

Question 1

To whom should the matter be referred in a case where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise and how will the matter be settled under section 35E(1) of the Central Excise Act, 1944

Answer

The Finance Act, 2008 has added a **proviso to section 35E(1) of Central Excise Act 1944** to cover a case where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise. In such a case the Committee shall state the point or points on which it differs and make a reference to the Board which after considering the facts of the order, if is of the opinion that the decision or order passed by the Commissioner of Central Excise is not legal or proper may direct such Commissioner or any other Commissioner to apply to Appellate Tribunal for determination of such points arising out of decision or order

Question 2

M/s Raj Fibres had filed an appeal to the High Court on Aug. 11, 2011 under section 35G of the Central Excise Act, 1944 aggrieved by an order passed by the Appellate Tribunal. The order appealed against was received by the assessee on Jan. 1, 2011. The High Court dismissed the appeal petition on the ground that the same had been filed beyond the period provided for filing an appeal under section 35G of the Act and the Court had no power to condone the delay. M/s Raj Fibres urged before the High Court that the provisions of the Limitation Act, 1963 should be made available and the delay in presenting the appeal ought to be condoned. State briefly whether the High Court could condone the delay in presenting the appeal pursuant to the provisions of the Limitation Act, 1963 as urged by M/s Raj Fibres.

Answer

With effect from 19-08-2009, section 35 G as well as 35H have been amended with retrospective effect from 01-07-1999 to provide that High Court can condone delay in filing appeal or cross objection, if sufficient cause is shown to the High Court.

Question 3

Write a brief note on power of rectification of mistakes given to Appellate Tribunal under Section 35C(2) of Central Excise Act. Whether the power of rectification includes the power to review the order also?

Answer

Under Section 35C(2) of the Central Excise Act, 1944, the Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it. Such a rectification shall be made when the Commissioner of Central Excise or the other party to the appeal brings the mistake to the notice of the Tribunal. Where such an amendment has the effect of increasing the liability of the other party then such an amendment shall be made only after issuing a notice and giving a reasonable opportunity of being heard to the party concerned.

The Appellate Tribunal u/s 35C is not empowered to review an order passed by it. The power of review is not an inherent power and must be expressly granted – **CCE v. Steel Co. Gujarat Ltd. 2004 (163) ELT 403 (SC).**

Question 4

What are the grounds for obtaining a stay of demand of duty ?

Answer

According to first proviso to Section 35F of Central Excise Act, 1944 pre-deposit of duty and penalty for hearing appeal may be dispensed or waived or stayed by appellate authority if in the opinion of the Appellate Authority the deposit or duty demanded or penalty levied would cause '**undue hardship**' to the concerned person. The hardship can be any hardship and not only financial hardship. Wide discretion is available to the appellate authority in granting stay/dispensing pre-deposit of duty.

Question 5

State in relation to appeals to Commissioner (Appeals) under Central Excise Act, 1944 and Central Excise (Appeals) Rules, 2001 regarding order that can be passed.

Answer

According to provisions of section 35A(3) of Central Excise Act, 1944 the Commissioner (Appeals) shall, after making necessary enquiry, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against. Further, section 35A(4) provides that order of Commissioner(Appeals) shall be in writing and shall state all points for determination, give decision and reasons for the same. Copy of the order should be communicated to the following:

- (i) Appellant
- (ii) The adjudicating authority against whose order the appeal was filed and
- (iii) Commissioner
- (iv) Chief Commissioner of Central Excise.

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Question 6

Explain the validity of the following statement with reference to the Central Excise Laws as amended:

High Court is empowered to condone delay in filing appeal and cross objection filed under sections 35G and 35H of the Central Excise Act, 1944, beyond the prescribed period.

Answer

Yes, the statement is valid. Sub-section (2A) of section 35G and sub-section (3A) of section 35H, **empowers the High Court to condone the delay in filing appeal and cross objections** filed under sections 35G and 35H of the Central Excise Act, 1944 after the expiry of the prescribed period.

Question 7

In what circumstances additional evidence can be produced by an appellant before the Commissioner (Appeals) of Central Excise?

Answer

Rule 5 of the Central Excise (Appeals) Rules, 2001 provides that the appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, in addition to evidence produced by him during the course of the proceedings before the adjudicating authority. However, **additional evidence can be produced in the following circumstances –**

- (1) where the adjudicating authority has refused to admit evidence which ought to have been admitted, or
- (2) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by adjudicating authority, or
- (3) where the appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal, or
- (4) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

The Commissioner (Appeals) has to record the reasons for admitting the additional evidence in writing. Further, the adjudicating authority or an officer authorized by the said authority has to be allowed a reasonable opportunity:

- (1) to examine the evidence or document or to cross examine any witness produced by the appellant; or
- (2) to produce any evidence or any witness in rebuttal of the additional evidence.

The power of the Commissioner(Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal is independent of the

above provisions relating to additional evidence and his powers will not be affected by the said provisions.

Question 8

Name the decisions or orders which could be appealed to the Appellate Tribunal under section 35B of Central Excise Act, 1944. Are there any exceptions to the said provision? If yes, mention those exceptions.

Answer

According to provisions of Section 35B of Central Excise Act, 1944 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 Central Excise as an adjudicating authority;
- (b) An order passed by the Commissioner (Appeals) under section 35A of Central Excise Act, 1944.

Exceptions to above provision

If order passed by the Commissioner (Appeals) under section 35A of Central Excise Act, 1944 relates to any of the following then no appeal shall lie to the Appellate Tribunal:

- (a) A case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;
- (b) A rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;
- (c) Goods exported outside India (except to Nepal and Bhutan) without payment of duty;
- (d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of Central Excise Act or the rules made thereunder.

Besides, the Appellate Tribunal may, its discretion, refuse to admit an appeal in respect of an order passed by the Commissioner (Appeals) under section 35A where:

- (i) In any disputed case (other than a case relating to the determination of rate of duty or valuation of goods) the difference in duty involved or duty involved ; or
- (ii) The amount of fine or penalty determined by such order does not exceed ₹ 50,000/-

Question 9

What are the orders that are appealable to Supreme Court under the Central Excise Act 1944?

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Answer

Orders that are appealable to Supreme Court: -As per section 35L of the Central Excise Act, 1944, an appeal shall lie to the Supreme Court from

- (a) any judgment of the High Court delivered -
 - (i) in an appeal made under section 35G or
 - (ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003 or
 - (iii) on a reference made under section 35H

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 Tribunal [before the establishment of NTT] having relation to the determination of rate of duty or value of goods, among other things.

Further, by Special Leave Petition (SLP) under Article 136 of Constitution of India i.e. permission of Supreme Court, even in cases where High Court does not certify it to be a fit case for appeal to Supreme Court, an appeal can be filed before S.C.

Question 10

Can the Department file an appeal in respect of the same assessee if in respect of some years no appeal was filed in matters involving identical dispute. Write a brief note with reference to the Central Excise Act, 1944.

Answer

It has been held by the Supreme Court in the case of *C.K Gangadharan v. CIT, Cochin, 2008 (228) ELT 497* that merely because Revenue has not preferred an appeal in some cases, it would not prevent the Revenue to prefer an appeal in another case if it is in the public interest or there is just cause for doing so or for a pronouncement by the higher Court when divergent views are expressed by the different High Courts.

However, the Supreme Court has given a conflicting decision in the case of *CIT v. J.K. Charitable Trust 2008 (232) ELT 769 (SC 3 members bench)* wherein it has held that if in respect of some years, in respect of same assessee, no appeal was filed involving an identical dispute, revenue can be precluded from filing an appeal if the fact situation in subsequent years remains the same.

Further, it may be noted that section 35R inserted vide the Finance Act, 2011 provides *inter alia* that where in pursuance of any instruction issued by CBEC with regard to fixing monetary limits for filing appeal etc., Central Excise Officer has not filed any appeal against any decision passed under the provisions of the Act, then it shall not preclude such officer from filing appeal in any other case involving the same or similar issues or questions of law.

Question 11

Write a brief note on the matters with respect to which an appeal does not lie before the Customs Excise Service Tax Appellate Tribunal against any order passed by Commissioner (Appeals), under section 35B of the Central Excise Act, 1944

Answer

As per section 35B of the Central Excise Act, 1944, the matters in respect of which an appeal does not lie before the Customs Excise Service Tax Appellate Tribunal against any order passed by Commissioner (Appeals) are as follows:-

- (a) case of loss of goods during transit or during their processing in a warehouse or in storage in a factory or a warehouse
- (b) rebate of excise duty on export goods or on excisable materials used in the manufacture of export goods or goods exported without payment of duty (except exports to Nepal or Bhutan);
- (c) CENVAT credit which is utilized for payment of excise duty on final products

Question 12

State briefly the procedure for adducing additional evidence in appeal proceedings before the Commissioner (Appeals) under Section 35 of the Central Excise Act, 1944.

Answer

The Commissioner (Appeals) shall not admit any additional evidence unless the adjudicating authority or his authorized person in this behalf has been allowed a reasonable opportunity:-

- (a) to examine the evidence or documents or to cross-examine any witness produced by the appellant, or
- (b) to produce any evidence or any witness in rebuttal of the additional evidence produced by the appellant.

However, the Commissioner (Appeal) must record in writing the reason for admission of additional evidence.

Question 13

Examine the validity of the statement "Commissioner of Central Excise (Appeals) can enhance the amount of duty demanded or fine in lieu of confiscation or penalty while deciding appeal filed by an assessee".

Answer

The statement is valid. Section 35A provides that Commissioner (Appeals) can enhance penalty or fine in lieu of confiscation or duty demanded after making further enquiry as may be necessary and after giving an opportunity of being heard to the appellant. Further,

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enhancement of duty demand shall be subject to time limit under section 11A of the Central Excise Act, 1944.

Question 14

Rishabh Internationals Limited (RIL) cleared the goods to Sambhav Enterprises (SE) paying excise duty @ 14% in the month of March, 2011 although the rate of duty on the said goods had been reduced to 10% in the Union Budget 2011-12. However, SE refused to pay the higher duty paid by RIL by mistake and subsequently raised a debit note. RIL applied for the refund of excess excise duty paid of ₹ 4,90,000 which was rejected by the Department on the ground that a debit note could not form the basis for refund.

An appeal was filed to the Commissioner of Central Excise (Appeals) which passed an order accepting RIL's refund claim. You are required to examine whether, in the instant case, Revenue being aggrieved by the order of the Commissioner of Central Excise (Appeals) can file an appeal to the CESTAT against such order.

Answer

No, Revenue cannot file an appeal to CESTAT against the order passed by the Commissioner of Central Excise (Appeals). As per the National Litigation Policy, in Revenue matters, appeal shall not be filed if the amount involved is less than the monetary limit fixed by the Revenue authorities for the said purpose. CBEC has issued the instructions fixing the monetary limits of duty below which an appeal shall not be filed in CESTAT, High Court and Supreme Court. Consequently, an appeal cannot be filed in Tribunal if the duty involved in a case is ₹ 5,00,000 or below and these monetary limits apply to cases of refund as well. Since the amount of duty involved in the instant case is less than ₹ 5,00,000, the Revenue cannot file an appeal in the Tribunal.

Exercise

1. Who can sign the grounds of appeal and the form of verification as contained in Form No. E.A.-1?
2. Briefly explain the provisions relating to revision application.
3. What are the matters on which appeal does not lie with CEGAT? Where does redressal lie in such cases?
4. Discuss the revisionary powers of the Central Excise Authorities under section 35E and section 35EE of the Central Excise Act, 1944.
5. What are the orders that are appealable to the Supreme Court?
6. Write a note on production of additional evidence before Commissioner (Appeals).
7. When revision power under section 35EE can be exercised by the Central Government?