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[Training Material for Departmental Use]

E-BOOK

On

*Appeals*

*Before the Commissioner (Appeals)*

*in*

*Central Excise /Customs/Service Tax*

## Appeals before the Commissioner (Appeals)

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### Note:

1. In this E-book, attempts have been made to explain about ***filing of Appeals before the Commissioner (Appeals) in Central Excise, Customs & Service Tax.*** It is expected that it will help departmental officers in their day-to-day work.
2. Though all efforts have been made to make this document error free, but it is possible that some errors might have crept into the document. If you notice any errors, the same may be brought to the notice to the NACIN, RTI, Kanpur on the Email address: [nacin.kanpur@gov.in](mailto:nacin.kanpur@gov.in). This may not be a perfect E-book. If you have any suggestion to improve this book, you are requested to forward the same to us.
3. This e-book has been prepared with active assistance and contribution by **Shri Sanjay Kumar Agarwal, Superintendent, Commissionerate of Central Excise, Lucknow (now retired), Shri S.A. Khan, Assistant Director, NACIN, ZC, Kanpur (now retired) under the able guidance of Shri C. P. Goyal, the then Additional Director General of NACIN, ZC, Kanpur and has further been updated by Shri R.S.Chandel, Additional Assistant Director, NACIN, ZC, Kanpur.** I appreciate their participation and willingness to prepare e-books and to help fellow departmental officers in capacity building and upgrading their knowledge.
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### **1. Introduction**

- 1.1 Under Central Excise/Customs/Service Tax laws, the officers of Customs & Central Excise have been empowered to act as a quasi-judicial authority and decide as to whether an infringement or contravention has taken place and whether penal action is called for. The adjudication proceedings are quasi-judicial proceedings, ultimately resulting into issuance of a speaking order, which is appealable to the next higher forum.
- 1.2 In the Indirect Taxation, both, assessee and the department, have been conferred with a right of two or three stage appellate remedy, but with certain restrictions on department on the basis of monetary limit, barring the issue-based litigations. **Against the orders passed by the officers who are lower than the rank of Principal Commissioner of Central Excise/Customs/Service Tax or Commissioner of Central Excise/ Customs /Service Tax, the first appeal lies to the Commissioner (Appeals)** and there from to the Customs, Excise & Service Tax Appellate Tribunal (i.e. CESTAT) and finally to the High Court/ Supreme Court, as the case may be. But, where the order of the Tribunal does not relate to determination of rate of duty or value of goods, an appeal to the High Court lies under Sections 35G of Central Excise Act / Section-130 of Customs Act & reference application under 35H of Central Excise Act / Section-130 of Customs Act, instead of Appeal to Supreme Court.
- 1.3 In certain specified categories of cases, the appeal against the order of Commissioner (Appeals) lies before Joint Secretary (Revision Application). *To know about the concept of Revision Application in indirect taxes, refer to e-book on “revision Application” at <https://nacin.gov.in/page/rti-kanpur>*
- 1.4 In cases where the Order-in-Original is passed by a Principal Commissioner or Commissioner of Central Excise/Customs/Service Tax, first appeal is directly filed before the Appellate Tribunal.
- 1.5 The provisions for appeals are contained in **Chapter VI-A of the Central Excise Act, 1944** and **Chapter XV of the Customs Act, 1962**. In case of Service Tax, these provisions are contained in Sections 84, 85, and 86 of the Finance Act, 1994. Further, certain sections of the Central Excise Act, 1944, contained in Chapter VI-A, namely 35EE, 35F, 35FF to 35O, 35Q, 35R and 36 Sections have also been made applicable to Service Tax matters *Vide* section 83 of the Finance Act, 1994.

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- 1.6 The Rules pertaining to appeal i.e., Central Excise (Appeals) Rules, 2001 have been notified w.e.f. 01.07.2001. Similarly, the provisions relating to appeals in Customs matters are contained in Customs (Appeals) Rules, 1982, which have been notified w.e.f. 10.09.1982. In case of Service Tax, the provisions are contained in Rule 8 and 9 of the Service Tax Rules, 1994.
- 1.7 The provisions relating to appeals, as contained in Central Excise Act, 1944 and rules made thereunder are also applicable to cases under Produce Cess Act, 1966, and for Handloom Cess leviable under Khadi and other Handloom Industries Development (Additional Excise Duty on Cloth) Act, 1953.
- 1.8 The appellate remedy available for orders passed by different authorities may be summarized as given in Table-I below :-

**TABLE-1**

Sl.	Order Passed by	Appellate Authority
1	All officers upto & including Additional Commissioner	Commissioner (Appeals)
2	Principal Commissioner of Central Excise/ Commissioner of Central Excise/ Commissioner (Adjudication) of DGCEI/ DRI/ Commissioner (Appeals)	<b>CESTAT</b>
3.	Commissioner (Appeals)	<b>CESTAT</b> However, in following cases, 'Appeals' against order of Commissioner (Appeals) shall be filed before the Joint Secretary (Revision Application)  <u><b>(A) In Central Excise cases</b></u>  (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 Bhutan) without payment of duty;

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		<p>(d) credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of the Central Excise Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No.2) Act, 1998] <b><i>(Date for this clause not yet notified by the Central Government).</i></b></p> <p><b><u>(B) In Customs cases</u></b></p> <p>(a) any goods imported as baggage;</p> <p>(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;</p> <p>(c) payment of drawback as provided in Chapter X, and the rules made thereunder.</p> <p><b><u>(C) In Service Tax cases</u></b></p> <p>If the matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service.</p>
4	CESTAT	Supreme Court (Classification and Valuation cases)
5	CESTAT	High Court (Other than classification and valuation matters)
6	High Court	Supreme Court

**1.9** This e-book is limited to the subject matter of filing appeal before Commissioner (Appeals) and matter relating thereto.

### ***2. Statutory Provisions for Appeals before Commissioner (Appeals)***

- 2.1** The provisions relating to appeals before the Commissioner (Appeals) are contained in [Section 35 & 35A](#) of the Central Excise Act, 1944, [Section 128 & 128A](#) of the Customs Act, 1962 and [Section 84 & 85](#) of the Finance Act, 1994.
- 2.2** The provisions relating to appeals, as contained in Central Excise Act, 1944 and Rules made thereunder, are also applicable to cases under Produce Cess Act, 1966, and for Handloom Cess leviable under the Khadi and other Handloom Industrial Development (Additional Excise Duty on Cloth) Act, 1953.
- 2.3** The provisions of Central Excise Act, 1944 and Rules made thereunder (Central Excise Law); Chapter V of the Finance Act, 1994 (Service Tax law) alongwith various other Central and State laws have been repealed or substituted by a new set

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of GST law w.e.f. 01-07-2017. However, a provision relating to repeal or saving of certain provisions under the old law have been made in the GST Act through Section 174, which through clause (f), has ensured that the rights and powers created under the old laws regarding appeals are intact and are not affected by the enactment of new law by repealing the old laws. Clause (f) of Section 174 of the CGST Act, 2017 reads as “shall not-affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed”.

**2.4** The summaries of statutory provisions relating to appeals before Commissioner (Appeals) are given in Table-2 below.

**TABLE-2**

Sl. No.	Description	Particulars/ Details		Relevant Statutory Provision/ Authority (*)
1	<b>Statutory provisions</b> relating to appeals before Commissioner (Appeals)	In Central Excise		Section 35 & 35A of CEA
		In Customs		Section 128 & 128A of CA
		In Service Tax		Section 84 & 85 of FA
2	<b>Time limit for filing appeal</b> before the Commissioner (Appeals)	<b>In Central Excise:-</b> <b>60 days</b> from the date of communication of order appealed against.		Section 35(1) of CEA
		<b>In Customs:-</b> <b>60 days</b> from the date of communication of order appealed against.		Section 128(1) of CA
		<b>In Service Tax:-</b> <b>2 Months</b> from the date of receipt of the decision/ order made on or after 28.05.2012 [earlier this period was 3 months u/s 85(3)]		Section 85 (3A) of FA
3	<b>Extension of time limit</b> for filing the appeal subject to the satisfaction of the Commissioner (Appeals) that appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days	<b>In Central Excise:-</b> <b>30 days</b> from the original period of 60 days		Section 35(1) of CEA
		<b>In Customs:-</b> <b>30 days</b> from the original period of 60 days		Section 128(1) of CA
		<b>In Service Tax:-</b> <b>1 month</b> from the original period of 2 months w.e.f. 28.05.2012 [earlier this period was 3 months u/s 85(3)]		Section 85 (3A) of the Finance Act, 1994
4	Prescribed Form	Central Excise	<a href="#">E.A.-1</a>	Rule 3 of Central Excise (Appeals) Rules, 2001
		Customs	<a href="#">C.A.-1</a>	Rule 3 of Customs (Appeals) Rules, 1982
		Service Tax	<a href="#">S.T.-4</a>	Rule 8(1) of the STR
5	Enclosures to be filed with	• Copy of O-in-O (being appealed)		Before 06.08.2014, Stay



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	Appeal [Appeal is required to be filed in duplicate in the prescribed format].	against) • Self attested copy of proof of payment of pre-deposit [ <i>Authority: CBEC Circular No.984/08/2014-CX dated 16.09.2014.</i> ]	application for stay of disputed amount was also required to be filed. With introduction of concept of pre-deposit, it is no longer required.
6	Quantum of pre-deposit to be made before filing appeal (w.e.f. 06.08.2014)	7.5% of the duty, in case where duty or duty and penalty are in dispute; or penalty, where such penalty is in dispute (aggregate of all penalties imposed)	Section 35F of CEA and Section 129E of CA.

**Note: (\*)** CEA means Central Excise Act, 1944; CA means Customs Act, 1962; FA means Finance Act, 1994; and STR means Service Tax Rules, 1994.

### 3. Other Important points

- 3.1. Any person aggrieved by any decision or order passed by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals) within specified period.
- 3.2. Specified period (of 60 days or 2 months, as the case may be) can be extended (by further period of 30 days or one month, as the case may be) by Commissioner (Appeals). This can be done only if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the specified period.
- 3.3. Appeal is required to be filed in Specified format in duplicate along with a copy of the decision or order appealed against.
- 3.4. Separate formats have been prescribed for the party and the Department for filing appeal before the Commissioner (Appeals)
- 3.5. The Grounds of appeal and the form of verification as contained in Form No. E.A.-1/ C.A.-1/ S.T.-4 is required to be signed by person as specified in Table 3 below :-

**TABLE-3**

Sr. No.	Appeal by	Who can sign appeal form?
1.	In the case of an individual,	the individual himself
2.	If the individual is absent from India	the individual concerned or by some person duly authorized by him in this behalf
3.	If the individual is a minor or is mentally incapacitated from attending to his affairs,	his guardian or by any other person competent to act on his behalf.
4.	In the case of a Hindu undivided family	The karta



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5.	If the karta is absent from India or is mentally incapacitated from attending to his affairs	Any other adult member of such family
6.	In the case of a company or local authority	The principal officer thereof;
7.	In the case of a firm	Any partner thereof, not being a minor
8.	In the case of any other association	Any member of the association or the principal officer thereof.
9.	In the case of any other person	The person himself or any person competent to act on his behalf.

### **4. Applications (Appeals) by the Department before Commissioner (Appeals)**

The summary of statutory provisions relating to Departmental Application (i.e. Appeals) before Commissioner (Appeals) is given in Table-4 below.

**TABLE 4**

Sl. No.	Description	Particulars/ Details		Relevant Statutory Provision/ Authority (*)
1	Statutory provisions relating to Departmental appeals before the Commissioner (Appeals)	In Central Excise		Section 35E(2) of CEA
		In Customs		Section 129D(2) of CA
		In Service Tax		Section 84 of FA
2	Time limit for filing appeal before the Commissioner (Appeals)	The order directing to apply to the Commissioner (Appeals) should be made within 3 months from the date of communication of the order to be appealed against, whether the issue relates to Central Excise or Customs or ST. Thereafter, an application has to be filed within 1 month of the date of communication of the said order, which is treated as appeal.		<b>Central Excise:-</b> Section 35E(3) & (4) of CEA, 1944
				<b>Customs:-</b> Section 129D(3) & (4) of CA
				<b>Service Tax:-</b> Section 84 of FA
3	Prescribed Forms	Central Excise	<a href="#">E.A.-2</a>	Rule 4 of Central Excise (Appeals) Rules, 2001
		Customs	<a href="#">C.A.-2</a>	Rule 4 of Customs (Appeals) Rules, 1982
		Service Tax	<a href="#">ST-4</a> , though no specific form prescribed.	Refer Section 84(3) of FA
4	Enclosures to be filed with Application (Appeal)	(i) The form of application including statement of facts and grounds of application (in duplicate) (ii) Two copies of the decision or order passed by the adjudicating authority (one of which at least shall be a certified copy)		

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		(iii) A copy of the order of the Principal Commissioner /Commissioner of Central Excise under sub-section (2) of Section 35E of the Central Excise Act /129D(2) of Customs Act /84(1) of Finance Act.	
5	Quantum of pre-deposit to be made before filing appeal (w.e.f. 06.08.2014)	Nil	Section 35F of CEA and Section 129E of CA.

**Note: (\*)** CEA means Central Excise Act, 1944; CA means Customs Act, 1962; FA means Finance Act, 1994; and STR means Service Tax Rules

### **5. Procedures at the Stage of Commissioner (Appeals)**

- 5.1** The Commissioner (Appeals) is required to give an opportunity to the appellant to be heard, if he so desires [**Ref: Section 35A (1) of CEA, 1944/Section 128 A(1) of Customs Act, 1962**].
- 5.2** W.e.f. 10.09.2004, a new sub section 35(1A) of CEA, 1944/128 (1A) of CA, 1962 has been inserted which deals with the adjournment of hearing of appeal. On being shown sufficient cause at any stage of hearing of an appeal, the Commissioner (Appeals) should grant time, from time to time, to the parties and adjourn the hearing of appeal. However, such adjournment can only be granted three times to a party during hearing of the appeal.
- 5.3** 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, should not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order. In service tax, such order may include an order enhancing the service tax, interest or penalty [Ref: Section 35A (3) of CEA, 1944/ Section 128A(3) of Customs Act, 1962/ 85(4) of the FA, 1994].
- 5.4** The Commissioner (Appeals) should, wherever possible, hear and decide every appeal within a period of six months from the date on which it is filed. [**Ref: Section 35A (4A) of CEA, 1944/ Section 128A(4A) of Customs Act, 1962**]
- 5.5** On the disposal of the appeal, the Commissioner (Appeals) is required to communicate the order passed by him to the appellant, the adjudicating authority, the Principal Chief Commissioner or Chief Commissioner and the Principal Commissioner or Commissioner of Central Excise/Customs, as the case may be. [**Ref: Section 35A(5) of CEA, 44/ Section 128A(5) of Customs Act, 1962**]

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**5.6** In section 85 (5) of the Finance Act, 1994, the provisions has been incorporated to provide that the Commissioner of Central Excise (Appeals) will exercise the same powers and follow the same procedure as he exercise and follows in hearing the appeals and making orders under the Central Excise Act, 1944. While in Central Excise Act, 1944, the section 35 A specifically deals with the Procedure in Appeals, no such separate section exists in Service Tax. The section 35 A of the Central Excise Act, 1944 has been made applicable to Service tax matters by virtue of Section 85(5) of the Finance Act, 1994 subject to modification as mentioned in Section 84 and 85 of the Finance Act, 1994.

### **6. Other Important Issues**

#### **(A) Service of Copy of Appeal to the Respondent Adjudicating Authority is mandatory.**

**6.1** As per CBEC Instruction issued vide letter F. No. 275/42/2004-CX 8A dated 05.09.2005, the following directions have been issued to the field formations: -

- (i) The appellant must serve a copy of the appeal on the respondent adjudicating authority, so that, he can take appropriate timely action for defending the case including engagement of an advocate, in important cases, involving substantial question of law and/ or high revenue stake; and
- (ii) The office of the Commissioner (Appeals) must send a copy of the hearing intimation memo to the respondent Adjudicating Authority, simultaneously with the appellant.

As such, now all the appellants are required to serve a copy of the appeal, to the respondent Adjudicating Authority and to submit a proof of service before the Commissioner (Appeals), before the appeal is heard.

#### **(B) Production of Additional Evidence before Commissioner (Appeals)**

**6.2** As per Rule 5 of the Central Excise (Appeals) Rules, 2001, the appellant shall not be entitled to produce before the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority, except in the circumstances given in said Rule 5(1).

**6.3** It has also been provided that no evidence shall be admitted under Rule 5(1) unless the Commissioner (Appeals) records in writing the reasons for its admission.

**6.4** It has also been provided that the Commissioner (Appeals) shall not take any evidence produced under Rule 5 (1), unless the adjudicating authority or an officer authorised in this behalf by the said authority, has been allowed a reasonable opportunity to examine the evidence or document or to cross-examine any witness

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produced by the appellant; or to produce any evidence or any witness in rebuttal of the evidence produced by the appellant.

- 6.5 However, it is pertinent to mention here that nothing contained in this rule shall affect 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.

### **(C) Remand of Cases by Commissioner (Appeals)-Not allowed**

- 6.6 Section 35A(3) of the Central Excise Act, 1944 / Section 128A(3) of the Customs Act, 1962, as it existed before 11.5.2001, provided that Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against **or may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary.**

- 6.7 An amendment was brought out in the aforesaid sections vide Finance Act, 2001 w.e.f. 11.5.2001 deleting the phrase as mentioned in bold above with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities. After the amendment in 2001, the said Sections read as follows: -

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

- 6.8 The matter whether the Commissioner (Appeals) continues to have powers to remand beyond 11.5.2001 came up before the Gujarat High Court in the case of M/s. Medico Lab. The Hon'ble High Court of Gujarat, vide order dated 21.9.2004 in the case of CCE, Ahmedabad-I Vs. Medico Lab [2004(173) ELT 117 (Guj.)], held that the Commissioner (Appeals) continues to have the power to remand even after the amendment. (Para 14 of the Order refers).
- 6.9 Later, Hon'ble Punjab & Haryana High Court in the case of CC, Amritsar Vs. M/s. Enkay (India) Rubber Co. Pvt. Ltd., vide order dated 8.3.2007 and in the case of CCE, Jalandhar Vs. B.C. Kataria[2008(221) ELT.508 P&H], vide order dated 6.9.2007 had held that the Commissioner(Appeals) have been divested of the powers to remand the cases back to adjudicating authority after deletion of that power from Section 35A(3) of the Central Excise Act, vide amendment made in

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2001. Hon'ble High Court has distinguished the judgement of the Gujarat High Court in the case of Medico Labs in this case.

**6.10** Finally, Hon'ble Supreme Court in its judgement dated 1.3.2007 in Civil Appeal No. 6988/2005 in the case of MIL India Ltd. [2007(210) ELT.188(SC)] has observed that *"in fact, the power of remand by the Commissioner(Appeals) has been taken away by amending Section 35A with effect from 11.5.2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the power of the Commissioner(A) to remand matters back to the adjudicating authority for fresh consideration."*

**6.11** In light of the above backdrop, CBEC issued instruction vide F.No. 275/34/2006-CX.8A dt. 18.02.2010, wherein it was instructed that the Commissioner (Appeals) should follow the said judgments strictly. It may also be brought to their notice that Hon'ble Supreme Court in the case of MIL India Ltd., while noting that the powers of remand had been taken away, has also categorically stated that the Commissioner (A) continues to exercise the power of adjudicating authority in the matter of assessment and the Commissioner(A) can add or subtract certain items from the order of assessment made by the adjudicating authority and the order of Commissioner (A) could also be treated as an order of assessment. **Board's instructions issued vide F.No. 275/34/2006-CX.8A dated 25.7.2008** in this regard were reiterated wherein Commissioners (Appeals) were advised to resort to enquiry in such appeals as may be necessary in the facts and circumstances of the case before passing a just and fair order in accordance with the provisions of the Act.

### **(D) Mandatory pre-deposit for filing Appeal by the Appellant before the Commissioner (Appeals)**

**6.12** After enactment of the Finance Act (No.2), 2014 w.e.f. 06.08.2014, Section 35F of the Central Excise Act, 1944 (also applicable to Service Tax matters vide Section 83 of Finance Act, 1994) and Section 129E of the Customs Act, 1962 have been substituted with new sections to prescribe mandatory pre-deposit as a percentage of the duty demanded where duty demanded is in dispute or where duty demanded and penalty levied are in dispute. Where penalty alone is in dispute, the pre-deposit shall be calculated on the penalty imposed.

**6.13** The amended provisions apply to appeals filed after 6<sup>th</sup> August, 2014. At present, the quantum of pre-deposit is 7.5%. *To know more about the concept of pre-deposit while filing appeal before Commissioner (Appeals) and CESTAT, please refer to e-book on "pre-deposit for filing appeals" at*



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<https://nacin.gov.in/page/rti-kanpur>

### **(E) Principle of Natural Justice**

- 6.14** The principle of natural justice forms the basis of the provisions relating to appeals under Central Excise Act, 1944 or Customs Act, 1962 or Finance Act, 1994. It is now firmly established that the principles of natural justice have to be observed in all judicial, quasi-judicial and administrative proceedings which involve civil consequences to the parties. Principles of natural justice are those rules which have been laid down by the Courts over a period of time as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while issuing an order affecting those rights. These rules are intended to prevent such authority from doing injustice.
- 6.15** The purpose of following the principles of natural justice is the prevention of miscarriage of justice either by way of non application of mind or by way of showing any bias. Though bias may be of many types, still total elimination of official bias is desirable in departmental adjudication and appellate mechanism. To know more about the principles of natural justice, refer to e-book on principles of natural justice at

<https://nacin.gov.in/page/rti-kanpur>

### **(F) Introduction of monetary limits at the level of Commissioner (Appeals), in legacy Central Excise & Service Tax matters for reduction of litigations**

- 6.16** In terms of exercise of the powers conferred by Section 35R of the Central Excise Act, 1944 also made applicable to Service Tax vide Section 83 of the Finance Act, 1994, the Central Board of Indirect Taxes has fixed a monetary limit of Rs.2,50,000/-, below which, appeal shall not be filed with the Commissioner (A). These instructions shall be applicable only in legacy Central Excise & Service Tax matters only meaning thereby that these instructions shall not be applicable in Customs matter. **[GOI, MOF, DOR, CBIC Instruction F. No. 390/Misc/390/2017-JC dated 15.05.2018 available at website of CBIC i.e. [www.cbic.gov.in](http://www.cbic.gov.in)]**
- 6.17** This limit applies only to legacy matters and is also applicable to the cases pending at the level of Commissioner (Appeals) on the date of issue of above Instruction.
- 6.18** For ascertaining, as to whether a matter would be covered within the aforementioned limits or not, the determinative element would be duty/tax under dispute. To illustrate it further in a case involving duty of Rs. 2.5 lakhs or below with equal penalty and interest, as the case may be, no appeal shall be filed before the Commissioner (Appeals). However, where the imposition of penalty is the

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subject matter of dispute and the said penalty exceeds the limit prescribed, then the matter could be litigated further. Similarly, where the subject matter of dispute is the demand of interest and the amount of interest exceeds the prescribed limit, then the matter may require further litigation.

- 6.19** In a case where a part of the duty demanded is not disputed and is paid and the outstanding duty under dispute is less than the monetary limit prescribed by the Board, no appeal shall be filed. In other words, monetary limit shall apply on the disputed duty/interest/penalty and not on the total duty/interest/penalty demanded in a case.
- 6.20** For withdrawal of cases pending before the Commissioner (Appeals), the same process will follow, as is being followed while withdrawing the Departmental cases pending before the CESTAT and HC. [refer **GOI, MOF, DOR, CBIC Instruction F. No. 390/Misc/163/2010-JC dated 17.08.2011 available at website of CBIC i.e. [www.cbic.gov.in](http://www.cbic.gov.in)**]
- 6.21** It may be noted that the cases with issues involving substantial questions of law, as described in para 1.3 of the Instruction dt 17.08.2011 issued from F. No. 390/Misc/163/2010-JC, shall be contested irrespective of the prescribed monetary limits.

## **7. Text of Relevant Statutory Provisions/Circulars/Instructions**

### **7.1 Text of Relevant Sections/Rules of Customs/Central Excise/Service Tax laws**

- 7.1.1** For the sake of brevity, the text of sections i.e. 35, 35 A and 35 E of the Central Excise Act, 1944; Section 128, 128A and 129 D of the Customs Act, 1962 and Section 84 & 85 of the Finance Act, 1994 has not been reproduced here. The same may be downloaded from the Website of CBIC i.e. [www.cbic.gov.in](http://www.cbic.gov.in).
- 7.1.2** Similarly, the text of Relevant Rules namely, Rule 3 of the Central Excise (Appeals) Rules, 2001; Rule 3 of the Customs (Appeals) Rules, 1983 and Rule 8 of the Service Tax Rules, 1994, have also not been reproduced here. The same may be downloaded from the website of CBIC i.e. [www.cbic.gov.in](http://www.cbic.gov.in)

### **7.2 Text of Relevant Circulars**

#### **7.2.1 Instructions issued vide F.No.275/34/2006-CX.8A, dated 08.02.2010**

Sub:- **Powers of Commissioner (Appeals) to remand cases – Reg.**

Section 35A(3) of the Central Excise Act, 1944 / Section 128A(3) of the Customs Act, 1962 as it existed before 11.5.2001 provided that Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against **or may refer the case back to the adjudicating**



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authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary.

2. An amendment was brought out in the aforesaid sections vide Finance Act, 2001 w.e.f. 11.5.2001 deleting the phrase as mentioned in bold above with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities. After the amendment in 2001, the said Sections read as follows:-

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

3. The matter whether the Commissioner (Appeals) continues to have powers to remand beyond 11.5.2001 came up before the Gujarat High Court in the case of M/s. Medico Lab. The Hon'ble High Court of Gujarat, vide order dated 21.9.2004 in the case of CCE, Ahmedabad-I Vs. Medico Lab, held that Commissioner(Appeals) continues to have the power to remand even after the amendment.

4. Hon'ble Punjab & Haryana High Court in the case of CC, Amritsar Vs. M/s. Enkay (India) Rubber Co. Pvt. Ltd. vide order dated 8.3.2007 and in the case of CCE, Jalandhar Vs. B.C. Kataria [2008(221) ELT.508 P&H] vide order dated 6.9.2007 had held that the Commissioner (Appeals) have been divested of the powers to remand the cases back to adjudicating authority after deletion of that power from Section 35A(3) of Central Excise Act *vide* amendment made in 2001. Hon'ble High Court has distinguished the judgement of the Gujarat High Court in the case of Medico Labs in this case and also stated that the reliance on the Hon'ble Supreme Court judgement in the case of Umesh Dhaimonde (1998(98) ELT 584) cannot be made as in that case Hon'ble Supreme Court was not dealing with the provisions where earlier power of remand was specifically conferred and subsequently taken away by amendment carried by Finance Act, 2001.

5. The Hon'ble Supreme Court in its judgement dated 1.3.2007 in Civil Appeal No. 6988/2005 in the case of MIL India Ltd. [2007(210) ELT.188(SC)] has observed that **“in fact, the power of remand by the Commissioner (Appeals) has been taken away by amending Section 35A with effect from 11.5.2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the power of the Commissioner(A) to remand matters back to the adjudicating authority for fresh consideration.”** The said decision of the Supreme Court was brought to the notice of CESTAT in the case of CCE, Jalandhar Vs. Hawkins Cookers Ltd. reported in 2007(8)RLT.7, but the Tribunal held that the Supreme Court in the said case had only noted the provisions of amended law whereas the specific issue whether Commissioner(A) has power to remand after amendment to provisions of Section 35A has been considered by the Hon'ble Gujarat High Court in the case of Medico Lab and the High Court has held that the Commissioner (A) has power to remand under the amended provisions also. The appeal (CEA No.29/2008) filed by the Commissioner of Central Excise, Jalandhar against the said order in the Hawkins Cookers case stating that the said observations as quoted above are part of the ratio decidendi of the decision of the Hon'ble Supreme Court, has been allowed by the Punjab & Haryana High Court vide order dated 14.7.2008 relying upon its own judgement in the case of CCE, Jalandhar Vs. B.C. Kataria [2008(221) ELT.508].

6. In the light of the observations of Hon'ble Supreme Court in the case of MIL India Ltd. and the judgement of Hon'ble High Court of Punjab & Haryana in the case of M/s. Enkay (India) Rubber Co. Pvt. Ltd., M/s. B.C. Kataria and M/s. Hawkins Cookers Ltd., you are requested to issue suitable instructions to the Commissioners(A) working under your jurisdiction to follow the said judgments strictly. It may also be brought to their notice that Hon'ble Supreme Court in the case of MIL India Ltd., while noting that the powers of remand had been taken away, has also categorically stated that the Commissioner (A) continues to exercise the power of adjudicating authority in the matter of assessment and the Commissioner(A) can add or subtract certain items from the order of assessment made by the adjudicating authority and the order of Commissioner (A) could also be treated as an

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order of assessment. Board instructions dated 25.7.2008 (copy enclosed) may be referred in this regard.

7. The receipt of this instruction may please be acknowledged. A copy of the instruction issued to the Commissioner(Appeals) under your jurisdiction may also be endorsed to the Board. The issue may also be monitored at your level.

### ANNEXURE

#### **7.2.2 Instruction issued vide F.No. 275/34/2006-CX.8A, dated 25.07.2008**

**Subject: Procedure in Appeal under Sec.35A of the Central Excise Act/Section 128A of Customs Act /Sec.85 of the Finance Act, 1994 – reg.**

Section 35A of the Central Excise Act, 1994 prescribes the procedure in appeal to be followed by Commissioner (Appeals) while deciding the appeals filed before him under Section 35/35E of the Central Excise Act 1944. Similar provisions exist under Section 128A of the Customs Act, 1962 and Section 85 of the Finance Act, 1994.

2. Sub-Section (3) of the Section 35A of Central Excise Act, 1994 reads as follows-

***The Commissioners (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against;***

3. The Board has noted that Commissioner (Appeals) do not resort to the mechanism of further enquiry as provided to them under the appeal procedure as above in such cases where it may be necessary before passing the order. Sub-Rule 4 of Rule 5 of Central Excise (Appeals) Rules, 2001 provides that nothing contained in said rule shall affect the power of the Commissioner (Appeals) to direct the production of any document, or the examination of any witness to enable him dispose of the appeal.

4. In the light of the provisions as contained in the statute and the rules made there under, I am directed to request you to advise Commissioners (Appeals) working in your jurisdiction **to resort to enquiry in such appeals as may be necessary in the facts and circumstances of the case before passing a just and fair order in accordance with the provisions of the Act.**

## Appeals before the Commissioner (Appeals)

### 8. *Form and Formats*

#### FORM NO. E.A. 1

[See Rule 3 of Central Excise (Appeal) Rules, 2001]  
Form of Appeal to the [Commissioner] (Appeals) under  
Section 35 of the Act

- (1) No.....of.....2001
- (2) Name and address of the appellant.
- (3) Designation and address of the officer passing the decision or order appealed against and the date of the decision or order.
- (4) Date of communication of the decision or order appealed against to the appellant.
- (5) Address to which notices may be sent to the appellant.
- (6)(i) Description and classification of goods
- (ii) Period of dispute
- (iii) Amount of duty, if any, demanded for the period mentioned in item (ii)
- (iv) Amount of refund, if any claimed for the period mentioned in item (ii)
- (v) Amount of fine imposed.
- (vi) Amount of penalty imposed
- (vii) Market value of seized goods
- (7) Whether duty or penalty or both is deposited; if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).
- (8) Whether the appellant wishes to be heard in person ?
- (9) Reliefs claimed in appeal.

#### Statement of facts

#### Grounds of appeal

Signature of the authorised representative, if any

Signature of the applicant

#### Verification

I,.....the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today, the.....day of.....

Place.....

Date.....

Signature of the authorised representative, if any.

Signature of the applicant

**NOTES:**(1) The grounds of appeal and the form of verification shall be signed by the appellant in accordance with the provisions of rule 3.

(2) The form of appeal including the statement of facts and the grounds of appeal shall be filed in duplicate and shall be accompanied by a copy of the decision or order appealed against.

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## Appeals before the Commissioner (Appeals)

### FORM NO. E.A.-2

*(See Rule 4 of Central Excise (Appeals) Rules, 2001)*  
**Form of Application to the Commissioner (Appeals)**  
**[under Sub Section (4) of Section 35E of the Act]**

No.....of.....-200.....

.....Applicant

Vs.

.....Respondent

(1) Designation and address of the applicant (If the applicant is not the adjudicating authority, a copy of the authorisation from the [Commissioner] of Central Excise to make the application should be enclosed).

(2) Name and address of the respondent.

(3) Designation and address of the officer passing the decision or order in respect of which this application is being made and the date of the decision or order.

(4) Date on which order under sub-section (1) of Section 35E has been passed by the Board.

(5) Date of communication of the order referred to in (3) above to the adjudicating authority.

(6) (i) Description and classification of goods

(ii) Period of dispute

(iii) Amount of duty, if any, demanded for the period mentioned in column (ii)

(iv) Amount of refund, if any, claimed for the period mentioned in column (ii)

(v) Amount of fine imposed

(vi) Amount of penalty imposed

(vii) Market value of seized goods.]

(7) Reliefs claimed in the application.

**Statement of facts**  
**Grounds of application**

*Signature of the applicant.*

**NOTE:** The form of application including statement of facts and grounds of application shall be filed in duplicate and accompanied by two copies of the decision or order passed by the adjudicating authority (one of which at least shall be a certified copy) and a copy of the order of the [Commissioner] /Principal Commissioner of Central Excise under sub-section (2) of Section 35E of the Act.

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## Appeals before the Commissioner (Appeals)

### FORM NO. C.A.-1

[Refer Rule 3 of the Customs (Appeal) Rules, 1982]

#### Form of Appeal to the Commissioner (Appeals) under Section 128 of the Customs Act, 1962

- (1) No..... of .....19.....
- (2) Name and Address of the appellant.
- (3) Designation and address of the officer passing the decision or order appealed against and the date of the decision or order.
- (4) Date of communication of the decision or order appealed against to the appellant.
- (5) Address to which notices may be sent to the appellant
- (6) Whether duty or penalty or both is deposited: If not, whether any application for dispensing with such deposit has been made. (A copy of the Challan under which is deposit is made shall be furnished).
- (6A) Whether the appellant wishes to be heard in person.
- (7) Reliefs claimed in appeal.

#### Statement of Facts Grounds of appeal

- (i)
- (ii)
- (iii) etc.

Signature of authorised  
representative, if any.

Signature of the  
appellant.

#### Verification

I, ..... the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today, the..... day of.....19.....

Place.....

Date.....

Signature of authorised  
representative, if any.

Signature of the  
appellant.

- Notes: (1) The grounds of appeal and the form of verification shall be signed by the appellant in accordance with the provisions of Rule 3 of the Customs (Appeals) Rules, 1982.
- (2) The form of appeal, including the statement of facts and the grounds of appeal shall be filed in duplicate and shall be accompanied by a copy of the decision or order appealed against.

## Appeals before the Commissioner (Appeals)

### FORM NO. C.A.-2

[Refer Rule 4 of the Customs (Appeal) Rules, 1982]

#### **Form of Application to the Commissioner (Appeals) under Section 129D(4) of the Customs Act, 1962**

Appeal No..... of .....19.....

.....Applicant

Vs.

.....Respondent

- (1) Designation and address of the applicant (If the applicant is not the adjudicating authority, a copy of the authorisation from the Commissioner of Customs to make the application should be enclosed).
- (2) Name and address of the respondent.
- (3) Designation and address of the officer passing the decision or order in respect of which this application is being made and the date of the decision or order.
- (4) Date on which the order under sub-section (2) of Section 129D has been passed by the Commissioner of Customs.
- (5) Date of communication of the order referred to in (4) above to the adjudicating authority.
- (6) Relief claimed in the application.

#### **Statement of facts Grounds of application**

(i)

(ii)

(iii) etc.

*Signature of the applicant*

**Note:** The form of application, including the statement of facts and the grounds of application shall be filed in duplicate and shall be accompanied by two copies of the decision or order passed by the adjudicating authority (one of which at least shall be a certified copy) and a copy of the order of the Commissioner of Customs under sub-section (2) of section 129D of the Act.

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## Appeals before the Commissioner (Appeals)

### FORM ST-4

#### Form of Appeal to the Commissioner of Central Excise (Appeals) under section 85 of the Finance Act, 1994 (32 of 1994)

1. No. \_\_\_\_\_ of \_\_\_\_\_ 20\_\_\_\_ :
2. Name and address of the appellant :
3. Designation and address of the officer passing the decision or order appealed against and the date of decision or order :
4. Date of communication of the decision or order appealed against to the appellant :
5. Address to which notices may be sent to appellant :
- 5A. (i) Period of dispute :
- (ii) Amount of service tax, if any, demanded for the period mentioned in column (i) :
- (iii) Amount of refund, if any, claimed for the period mentioned in column (i) :
- (iv) Amount of interest :
- (v) Amount of penalty :
- (vi) Value of the taxable service for the period mentioned in column (i) :
6. Whether service tax or penalty or interest or all the three have been deposited? :
- 6A. Whether the appellant wishes to be heard in person? :
7. Relief claimed in appeal :

#### STATEMENT OF FACTS Grounds of appeal

Signature of the authorized  
representative, if any

Signature of the appellant

#### Verification

I, \_\_\_\_\_ the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today, the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

Place:

Date:

Signature of the authorized  
representative, if any

Signature of the appellant or his  
authorized representative

**Note:** The form of appeal including the statement of facts and the grounds of appeal shall be filed in duplicate and shall be accompanied by a copy of the decision or order appealed against.