taken under Sec.28?	Whenever there is a short levy/short payment or non-levy or non-payment, erroneous refund of duty, the proceedings can be undertaken.
2. What is the difference between non-levy and short levy?	When excise duty has not at all been charged on the product, it becomes non-levy. When the levy has been charged but not correctly, there is short levy.
3. What is the difference between short payment and non-payment?	Short payment means payment of an amount less than what is due. Non-payment means the levy itself has not been paid.
4. What is the difference between short levy and short payment ?	Short levy arises when the charge itself is done at lower rates, for eg., wrong classification of the product. Short payment can be due to short levy or short payment of a correct levy (when payment is made less than what is due).
5. Should the Department intimate the assessee?	It is mandatory for the Department to issue a show cause notice.
6. Within what time should the show cause notice be served?	Where there is fraud, collusion, willful mis-statement or suppression of facts or contravention of any provisions with an intent to evade payment of duty , 5 years from relevant date. In other cases, 1 year from relevant date. Where the service of notice is stayed by court order, the period of such stay would be excluded in computing this time limit. If the matter is before the Settlement Commission, Sec. 32L(3) specifies that the time commencing from date of application to receipt of order sending back the case shall be excluded. It is very important to note that such notice must be received by the assessee within the time limit stipulated above.

9.6 Customs

7. What is this relevant date?	Relevant date is defined in Sec. 28(3) to mean - a. in case of short levy/non-levy or short payment/non-payment the date on which the proper officer makes an order for clearance of the ; b. In cases of provisional assessment, the date of adjustment of duty after final assessment. c. In case of erroneous refund, the date of such refund d. any other case, date of payment of duty.
8. Is it obligatory on the part of the Department to take on record the assessee's representation ?	Sub-section 2 makes it mandatory for the officer to consider the representation of the assessee. The officer has to comply with the principles of natural justice.
9. Is it mandatory for the officer to pass a written order or will a simple letter from the department suffice?	It is mandatory for the officer to pass a speaking order. Speaking order is one which gives the reasons for the decision. A simple letter asking for payment of duty is not an order.
10. Should the assessee pay the amount after passing the order?	The assessee has a right of further appeal which grants him rights of obtaining stay of demanded amounts. (Please see Chapter on Appellate Procedures.)
11. Should the officer adjudicate cases within a particular time limit?	For cases involving fraud, etc. adjudication should complete within 1 year and other cases within 6 months.
12. Can the assessee pay duty before issue of show cause notice?	No notice would be issued if full duty is paid and intimated to the Department. However this will not apply to cases of fraud etc. Moreover, if there is still some short payment, the officer can recover within 1 year of such intimation.

9.2 INTEREST ON DELAYED PAYMENT OF DUTY IN SPECIAL CASES [SECTION 28AB]

Interest is liable to be paid under section 28AB on all cases of short payment etc. and is charged from the month following the month when the duty should have been paid whether it involves fraud, collusion, willful misstatement or suppression of fact with in intent to evade the payment of duty or not. Therefore, if the demand is raised, the interest under section 28AB will follow.

Under this section, the Central Government is empowered to specify the rate of interest to be charged under Section 28AB and such interest rate should not be below 10% and should not exceed 36% per annum. Presently, the interest is payable at the rate of 13% per annum

starting from the date of the next month succeeding the month in which the duty ought to have been paid. (*Notification 76/2003-Cus (NT) dated 12.09.2003*)

9.3 POWER OF THE CENTRAL GOVERNMENT NOT TO RECOVER DUTIES [SECTION 28A]

Notwithstanding anything contained in this Act, if the Central Government is satisfied -

(a) that a practice was, or is, generally prevalent regarding levy of duty (including non-levy thereof) on any goods imported into, or exported from, India; and

(b) that such goods were, or are, liable -

(i) to duty, in cases where according to the said practice the duty was not, or is not being, levied, or

(ii) to a higher amount of duty than what was, or is being, levied, according to the said practice,

then, the Central Government may, by notification in the Official Gazette, direct that the whole of the duty payable on such goods, or, as the case may be, the duty in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.

(2) Where any notification under sub-section (1) in respect of any goods has been issued, the whole of the duty paid on such goods, or, as the case may be, the duty paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 27.

The person claiming the refund of such duty or, as the case may be, excess duty, should make an application in this behalf to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, in the form referred to in sub-section (1) of section 27, before the expiry of six months from the date of issue of the said notification.

9.4 DUTIES COLLECTED FROM THE BUYER TO BE DEPOSITED WITH THE CENTRAL GOVERNMENT [SECTION 28B]

1. Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal, **the National Tax Tribunal** or any Court or in any other provision of this Act or the regulations made there under, every person who is liable to pay duty under this Act and has collected any amount in excess of the duty assessed or determined or paid on any goods under this Act from the buyer of such goods in any manner as representing duty of customs, shall forthwith pay the amount so collected to the credit of the Central Government [Sub-section 1].

2. Every person, who

9.8 Customs

- has collected any amount in excess of the duty assessed or determined or paid on any goods or
- has collected any amount as representing duty of customs on any goods which are wholly exempt or are chargeable to nil rate of duty;

from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government [Sub-section 1A].

3. Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1A) as the case may be and which has not been so paid, the proper officer may serve on the person liable to pay such amount, a notice requiring him to show cause why he should not pay the amount, as specified in the notice to the credit of the Central Government [Sub-section 2].
4. The proper officer shall, after considering the representation, if any, made by the person on whom the notice is served, determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined [Sub-section 3].
5. The amount paid to the credit of the Central Government under sub-section (1) or sub-section (1A) or sub-section (3) shall be adjusted against the duty payable by the person on finalisation of assessment or any other proceeding for determination of the duty relating to the goods referred to in sub-section (1) or sub-section (1A) [Sub-section 4].
6. Where any surplus is left after the adjustment made under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 27 and such person may make an application under that section in such cases within six months from the date of the public notice to the issued by the Assistant Commissioner of Customs for the refund of such surplus amount [Sub-section 5].

9.5 PROVISIONAL ATTACHMENT OF PROPERTY PENDING ADJUDICATION [SECTION 28BA]

- (1) During the pendency of any proceeding under section 28 or section 28B, the proper officer may provisionally attach any property belonging to the person on whom notice is served under sub-section (1) of section 28 or sub-section (2) of section 28B, as the case may be, in accordance with the rules made in this behalf under section 142 of the Customs Act, 1962.
- (2) Such an attachment shall be done only when the proper officer is of the opinion that the attachment is necessary for the purpose of protecting the interests of revenue. However, a previous approval of the Commissioner of Customs, by order in writing, is a prerequisite for such provisional attachment.

- (3) Such an attachment can be done for a period of 6 months. This period will commence from the date of the order of the Commissioner of Customs permitting such provisional attachment.
- (4) However, this period may be extended by the Chief Commissioner of Customs by such further period or periods as he thinks fit. The reasons for such an extension shall be recorded in writing. It is to be noted that the total period of extension in any case shall not exceed 2 years.
- (5) If an application for settlement of a case under section 127B is made to the Settlement Commission, the period commencing from the date on which such an application is made and ending with the date on which an order under section 127C(1) is made shall be excluded from the extended period mentioned in point (4).

9.6 APPEALS AND REVISIONS

Chapter XV deals with provisions relating to appeals and revisions.

9.6.1 Appellate Stages : Under this Chapter, both assessee and department have been conferred with a right of three stage remedies against the orders passed under Customs Act and Rules.

Briefly, it consists of three stages of appeal two stages of revision and further appeal to Supreme Court. The three stages of Appellate Authorities are the Commissioner (Appeals), CESTAT, High Court **(up to the date when the National tax Tribunal (NTT) is constituted) and NTT [after the NTT is constituted - refer Note at the end of Chapter].**

For orders passed by officers lower than the rank of Commissioner of Customs, the first appeal lies to the Commissioner (Appeals) and there from to the Appellate Tribunal, and then to High Court and finally to the Supreme Court. Where the order of the Tribunal does not relate to determination of rate of duty or value of goods, an appeal is made to the High Court under sections 130, instead of appeal to Supreme Court. In cases where the order-in-original is passed by a Commissioner of Customs, appeal lies directly to the Appellate Tribunal.

The provisions contained in sections 128 to 131C are similar to the provisions contained in sections 35 to 36 of the Central Excise Act.

9.6.2 Appeals to Commissioner (Appeals) [Section 128] Any person aggrieved by any decision or order passed under this Act by an officer of Customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order.

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

9.10 Customs

Commissioner (Appeals) may, if sufficient cause is shown, at any stage of proceeding, grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

The appeal before the Commissioner (Appeals) is to be filed in Form No.C.A.1. in duplicate and is to be accompanied by a copy of decision or order appealed against. The grounds of appeal and the form of verification as contained in form No.C.A.1 is to be signed by the appellant.

The following are important with respect to this section:

1. The provisions of section 5 of the Limitation Act 1963 will apply only to courts. Therefore, quasi judicial authorities such as Collectors and Tribunals are not required to follow the provisions of that Act for computation of time. Even where the Act provides that the provisions of Limitation Act shall apply, section 5 of that Act will come into play only after computing the time prescribed under that particular statute. [*Sakuru vs. Tanaju*, 1985 (22) ELT 327 (SC)].
2. A person who is not a party to the original proceeding cannot file an appeal. He is not an aggrieved person as none of his legal rights are affected.
3. Additional grounds cannot be raised in appeal as a matter of right, if these grounds had not been raised before the original authority. Although the appellate authority is competent to allow such grounds, it should be established that the additional grounds are bonafide and could not be raised earlier before the assessing officer.
4. In an appeal, several grounds can be raised including alternative grounds. It is not open to the authority to pick one of the grounds and reach a conclusion. Raising of a ground in the alternative does not mean that the appellants are claiming so. Such grounds are always without prejudice to other grounds. Therefore, it would be improper to pick up one of the grounds to come to the conclusion that that is all along the claim of the appellant. [*Bombay Chemicals Pvt Ltd vs. UOI*, 1982 ELT 171 (Bom)].
5. CHA (Custom House Agent) cannot file an appeal on behalf of principal: Clause (f) of sub-section (2) of section 146 allows right of appeal against an order suspending his own licence. Nowhere this or other provisions allow a CHA to file an appeal in relation to imports or exports of his principal. [*V.V. Dabke & Sons vs. CC*, 1983 ELT 583 (T-D)].

9.6.3 Procedure in appeal [Section 128A]: 1. The Commissioner (Appeals) shall give an opportunity to the appellant to be heard if he so desires.

2. The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

Demand and Appeals 9.11

3. The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.

However, an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Further, where the Commissioner (Appeals) is of the opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 28 to show cause against the proposed order.

4. The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.
5. The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed. [Sub-section 4A]
6. On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority, the Chief Commissioner of Customs and the Commissioner of Customs.

9.6.4 Appellate Tribunal [Section 129]

1. The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.
2. A judicial member shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade I of that service or any equivalent or higher post for at least three years, or who has been an advocate for at least ten years.

For the purposes of this sub-section, -

- (i) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;
- (ii) in computing the period during which a person has been an advocate, there shall be included any period during which the person has held a judicial office, or the office

9.12 Customs

of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.

3. A technical member shall be a person who has been a member of the Indian Customs and Central Excise Service, Group A, and has held the post of Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years.
4. The Central Government shall appoint —
 - (a) a person who is or has been a Judge of a High Court; or
 - (b) one of the members of the Appellate Tribunal, to be the President thereof.
5. The Central Government may appoint one or more members of the Appellate Tribunal to be the Vice-President, or, as the case may be, Vice-Presidents, thereof.
6. The Senior Vice-President or a Vice-President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing.
7. On ceasing to hold office, the President, Vice-President or other Member shall not be entitled to appear, act or plead before the Appellate Tribunal.

9.6.5 Appeals to Appellate Tribunal [Section 129A]

1. **Orders appellable to Appellate Tribunal:** Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -
 - (a) a decision or order passed by the Commissioner of Customs as an adjudicating authority;
 - (b) an order passed by the Commissioner (Appeals) under section 128A;
 - (c) an order passed by the Board or the Appellate Commissioner of Customs under section 128, as it stood immediately before the appointed day;
 - (d) an order passed by the Board or the Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day :
2. **Orders not appealable :** No appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -
 - (a) any goods imported or exported as baggage;
 - (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;
 - (c) payment of drawback as provided in Chapter X, and the rules made thereunder.

Demand and Appeals 9.13

In the following cases, the Appellate Tribunal may refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where –

- (i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or
- (ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
- (iii) the amount of fine or penalty determined by such order, does not exceed Rs.50,000 [Sub-section 1].

Appeal by Committee of Commissioners: The Board may, by notification in the Official Gazette, constitute such Committees as may be necessary for the purposes of this Act. Such Committee shall consist of two Chief Commissioners of Customs or two Commissioners of Customs [Sub-section (1B)]. Such Committee of Commissioners of Customs may direct the proper officer to appeal on its behalf to the Appellate Tribunal against such order, if it is of the opinion that an order passed by the Commissioner (Appeals) under section 128 or under section 128A is not legal or proper [Sub-section (2)].

However, where the Committee of Commissioners of Customs differs in its opinion regarding appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner of Customs. The Chief Commissioner shall direct the proper officer to appeal to the Appellate Tribunal against such order if it is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper.

It has also been explained that “jurisdictional Chief Commissioner” means the Chief Commissioner of Customs having jurisdiction over the adjudicating authority in the matter.’

Time limit for filing appeal: Every appeal under this section shall be filed within three months from the date on which the order appealed against was communicated to the Commissioner or, as the case may be, the other party preferring the appeal.

Memorandum of Cross objections: On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

9.14 Customs

The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

Form of Appeal: An appeal to the Appellate Tribunal shall be in form CA3 and shall be verified in such manner as may be specified by rules made in this behalf.

Sub-section (6), of section 129A prescribes the amount of fee for filing an appeal to the Appellate Tribunal.

Amount of duty, interest demanded and penalty levied	Fee for filing an appeal
Less than or equal to Rs. 5,00,000	Rs. 1,000.00
More than Rs.5,00,000 but not exceeding Rs.50,00,000	Rs. 5,000.00
More than Rs.50,00,000	Rs.10,000.00

However, no such fee shall be payable in the case of an appeal preferred by Commissioner of Customs. Also, no fee shall be payable in case of filing of a memorandum of cross-objections.

Sub-section (7) prescribes a fee of Rs.500 for every application made before the Appellate Tribunal. The application can be an appeal for grant of stay or for rectification of mistake or for any other purpose; or for restoration of an appeal or an application. However, no such fee shall be payable in the case of an application filed by or on behalf of the Commissioner of Customs.

3. Orders of Appellate Tribunal [Section 129B]:

1. The Appellate Tribunal may
 - pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or
 - may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

However, the Appellate Tribunal may pass such orders only after giving the parties to the appeal, an opportunity of being heard.

The Appellate Tribunal (CESTAT) may, if sufficient cause is shown, at any stage of proceeding, grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

2. The Appellate Tribunal may, at any time within six months from the date of the order amend any order passed by it and shall make such amendments if the mistake is brought to its notice by the Commissioner of Customs or the other party to the appeal. Such amendments shall be made with a view to rectifying any mistake apparent from the record.

An amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other party shall not be made unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

Every appeal shall be decided by the Appellate Tribunal within a period of three years from the date on which such appeal is filed, if it is possible to do so. Further where a order of stay is made in the proceedings of a appeal, the Appellate Tribunal is required to dispose of the appeal within 180 days from the date of such order of stay. However, if such appeal is not disposed of within the above specified period, the stay order shall stand vacated on the expiry of the period of 180 days.

3. The Appellate Tribunal shall send a copy of every order passed to the Commissioner of Customs and the other party to the appeal.
4. Save as otherwise provided in section 130 or section 130E, orders passed by the Appellate Tribunal on appeal shall be final.

4. Procedure of Appellate Tribunal [Section 129C]

The powers and functions of the Appellate Tribunal are to be exercised and discharged by the Benches constituted by the President of the Tribunal and such benches would be formed from amongst the members of the Appellate Tribunal. [Sub-section (1)]

Under sub-section (2) to Section 129C, it is provided that such bench shall consist of one judicial member and one technical member.

However, under sub-section (4) an exception to the above is provided that the President or any other member of the Appellate Tribunal authorized in this behalf by the President may sit singly and dispose of any case which has been allotted to the bench of which he is a member, subject to the condition that none of following does not exceed ten lakhs:

- (i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under Section 125;
- (ii) in case of dispute relating to the rate of duty of customs or to the value of goods for the purpose of assessment and the difference in duty involved or the duty involved
- (iii) the amount of fine or penalty involved

If the members of the Bench differ in opinion on any point, such point shall be decided according to the opinion of the majority, if there is a majority. If the members are equally divided, they shall state the point on which they differ and make reference to the President,

9.16 Customs

who will either hear himself or refer the case for hearing on such point and shall be decided according to the opinion of the majority of these members including those heard first.

Any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding and the Appellate Tribunal shall be deemed to be a Civil Court.

9.6.6 Powers of Committee of Chief Commissioners of Customs or Commissioner of Customs to pass certain orders [Section 129D]

Section 129D(1) gives powers to Committee of Chief Commissioners or Commissioner of Customs to pass certain orders. The Committee of Chief Commissioners may of its own motion, call for and examine the record of any proceeding in which a Commissioner of Customs has passed any order so as to satisfy itself upon the legality or propriety of the order. Thereafter, the Committee of Chief Commissioners may direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal to determine such points as may be specified by it.

However, where the Committee of Chief Commissioners of Customs differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Customs, it shall state the point or points on which it differs and make a reference to the Board. If the Board is of the opinion that the decision or order passed by the Commissioner of Customs is not legal or proper, it may direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order.

Sub-section (2) of section 129D grants similar powers of review to the Commissioner of Customs in respect of decisions taken by the adjudicating authority subordinate to him. The Commissioner may direct such authority or any officer of customs subordinate to him to apply to the Commissioner (Appeals) to determine such points as may be specified by him.

Every order under sub-section (1) and sub-section (2) shall be made within a period of 3 months from the date of communication of the decision or order of the adjudicating authority.

The time period available to the adjudicating authority or the authorised officer to make an application to the Appellate Tribunal or the Commissioner (Appeals) is 1 month from the date of communication of the order of the Committee of the Chief Commissioner or Commissioner. Such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals) as if such application were an appeal made against the decision or order of the adjudicating authority. The provisions regarding appeals, including the provisions of sub-section (4) of section 129A shall, so far as may be, apply to such application.

The provisions of this section do not apply to any decision or order in which the determination of any question having a relation to the rate of duty or to the value of goods for the purposes

of assessment of any duty is in issue or is one of the points in issue.

9.6.7 Powers of revision of Board or Commissioner of Customs in certain cases [Section 129DA]

The Board on its own motion or on the application of any aggrieved person can call for and examine the record of any proceedings in which a Commissioner of Customs has passed any decision or order. After satisfying itself as to correctness legality or propriety of such decision or order, the Board may pass such order thereon as it thinks fit. Similar powers have also been given to Commissioner of Customs in respect of proceedings in which an adjudicating authority subordinate to him has passed any decision or order. Such revisionary powers of Board and Commissioner of Customs are in respect of orders involving rate of duty or valuation of goods.

However, no such orders shall be passed so as to prejudicially affect any person unless, such person is given a reasonable opportunity of being heard in this regard. No notice of demand of duty under this section can be issued unless such person is given notice under section 28 to show cause against the proposed order. Further, such revisionary proceedings cannot be initiated after the expiry of six months from the date of communication of such decision or order of Commissioner of Customs.

One should note that section 129DA has not been brought into force till date since it was initially introduced with the object of establishing a Tribunal called CERAT – Customs and Excise Revenue Appellate Tribunal with the object of deciding matters relating to classification and valuation. However, with the CEGAT functioning smoothly, this Tribunal was never set up and this section therefore has never come into effect till date.

9.6.8 Revision by Central Government [Section 129DD]

The Central Government is vested with the powers to review orders of the Commissioner or Commissioner Appeals on an application made by any aggrieved person. The powers can be exercised only in the following cases:

- (a) any goods imported or exported as baggage;
- (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;
- (c) payment of drawback as provided in Chapter X, and the rules made thereunder.

9.6.9 Deposit, pending appeal, of duty and interest demanded or penalty levied [Section 129E]

Where in any appeal the decision or order appealed against relates to any duty and

9.18 Customs

interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall first deposit the duty and interest demanded or penalty levied with the proper officer.

However, such pre-deposit may be waived by the Commissioner (Appeals) or the Appellate Tribunal if he or it is of the opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such person. Such pre-deposit shall be dispensed with subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

The Commissioner (Appeals) should decide the application for stay/waiver of such pre-deposit of duty and interest or penalty within 30 days from the date of its filing.

9.6.10 Interest on delayed refund of amount deposited under the proviso to section 129E [Section 129EE]

The amount of pre-deposit made under the first proviso to section 129E by an appellant becomes refundable if the appellant succeeds in appeal. Section 129EE provides that interest shall be paid to the appellant where such pre-deposit becomes refundable in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (appellate authority) and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority.

Interest shall be paid at the rate specified in section 27A after the expiry of three months from the date of the communication of the order of the appellate authority, till the date of refund of such amount. However, payment of such interest would not be required if the operation of the order of the appellate authority is stayed by a superior court or tribunal.

9.6.11 Appeal to High Court [Section 130]

An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law [sub-section (1)].

The Commissioner of Customs or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-

- (a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Customs or the other party;
- (b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;
- (c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved [sub-section (2)].

Demand and Appeals 9.19

The High Court has power to condone the delay and admit an appeal after the expiry of the period of 180 days referred to in sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period [sub-section (2A)].

Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question [sub-section (3)].

The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. However, nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question [sub-section (4)].

The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit [sub-section (5)].

The High Court may determine any issue which -

- (a) has not been determined by the Appellate Tribunal; or
- (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on any question of law [sub-section (6)].

When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges [sub-section (7)].

Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it [sub-section (8)].

The provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section [sub-section (9)].

Note: This section shall be omitted with effect from the date when the NTT is constituted.

9.6.12 Appeal to Supreme Court: The Customs Act, 1962, provides a two tier machinery for redressal of grievances against the decision of the Appellate Tribunal. In cases where the decision of the Appellate Tribunal relates to any question having relation with the determination of 'rate of duty' or 'value of goods' amongst other things, the same is directly appellable to the Supreme Court under Section 130E. However, where the order of the Appellate Tribunal does not relate to 'rate of duty' or 'value of goods', first an appeal is made to the High Court and thereafter an appeal against the judgment of the High Court can be made to the Supreme Court provided the High Court certifies it to be a fit case for appeal to

9.20 Customs

the Supreme Court.

It may be noted that the Supreme Court in *L. Chandra Kumar v. UOI* 1997 (92) E.L.T. 318 (S.C.) held in the context of Central Administrative Tribunals it would be incumbent on the parties to approach the relevant High Court before coming to the Supreme Court. However, the Delhi High Court has held in *Shalimar Rubber Industries v. UOI* 1998 (103) E.L.T. 217 (Del.) that the parties right under Sec. 35L has not been taken away by such a decision. The Madhya Pradesh High Court has held in *Neo Sacks Limited v. CEGAT* 1999 (114) E.L.T. 826 that the decision of the Supreme Court in *L.Chandra Kumars* case would include not only the CAT but also all Tribunals. The High Court has further added that writ jurisdiction against CEGAT orders are available and alternative remedy by way of statutory appeal to Supreme Court contained in Sec. 35L or Section 130E being restrictive is not a bar to maintaining a writ petition.

9.6.13 Orders appealable to the Supreme Court: Section 130E specifies two types of orders which are appealable to the Supreme Court:

- (a) an appeal shall lie to the Supreme Court from any judgment of the High Court delivered-
 - (i) in an appeal made under section 130, or
 - (ii) on a reference made under section 130 by the Appellate Tribunal before the 1st day of July, 2003, or
 - (iii) on a reference made under section 130A

if the High Court certifies the case to be fit for appeal to the Supreme Court. The High Court can certify any case on its own motion or on an oral application made by or on behalf of the aggrieved party, immediately after passing of the judgement.

- (b) any order of the Appellate passed **before the establishment of NTT** having relation to the determination of rate of customs duty or value of goods, among other things. **After the establishment of the NTT, the appeal from any order of the Appellate Tribunal having relation to the determination of rate of customs duty or value of goods, among other things shall first lie to NTT.**

Note: *National Tax Tribunal means the National Tax Tribunal established under section 3 of the National Tax Tribunal Act, 2005. The National Tax Tribunal Act, 2005 has been enacted by the Parliament in pursuance of Article 323B of the Constitution. It came into force with effect from December 28th, 2005. The notified date of establishment of the National Tax Tribunal (NTT) by the Central Government is 6th January, 2006.*

The objective behind the enactment of the National Tax Tribunal Act is to modify the present system of appeals under the Customs Act by substituting the National Tax Tribunal for the High Court, for facilitating quick adjudication of disputes under direct and indirect tax laws and achieve uniformity in the interpretation of central legislation. This Act provides that on

Demand and Appeals 9.21

establishment of the National Tax Tribunal, High Court will not have appellate jurisdiction in matters of direct and indirect taxes. This Act vests jurisdiction in NTT to decide direct and indirect tax disputes on appeal from the decision of the respective Appellate Tribunals. Appeal to NTT can be filed both by the assessee and the revenue, from order passed by the CESTAT, on a substantial question of law. Appeal to NTT will lie only if the NTT is satisfied that the case involves a substantial question of law. The NTT shall formulate the substantial question of law for the purpose of hearing of appeal by it.

A party to an appeal, other than the Government, may either appear in person or authorize one or more chartered accountants or legal practitioners or any person duly authorized by him or it to present the case before the NTT. The Government may authorize one or more legal practitioners or any of its officers to present its case before the NTT. It may be noted that the Act does not permit chartered accountants to present the case of the Government before the NTT.

The Act provides that any person, including any department of the Government, aggrieved by any decision or order of NTT may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order of the NTT to him. The Supreme Court can allow filing of the appeal beyond 60 days, if the appellant was prevented by sufficient cause from filing the appeal within the said period of 60 days.

The Bombay High Court in P.C. Joshi vs. Union of India (2006) 152 Taxman 285 has passed an ad-interim order restraining the Government from constituting the NTT and transferring the matters pending in the High Court to the NTT. Therefore, the constitution of the NTT will take effect only after the stay is vacated.

Self-examination questions

1. Briefly state the law relating to demand for payment of duty under section 28 of the Customs Act, 1962.
2. What are the 'relevant dates' for the purpose of issuing the show cause notice for demanding customs duty not levied?
3. Write a brief note on power not to recover duties not levied or short-levied as a result of general practice under section 28A of the Customs Act, 1962.
4. Mention briefly the orders that are not appealable to the Appellate Tribunal.
5. Write a brief note on the orders appealable to the Supreme Court.
6. Discuss the provisions in respect of making an appeal to the High Court.
7. Explain briefly the powers of revision of Board or Commissioner of Customs in certain cases.
8. Discuss the revisionary powers of the Central Government.
9. Write a note on the Committee of Commissioners.

9.22 Customs

10. 'M' imported second-hand machinery from Singapore and filed the classification list. 'M' claimed that the machinery was fully exempt from payment of customs duty under a Notification. However, the Assistant Commissioner of Customs, the authority in original, passed an order-in-original holding that the machinery imported by 'M' was classifiable under a different heading and chargeable to customs duty. Consequently, 'M' had to furnish the bank guarantee for the duty payable under that heading in order to release the machinery.

Subsequently, the Assistant Commissioner of Customs ordered to encash the bank guarantee executed by 'M' to realise the customs duty. No sooner the aforesaid order-in-original was issued to 'M', the Customs Department invoked the bank guarantee by sending an intimation-cum-request to the Bank to pay to them the amount of bank guarantee. 'M' contended that the order of the Assistant Commissioner was an appealable order and since the statutory period of filing an appeal was yet to expire, the Department's action was not correct.

Do you think the stand taken by the Customs Department is tenable in law? Discuss.

Answer

10. Similar situation was addressed to by the High Court in the case of the *Ocean Driving Centre Ltd. v. Union of India* 2005 (180) E.L.T. 313 (Bom.). In this case, the petitioner contended that he had a statutory right of appeal before the Appellate Authority and at the same time, he also had a right to move an application to get the pre-deposit waived in terms of section 129E of the Customs Act, 1962. He further submitted that he had an arguable case on classification. The debatable question had resulted in the release of goods subject to the furnishing of the bank guarantee at the stage of the provisional assessment. Had it not been a debatable issue, he would not have been allowed to claim release of the goods on furnishing the bank guarantee. The bank guarantee was furnished to secure dues of Department. The same was valid and should have been kept alive till the dispute was finally resolved. According to him, order of assessment as on date was not final and conclusive.

The High Court observed that it was not in dispute that the appeal period was yet to expire and that the order was an appealable order. Further, as per the policy engrafted in the Circular No. 396/29/98-CX., dated 2nd June 1998 the Department was expected not to resort to coercive action so long as the appeal period was not over. Hence, the action of Department was contrary to their own policy. The High Court held that it was not proper on the part of the Department to encash the bank guarantee before the expiry of the statutory period provided for filing appeal.

In the given case also 'M' had a statutory right to file an appeal and get the pre-deposit waived. Thus, extending the ratio of the above decision, it can be inferred that the stand taken by the Department is not tenable in law.