

Chapter 10: Appeals to High Court

10.0 Appeals to High Court under Section 130 Customs Act, 1962

1. An Appeal can be made to High Court within 180 days from the date of order of Tribunal received. High Courts are empowered to condone the delay in filing of appeals.
2. Case involves substantial question of law (i.e. Point relating to interpretation of statute, applicability of law etc,) will be taken up by High Court.
3. Appeal accompanied by a Fee of ₹200.

Case Law:

CCE v Gem Properties (P) Ltd 2010 (257) ELT 222 (Kar):

Assessee's claim: Excise duty was paid on exempted goods and hence, entitled to the refund of excise duty wrongly paid by it. Also stated that company is incurring heavy losses, therefore, refund not amounts to unjust enrichment.

Department Contention: Since, all the material sold by the assessee had been inclusive of excise duty. It was evident from the Chartered Accountant's certificate that the cost of the duty was included while computing the cost of production of the material. Therefore, refund of duty not allowed.

Decision: Refund not allowed. It would amount to unjust enrichment because all the materials sold by the assessee had been inclusive of excise duty.

Case Law:

CCE v Superintending Engineer TNEB 2014 (300) ELT 45 (Mad)

Question: Does the principle of unjust enrichment apply to State Undertakings?

Facts of the case:

1. The assessee (Basin Bridge Gas Turbine Power Station of the Tamil Nadu Electricity Board) filed refund claim on the ground that they were eligible for exemption of duty on Naphtha used in the production of electricity at their power plant. Consequently, they claimed refund of the duty paid by them for naphtha received by them during the relevant period.
2. The claim of the respondent was rejected on the ground that the respondent (assessee) had not proved that they had not passed on the duty liability to the consumers and when the electricity rate had remained the same and the exemption notification was not in force, the continuance of the same electricity rates even after availing of the benefits of exemption, would indicate that the assessee had passed on the duty liability to the ultimate consumer.

Decision: The High Court relied on the decision of the Constitution Bench of the Apex Court rendered in the case of *Mafatlal Industries Ltd. v Union of India* 1997 (89) ELT 247 (SC).

The Supreme Court in the said case held as under "the doctrine of unjust enrichment is, however, inapplicable to the State".

State represents the people of the country. No one can speak of the people being unjustly enriched."

The High Court held that the concept of unjust enrichment is not applicable as far as State Undertakings are concerned and to the State. Judgment has been given in favour of the assessee and against the department.

Case Law:

Astik Dyestuff Private Limited v CCE & Cus. 2014 (34) STR 814 (Guj)

1. Whether sales commission services are eligible input services for availment of CENVAT credit?
2. If there is any conflict between the decision of the jurisdictional High Court and the CBIC circular, then which decision would be binding on the Department?
3. Also, if there is a contradiction between the decisions passed by jurisdiction High Court and another High Court, which decision will prevail?

Decision:

1. It was elaborated by the High Court that in the case of *Cadila Healthcare Limited*, the jurisdictional High Court did not allow CENVAT credit on sales commission services after interpreting the relevant provisions of law.
2. The High Court clarified that the decision of the jurisdictional High Court is binding to the Department rather than the Circular issued by the C.B.E. & C.
3. When there are two contrary decisions, one of jurisdictional High Court and another of the other High Court, then the decision of the jurisdictional High Court would be binding to the Department and not the decision of another High Court.

Case Law:***Khanapur Taluka Co-op. Shipping Mills Ltd. v CCE* 2013 (292) E.L.T. 16 (Bom):**

Question: In a case where an appeal against order-in-original of the adjudicating authority has been dismissed by the appellate authorities as time-barred, can a writ petition be filed to High Court against the order-in-original?

Decision: The High Court referred to the case of *Raj Chemicals v UOI* 2013 (287) ELT 145 (Bom) wherein it held that where the appeal filed against the order-in-original was dismissed as time-barred, the High Court in exercise of writ jurisdiction could neither direct the appellate authority to condone the delay nor interfere with the order passed by the adjudicating authority. Consequently, it refused to entertain the writ petition in the instant case.

Case Law:***Habib Agro Industries v CCE* 2013 (291) ELT 321 (Kar)**

Question: Can delay in filing appeal to CESTAT for the reason that the person dealing with the case went on a foreign trip and on his return his mother expired, be condoned?

Decision: The High Court observed that there did not appear to be any deliberate laches or neglect on the part of the authorised representative to file the appeal. It held that the reason for delay in filing appeal to CESTAT, that the person dealing with the case went on a foreign trip and on his return his mother expired, could not be considered as unreasonable for condonation of delay.

Therefore, delay can be condoned.

Case Law:***Rishiroop Polymers Pvt. Ltd. V Designated Authority* 2013 (294) ELT 547 (Bom)**

Facts of the case: The CESTAT upheld a notification issued by the Central Government imposing anti-dumping duty on certain products originating from specified countries pursuant to the findings recorded by the Designated Authority in a review of anti-dumping duty.

The assessee filed a writ petition under Article 226 of the Constitution to challenge the said order passed by the CESTAT under section 9C of the Customs Tariff Act, 1975.

The Department contended that an appeal, and not a writ petition, would lie against the order passed by the CESTAT.

Decision: The High Court, therefore, held that it would not be appropriate for it to exercise the jurisdiction under Article 226 of the Constitution, since an alternate remedy by way of an appeal was available in accordance with law.

The High Court thus, dismissed the petition leaving it open to the assessee to take recourse to the appellate remedy.

Case Law:***Metal Weld Electrodes v CESTAT* 2014 (299) ELT 3 (Mad)**

Question: Which remedy is available against a pre-deposit order (i.e. interim order) passed by CESTAT under section 35F of Central Excise Act, 1944/section 129E of Customs Act, 1962; is it an appeal to High Court under section 35G of Central Excise Act, 1944/section 130 of Customs Act, 1962 or a writ petition before High Court?

Decision: The Commissioner of Central Excise or the other party aggrieved may file an appeal to the High Court against "any order passed by the Appellate Tribunal" (other than valuation and rate of duty determination) Section 35G(2) of C.E.A. 1944.

Finally, the High Court held that the order passed by the CESTAT in terms of section 35F of the Central Excise Act, 1944 or section 129E of the Customs Act, 1962 is appealable in terms of section 35G of the Excise Act, 1944 or section 130 of the Customs Act, 1962.

Case Law:***CCE v Nahar Industrial Enterprises Ltd.* 2010 (19) STR 166 (P&H)**

Facts of the Case: The assessee was engaged in the manufacture of sugar. The Central Government directed him to maintain buffer stock of free sale sugar for the specified period. In order to compensate the assessee, the Government of India extended buffer subsidy towards storage, interest and insurance charges for the said buffer stock of sugar.

Revenue issued a show cause notice to the assessee raising the demand of service tax alleging that amount received by the assessee as buffer subsidy was for storage and warehousing services.

Decision: The High Court noted that apparently, service tax could be levied only if service of storage and warehousing was provided. Nobody can provide service to himself. In the instant case, the assessee stored the goods owned by him.

After the expiry of storage period, he was free to sell them to the buyers of its own choice. He had stored goods in compliance with the directions of the Government of India issued under the Sugar Development Fund Act, 1982. He had received subsidy not on account of services rendered to Government of India, but had received compensation on account of loss of interest, cost of insurance etc. incurred on account of maintenance of stock. Hence, the High Court held the act of assessee could not be called as rendering of services.