

Demands and Appeals

Question 1

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 payable has been erroneously refunded

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.**

Relevant date means –

- (i) 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;
- (ii) in the case of provisional assessment, the date of adjustment of duty after the final assessment;
- (iii) in case of erroneous refund of duty or interest, the date of refund
- (iv) in any other case, the date of payment of duty or interest.

Question 2

Mention briefly the option available to an importer or exporter or their agent or employee under sub-section (5) of section 28 of the Customs Act, 1962.

Answer

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

If such a person pays the duty in full or in part as may be accepted by him including the interest payable thereon under section 28AA and penalty within 30 days of the receipt of the notice, the penalty will be reduced to 25% of the duty specified in the notice or the duty so accepted by that person. The person should also 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

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)**. It may be noted that excise duty chargeable on goods cleared by 100% EOUs in DTA, is equivalent to the aggregate of the customs duties which would be leviable under the Customs Act or any other law for the time being in force on like goods manufactured outside India if imported into India.

Question 4

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) Under Section 129D(2) of the Customs Act, 1962, the commissioner of Customs can suo moto review the order made under section 47 of the Customs Act and can give a direction to file a review application with the commissioner (appeals).
- (ii) Action can be taken under section 28 of the Customs Act, by **issuing a show cause notice**.

Question 5

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;
- (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.

By virtue of **section 129DD the Commissioner of Customs may 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 6

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, the Committee of Chief Commissioners 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

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Commissioners /Committee of Chief Commissioners of Customs bringing out the difference in the exercise of such powers.

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 be noted 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 7

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

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 8

Discuss with a brief note the provisions of section 129E of the Customs Act, 1962 regarding deposit of duty and interest or penalty levied pending appeal.

Answer

As per section 129E where, in any appeal, the decision or order appealed against relates to any duty and interest demanded in respect of goods which are not under the control of customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, first deposit the duty and interest demanded or penalty levied with the proper officer.

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

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

Question 9

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 Customs duty and valuation of goods.

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 10

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 in an appeal made under section 130, if the High Court certifies the case to be fit for appeal to the Supreme Court. Such certification can

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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 11

Briefly explain the power of CBEC to issue instructions regarding non-filing of appeal in certain cases under the Customs Act, 1962

Answer

Section 131BA provides as follows:-

The Board may issue instructions fixing such monetary limits for the purposes of regulating the filing of appeal/application/revision/reference by the Commissioner of Customs.

Where the Commissioner of Customs has not filed an appeal/application/revision/ reference against any decision or order passed under the provisions of this Act in pursuance of such an instruction, he shall not be precluded from filing any appeal etc. in any other case involving the same or similar issues or questions of law.

Non-filing of appeal, application etc. by Commissioner of Customs cannot be considered to be his acquiescence in the decision on disputed issue. Further, Appellate Tribunal or court must have regard to the circumstances for non-filing of appeal etc.

Question 12

'M' imported second-hand machinery from Singapore and 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 Drilling 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.

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. 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.

Question 13

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. This benefit was available vide an exemptions notification. They used the power so generated for export production but sold surplus power in domestic tariff area.

Customs Department has demanded duty on DG sets and furnace oil as surplus power has been sold in domestic tariff area. The notification does not specifically restrict the use of imported goods for manufacture of export goods.

Do you think the demand of the Customs Department is valid in law.

Answer

The facts of the case are similar to the case of **Commissioner v. Hanil Era Textile Ltd. - 2005 (180) E.L.T. A044 (S.C.)** wherein the Supreme Court agreed to the view taken by the Tribunal that **in the absence of a restrictive clause in the notifications** that 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.

Exercise

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. *Discuss the provisions in respect of making an appeal to the High Court.*
6. *Discuss the revisionary powers of the Central Government.*
7. *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.*
8. *Explain briefly the powers of review to the Commissioner of Customs under section 129D(2) of the Customs Act, 1962 in respect of decisions taken by adjudicating authority subordinate to him.*