

Demands and Appeals

Question 1

Explain the provisions of recovery of duties not levied or short levied or erroneously refunded.

Answer

Section 28 deals with the recovery of duties not levied or short levied or erroneously refunded. It is worth highlighting that provisions of section 28 have been substituted with effect from 08.04.2011 with a view to make these provisions more coherent and clear. The provisions of substituted section 28 are given below in the form of a table for easy understanding:

Relevant section and sub-section	Brief Heading	Relevant provisions
28(1)(a)	Issue of Show Cause Notice within one year from the relevant date	Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,- (a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;
28(1)(b)	Payment of duty or interest before issue of SCN	the person chargeable with the duty or interest may pay,

		before service of notice under clause (a), on the basis of- (i) his own ascertainment of such duty; or (ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.
28(2)	Written intimation to Proper Officer regarding payment of duty and/ interest and consequent no issue of SCN	The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.
28(3)	Issue of SCN for the deficient amount within one year from the date of receipt of information u/s 28(2)	Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub section and the

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		period of one year shall be computed from the date of receipt of information under sub-section (2).
28(4)	Issue of SCN within five years in case of collusion, willful mis-statement etc.	Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of— (a) collusion; or (b) any wilful mis-statement; or (c) suppression of facts, by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date , serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.
28(5)	Payment of accepted duty along with interest on such accepted duty as well as penalty of 25% of accepted duty and submission of relevant intimation in writing to proper officer	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 the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty-five per cent, of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.
28(6)	Deemed conclusion of proceedings if in the opinion of proper officer duty, interest and penalty has been paid in full u/s 28(5). Issue of SCN under section 28(1)(a) for recovery of deficient amount within one year from date of receipt of intimation u/s 28(5), if in the opinion of proper officer duty, interest and penalty has not paid in full u/s 28(5)	Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid the duty with interest and penalty under subsection (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion- (i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135,135A and 140 be deemed to be conclusive

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		as to the matters stated therein; or (ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable , then, the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).
28(7)	Exclusion of Period of Stay in computing the period of one year/five years	In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.
28(8)	Determination of due amount of duty or interest	The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.
28(9)	Time-limit for determination of duty or interest due by	The proper officer shall determine the amount of duty

	proper officer	or interest under sub-section (8),- (a) within six months from the date of notice, where it is possible to do so, in respect of cases falling under clause (a) of sub-section (7); (b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4).
28(10)	Compulsory payment of interest	Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.
Explanation 1 to Section 28(1)	Meaning of Expression 'Relevant Date'	For the purposes of this section, "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 goods; (b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be; (c) in a case where duty or interest has been erroneously refunded , the date of refund;

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		(d) in any other case , the date of payment of duty or interest.
Explanation 2 to section 28(1)	Non-levy, short levy or erroneous refund before 08.04.2011 to be governed by erstwhile provisions	For the removal of doubts, it is hereby declared that any non-levy, short levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President i.e. 08.04.2011 shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.

Question 2

Explain briefly the provisions of section 28(5) of the Customs Act, 1962 in respect of a person who voluntarily deposits full duty demanded along with interest and applicable penalty.

Answer

Section 28(5) provides an **option** 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 or short payment of interest or erroneous refund of duty and interest by reason of collusion or any willful mis-statement or suppression of facts.

Such a person may pay the duty in full or in part as **may be accepted by him** including the interest payable thereon under section 28AA and **penalty equal to 25% of the duty specified within 30 days of the receipt of the notice. In addition, such a person should inform the proper officer about such payment in writing.**

According to provisions of section 28(6) where in the opinion of the proper officer duty is paid in full together with the interest and penalty under sub-section (5), the **proceedings** in respect of such persons to whom notice is served shall be **deemed to have been concluded** in respect of the matters stated therein. On the other hand, where in the opinion of the proper officer the duty **with interest** and penalty that has been paid falls short of the amount actually payable, then, the proper officer shall proceed to issue the notice as provided in section 28(1)(a) in respect of the such amount which falls short of the amount actually payable within one year from the date of receipt of information under section 28(5).

Question 3

Write a note on the provisions of section 28AA of the Customs Act, 1962 regarding interest on delayed payment of duty.

Answer

W.E.F. 08.04.2011 the provisions of section 28AA regarding interest on delayed payment of duty are as under:

Relevant Section & Sub-section	Brief Heading	Details
28AA(1)	Compulsory payment of interest	Notwithstanding anything contained in any judgment, decree, order/direction of any court, Appellate Tribunal or any authority or any other provision of Customs Act or the rules made thereunder, the person, who is liable to duty in accordance with the provisions of section 28, shall be liable to pay interest, if any, fixed under section 28AA(2) in addition to making payment of such duty. Further, it is immaterial whether aforementioned interest payment is made voluntarily or after determination of the duty.
28AA(2)	Rate of Interest and Period of Interest	Interest is to be paid at such rate not below 10% per cent and not exceeding 36% p.a., as the Central Govt. may fix by way of notification in the Official Gazette. The above interest is to be paid for the period beginning from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund up to the date of payment of such duty.
28AA(3)	Situation when no interest is required to be paid	Notwithstanding anything contained in Section 28AA(1), no interest shall be payable in the following situation- (a) The duty becomes payable consequent to the issue of an order/ instruction/direction by the Board under section 151A ; and (b) Such amount of duty is voluntarily paid in full, within 45 days from the date of issue of such order, instruction/direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.

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Question 4

Write a brief note on the provisions of section 28BA of the Customs Act, 1962 regarding property that may be attached provisionally to protect the interest of revenue in certain cases.

Answer

Section 28BA provides that 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 has been served under section 28(1) or section 28B(2), in accordance with section 142 of the Customs Act and the Rules made thereunder. This action requires prior approval of the Commissioner of Customs and must be necessary for protecting the interest of Revenue.

Such an attachment could be effected for a period of 6 months which shall commence from the date of the order of the Commissioner permitting such provisional attachment. This period may be extended by the Chief Commissioner of Customs by such further period or periods as may be determined by him. The reasons for such extension should be recorded in writing and the total period should not exceed 2 years.

If an application for the settlement of the case is made under section 127B, the period commencing from the date on which such an application is made and ending with the date on which order under section 127C(1) is made shall be excluded from the period of 2 years mentioned above.

Question 5

State the situations in which the proper officer is authorized to issue show-cause notice under section 28 of the Customs Act, 1962 and also the time limit.

Answer

As per **section 28(1)** of the Customs Act, 1962, the proper officer is authorized to issue show cause notice 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
- (v) when interest payable has been part paid
- (vi) when interest has been erroneously refunded

W.E.F. 08.04.2011 **Time Limit** for issue of show-cause notice

- (a) For any reason other than the reasons of collusion or any willful mis-statement or suppression of facts– **within one year from the relevant date**

- (b) In the case of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter-**within five years from the relevant date.**

Question 6

Examine briefly the powers of the department, if it is not satisfied with an order made under section 47 of the Customs Act, 1962 pursuant to which goods have been cleared.

Answer

Goods are cleared from customs after proper officer makes an order permitting clearance of the same for home consumption under section 47 of the Customs Act. Once goods are cleared after issue of such order but the department is not satisfied with the order, following action can be taken:

- (i) Department can file a **review application** under section 129D(2) of the Customs Act against the order of the proper officer with the **Commissioner (Appeals)**; or
- (ii) Action can be taken under section 28 of the Customs Act, by **issuing a show cause notice.**

It has also been held by the Supreme Court in **UOI v. Jain Shudh Vanaspati Ltd. (1996) 86 ELT 460 (SC)** that action can be taken under section 28 of the Customs Act, even after goods are released from Customs by issuing a show cause notice etc.

Question 7

*A show cause notice **demanding customs duty** was issued in case of clearances made by 100% Export Oriented Undertaking (EOU) to Domestic Tariff Area (DTA). Is the show-cause notice defective in law?*

Answer

Yes, the show cause notice issued is defective in law as in respect of clearances made by a 100% export oriented undertaking (EOU) to domestic tariff area, the duty to be paid by the 100% EOU is **the duty of excise and not customs duty**. Therefore, show cause notice using the word customs duty instead of central excise duty is not maintainable. Similar view was expressed in the case of **CCE v. Suresh Synthetics (2007) 216 ELT 662 (SC)**.

Question 8

State the circumstances under which a revision petition can be filed before the Central Government under the Customs Act.

Answer

The first proviso to section 129A of the Customs Act, 1962 provides that the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order passed by Commissioner (Appeals) if such order relates to, -

- (a) any goods imported or exported as baggage;

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- (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or which are short landed at that destination;
- (c) payment of drawback as provided in Chapter X, and the rules made thereunder.

In such cases, redressal lies with the Central Government. Section 129DD(1) enables the appellant to get the orders of Appellate Commissioner (on these three aspects) annulled or modified by the Central Government.

Sub-section 1A of section 129DD enables the Commissioner of Customs to direct the proper officer to make an application on his behalf to the Central Government for revision of an order. However, such application can be made only if the Commissioner is of the opinion that the order passed by the Commissioner (Appeals) under section 128A is not legal or proper.

Question 9

The Committee of Commissioners of Customs is empowered under the Customs Act, 1962 to direct the filing of an appeal before the Appellate Tribunal in certain cases while in certain others, it may direct an application to be filed before the Appellate Tribunal for determination of such points arising out of the decision or order as may be specified by the said committee. Write a brief note on the powers of the Committee of Commissioners of Customs bringing out the difference in the exercise of such powers.

***Note:** The power to direct an application to be filed before the Appellate Tribunal for determination of such points arising out of the decision or order as may be specified by the Committee vests with the Committee of Chief Commissioner.

Answer

Under **section 129A(2)** of the Customs Act, 1962, the **Committee of Commissioners of Customs** may direct the proper officer to file appeal on its behalf to the Appellate Tribunal against the order of Commissioner (Appeals), if it is of the opinion that the order is not legal or proper.

Under **section 129D(1)** of the Customs Act, 1962, the **Committee of Chief Commissioners of Customs** may, of its own motion, call for and examine the record of any proceedings in which a Commissioner of Customs has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, 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 as may be specified by the Committee of Chief Commissioners of Customs in its order.

Therefore, **difference** in two cases mentioned above is that in the former case the Department has to file a **regular appeal** with the Tribunal while in the latter case a **review application** is filed with the Tribunal. It may also be noted here that the review application is treated as appeal filed against the decision or order of the adjudicating authority vide section 129D(4) of the Customs Act, 1962.

Further, in the former case an appeal has to be filed **within three months** as specified in section 129A(3) of the Customs Act, 1962 while in the latter case application for review can be filed **within four months**; three months for the Committee of Chief Commissioner of Customs to issue order for review and further one month to the Commissioner to file an application .

Question 10

K imported some old machinery from London claiming that the machinery was fully exempted from customs duty under a notification. Assistant Commissioner of Customs, the authority in original, differed and held that the machinery so imported was covered under a different heading and attracted customs duty. Therefore, K had to furnish bank guarantee for duty payable for release of machine.

Subsequently, the Assistant Commissioner of Customs ordered to encash the bank guarantee to realize the duty. This order was issued to K and immediately thereafter, the Customs Department invoked bank guarantee by sending request to bank for making payment to them. K contended that order of the Assistant Commissioner was appealable and the period of filing appeal was yet to expire. Hence the action of the Department was not correct. You are required to comment whether the action of customs Department is correct in law based on decided case law, if any.

Answer

Similar situation was faced by Bombay High Court, in the case of ***Ocean Driving Centre Ltd. v. Union of India 2005 (180) E.L.T 313,***. In that case, the petitioner contended that he had a statutory right of appeal before the Appellate Authority and also he 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 release of goods subject to furnishing bank guarantee at the **stage of provisional assessment**. Had it not been a debatable issue, he would not have been allowed to claim release of goods on furnishing the bank guarantee, which was furnished to secure the dues of Department. The same was valid and should have been kept alive **till the dispute was finally resolved**. According to them, the order of assessment 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 as per the Departmental circular no. 396/29/98-C.E 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 Departmental action was contrary to their own policy. According to the High Court, it was not proper on the part of Department to encash the bank guarantee before the expiry of statutory period provided for filing appeal.

Thus, the **stand taken by the Department was not tenable** in law.

Question 11

What are the orders of Commissioner (Appeals) not appealable to Appellate Tribunal as per section 129A of the Customs Act, 1962?

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Answer

No appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall have no jurisdiction to decide any appeal in respect of any order passed by the Commissioner of Appeals under **section 129A**, if such order relates to:

- (i) any goods imported or exported **as baggage**;
- (ii) any goods loaded in 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.
- (iii) **payment of drawback** as provided in Chapter X and the rules made there under.

Question 12

What are the orders that are appealable to the High Court under the Customs Act, 1962? Can the delay in filing an appeal be condoned by the High Court?

Answer

As per **section 130(1) of the Customs Act, 1962**, an appeal can be made to the High Court against the order of the Tribunal if the case involves substantial question of law, except in cases relating to rate of duty and valuation.

Sub-section (2) of section 130 *inter alia* lays down that an appeal can be made to the High Court **within 180 days** from the date on which the order appealed against is received by the Commissioner of Customs or the other party.

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)].

Question 13

Mention the orders against which appeal lies to the Supreme Court under Section 130E of the Customs Act.

Answer

As per **section 130E** of the Customs Act, an appeal shall lie to the Supreme Court from-

- (a) any judgment of 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 01.07.2003, or
 - (iii) on a reference made u/s 130 A,

if the High Court certifies the case to be fit for appeal to the Supreme Court. Such certification can be done by the High Court 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 Tribunal **having relation to the determination of rate of customs duty or value of goods**, among other things.

Question 14

Briefly explain the time limit for issuing show cause notice for demanding customs duty short paid.

Answer

Section 28 of the Customs Act, 1962 provides that where the customs duty has been short paid, a show cause notice shall be issued-

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

However, if the customs duty has been short paid by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or their agent or employee, the show cause notice can be issued **within five years from the relevant date**.

Relevant date means –

- (i) in a case where duty is not levied, the date on which the proper officer makes an order for the clearance of goods;
- (ii) in the case of provisional assessment, the date of adjustment of duty after the final assessment;
- (iii) in any other case, the date of payment of duty.

Question 15

M/s. XYZ, a 100% export oriented undertaking (100% E.O.U. in short) imported DG sets and furnace oil duty free for setting up captive power plant for its power requirements for export production. They used the power so generated for export production but sold surplus power in domestic tariff area. Is customs department justified in demanding duty on DG sets and furnace oil as surplus power has been sold in domestic tariff area?

Answer

D.G. Sets, spare parts of D.G. Sets and consumables, such as furnace oil/lubricating oil/HSD are exempt from duty if used in connection with the production of goods meant for export by a 100% EOU vide *Notification Nos. 13/81-Cus., 53/91-Cus. and 1/95-Cus.* In **Commissioner v. Hanil Era Textile Ltd. - 2005 (180) E.L.T. A044 (S.C.)** the Supreme Court agreed to the view taken by the Tribunal that **in the absence of a restrictive clause in the notifications** that

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imported goods are to be solely or exclusively used for manufacture of goods for export, there is no violation of any condition of notification if surplus power generated due to unforeseen exigencies is sold in domestic tariff area.

Therefore, **no duty can be demanded** from M/s XYZ for selling the surplus power in domestic tariff area **for the following reasons:**

- (i) They have used the DG sets and furnace oil imported duty free for generation of power, and
- (ii) such power generated has been used for manufacturing goods for export, and
- (iii) only the surplus power has been sold, as power cannot be stored.

Self-examination questions

Question 1

Briefly state the law relating to demand for payment of duty under section 28 of the Customs Act, 1962.

Question 2

What are the 'relevant dates' for the purpose of issuing the show cause notice for demanding customs duty not levied?

Question 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.

Question 4

Mention briefly the orders that are not appealable to the Appellate Tribunal.

Question 5

Discuss the provisions in respect of making an appeal to the High Court.

Question 6

Explain briefly the powers of revision of Board or Commissioner of Customs in certain cases.

Question 7

Discuss the revisionary powers of the Central Government.

Question 8

Write a note on the Committee of Commissioners.

Question 9

'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

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.