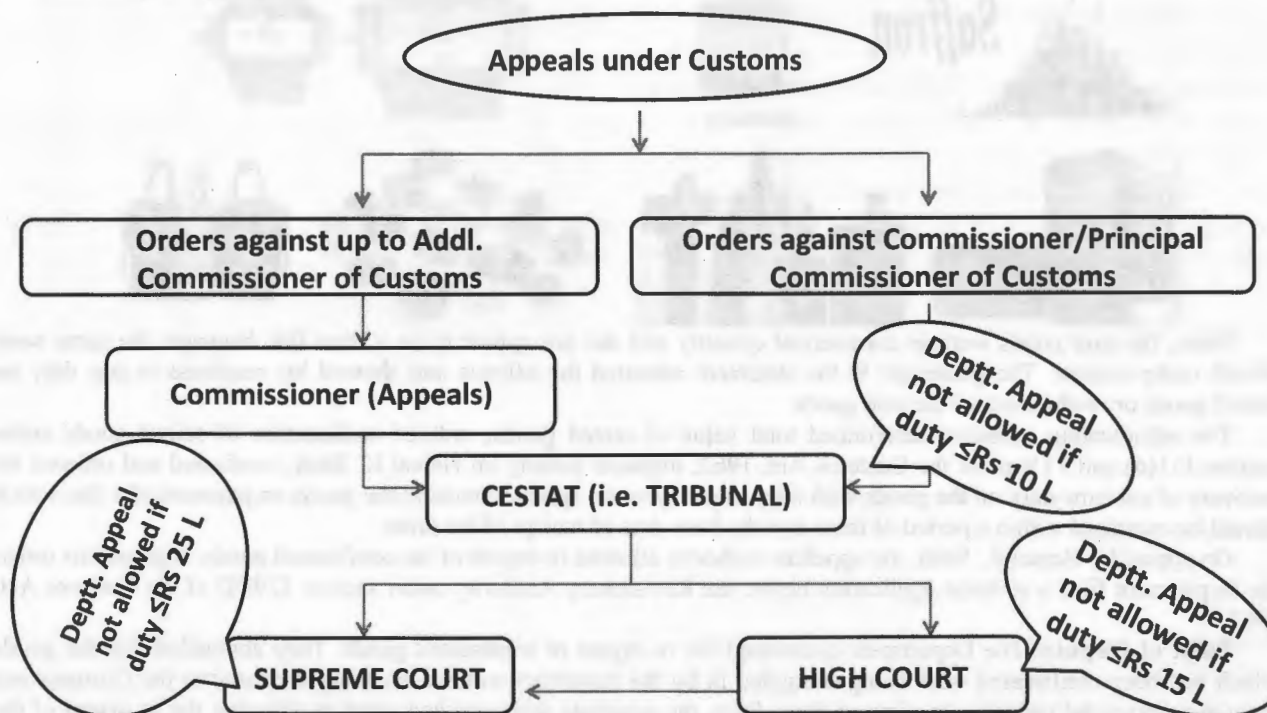


## Chapter 7: Appeals under Customs

### SYNOPSIS

7.0	Hierarchy of appeals under Customs	842
7.1	Mandatory pre-deposit for entertaining appeal (w.e.f. 6-8-2014)	843
7.2	Interest if pre-deposit is to be refunded - @ 6% p.a. simple interest [Section 129EE of the Customs Act, 1962]	844

### 7.0 Hierarchy of appeals under Customs



However, Departmental appeals in case of adverse judgments relating to the following disputes shall be allowed irrespective of the amount involved:

- Where the constitutional validity of the provisions of an Act or Rule is under challenge.
- Where notification/instruction/order or Circular has been held illegal or *ultra vires*.

The instruction has been further amended to provide that adverse judgments relating to classification and refunds issues which are of legal and/or recurring nature should also be contested irrespective of the amount involved [Instruction F. No. 390/Misc./163/2010-JC, dated 17.12.2015].

**Example:** X Ltd. received a protective demand notice from the department on 1.9.20XX under Section 28 of the Customs Act, 1962 where

	Amount ₹
Customs Duty	= 15,00,000
Interest	= 15%
Penalty	= 50% of Duty

The assessee went for appeal and filed the case in the Commissioner (Appeals) on 1.10.20XX. Subsequently on 31.10.20XX, the Commissioner (Appeals) decided the case in favour of the assessee.

The Committee of Commissioners can delegate the authority to the department officers to go for further appeal on its behalf to the Appellate Tribunal (CESTAT) against such order?

**Answer:**

As per the CBE&C instructions in a case involving **duty** of ₹10 lakh and below, no appeal shall be filed in the Tribunal (CESTAT).

In the given case, appeal can be filed in the Tribunal (since, amount of duty is more than ₹10 lakhs)

**7.1 Mandatory pre-deposit for entertaining appeal (w.e.f. 6-8-2014)**

Section 129E of the Customs Act, 1962, as amended by Finance (No. 2) Act, 2014 w.e.f. 6-8-2014, provides that Commissioner (Appeals) or CESTAT shall not '**entertain**' appeal unless specified pre-deposit of duty or penalty is made.

**The pre-deposit is as follows –**

- (a) 7.5% if appeal is filed before Commissioner (Appeals)
- (b) 7.5% if appeal is filed before CESTAT against order of Principal Commissioner/Commissioner as adjudicating authority
- (c) 10% if appeal is filed before CESTAT against order of Commissioner (Appeals).

**Note: Maximum amount of pre-deposit is ₹10 crores.**

**The aforesaid percentage is to be calculated as follows –**

- (i) if both duty and penalty is confirmed, then the percentage (7.5% or 10%) is only of the duty or service tax.
- (ii) if only penalty is imposed, then the percentage (7.5% or 10%) is of the penalty.

**Note: Maximum amount of pre-deposit is ₹10 crores.**

**Example 1:** X Ltd. received a protective demand notice from the department Assistant Commissioner of Customs on 1.9.20XX under Section 28 of the Customs Act, 1962 where

	Amount ₹
Customs Duty	= 5,00,000
Interest	= @15% p.a. for no. of days delay.
Penalty	= Nil

The assessee went for appeal and filed the case in the Commissioner (Appeals) on 25.9.20XX. This appeal has been taken up for hearing on 06-10-20XX. How much has to pay as pre-deposit of duty under section 129E of the Customs Act, 1962 and date of pre-deposit of duty by X Ltd. to entertain appeal by the Commissioner (Appeals).

**Answer:** Pre-deposit amount = ₹37,500

(i.e. ₹5,00,000 x 7.5%)

Therefore, in the given case pre-deposit can be paid before 06-10-20XX.

**Example 2:** Y Ltd. received a protective demand notice from the department Principal Commissioner of Customs on 29.8.20XX under Section 28 of the Customs Act, 1962 where

	Amount ₹
Customs Duty	= 9,75,00,000
Interest	= @15% p.a. for no. of days delay
Penalty	= 25% of Customs duty

The assessee went for appeal and filed the case in the office of the Appellate Tribunal (CESTAT) against such order on 11.10.20XX. Subsequently on 18.10.20XX, CESTAT entrain the appeal for hearing.

How much has to pay as pre-deposit of duty under section 129E of the Customs Act, 1962 and date of pre-deposit of duty by Y Ltd. to entertain appeal by the Appellate Tribunal (CESTAT).

**Answer:** The pre-deposit is ₹73,12,500

(9,75,00,000 x 7.5%)

In the given case pre-deposit can be paid before 18-10-20XX.

**CBIC has issued Circular No. 984/08/2014 CX, dated 16.09.2014** which clarifies the **Quantum of pre-deposit:** Where an appeal is made against the order of Commissioner (Appeals) before the Tribunal, **10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals).** This amount may or may not be same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.

**Example 3:** Z Ltd. received a protective demand notice from the department on 1.8.20XX under Section 28 of the Customs Act, 1962 where

	Amount ₹
Customs Duty	= 45,00,000
Interest	= @15% p.a. for no. of days delay
Penalty	= 100% of customs duty

The assessee went for appeal and filed the case in the Commissioner (Appeals) on 5.8.20XX. The Commissioner (Appeals) entertained the appeal on 11.8.20XX. Subsequently on 31.10.20XX, the Commissioner (Appeals) decided the case in favour of the department.

The assessee went for further appeal and filed the case in the office of the Appellate Tribunal (CESTAT) against such order on 24.11.20XX. Subsequently on 28.11.20XX, CESTAT entertained the appeal for hearing.

How much has to pay as pre-deposit of duty under section 129E of the Customs Act, 1962 and date of pre-deposit of duty by Y Ltd. to entertain appeal by the Commissioner (Appeals) and the Appellate Tribunal (CESTAT).

**Answer: Statement showing pre-deposit of duty by Z Ltd.**

Particulars	Pre-deposit in %	Pre-deposit duty ₹	Pre-deposit of duty is before	Working note
Appeals to Comm. (appeals)	7.5%	3,37,500	11-8-20XX	₹45 L x 7.5% = ₹3.375 L
Appeals to CESTAT	10%	4,50,000	28-11-20XX	₹45 L x 10% = ₹4.5 L

**Circular No. 984/08/2014-CX, dated 16.09.2014 issued by CBIC** has clarified that where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, pre-deposit would be calculated based on the **aggregate of all penalties imposed** in the order sought to be appealed against.

**Example 4:** In an order dated 20.08.2017 issued to M/s. GH & Sons, the Joint Commissioner of Customs has imposed a penalty of ₹10,50,000 (i.e. equal amount of customs duty) under section 112 of the Customs Act, 1962 plus a penalty of ₹2,50,000 under Section 112(b)(ii) of the Customs Act, 1962. M/s GH & Sons intends to file an appeal with the Commissioner (Appeals) against the said adjudication order.

Compute the quantum of pre-deposit required to be made by M/s. GH & Sons for filing the appeal with the Commissioner (Appeals).

Answer:

The quantum of pre-deposit will be ₹97,500.

[i.e. ₹10,50,000 + ₹2,50,000] x 7.5% = ₹97,500.

**Meaning of 'duty demanded'** – The term 'duty demanded' includes customs duty

**7.2 Interest if pre-deposit is to be refunded - @ 6% p.a. simple interest [Section 129EE of the Customs Act, 1962]**

If the assessee finally wins the case, the pre-deposit is to be refunded with interest from the date of pre-deposit till the date of refund of such amount @ 6% p.a. simple interest.

However, interest on delayed refund of pre-deposit made prior to 06.08.2014 will continue to be governed by the erstwhile provisions.

**Example:** In an order dated 30.08.2017 issued to M/s. KK & Sons, the Commissioner of Customs has confirmed a duty demand of ₹50,50,000 and imposed a penalty of equal amount under Customs Act, 1962 plus a penalty of ₹5,50,000 under Customs Act, 1962.

M/s. KK & Sons deposits the required amount of pre-deposit on 10.09.2017 and files an appeal with CESTAT. CESTAT decides the appeal in favour of M/s. KK & Sons on 10.11.2017. M/s. KK & Sons submits a letter seeking refund of the pre-deposit on 30.11.2017. The pre-deposit is refunded to M/s KK & Sons on 15.12.2017.

Compute the amount of interest payable on refund of such pre-deposit, if any under Sec. 129EE of the Customs Act, 1962.

Answer: Interest = ₹5,977

(₹50,50,000 x 7.5%) x 6/100 x 96/365

Month No. of day delay

Sep 2017 21

Oct 2017 31

Nov 2017 30

Dec 2017 14

Total 96

#### Important points:

- (1) for pre-deposits made prior to the amendments to Section 35FF of CEA, 1944 and Sec 129EE of Customs Act, 1962, the provisions of earlier sections shall apply (i.e. Section 11BB of CEA, 1944).
- (2) **Application for stay is still required.**—The provisions of sections 129E of Customs Act relating to pre-deposit of duty is only in respect of 'entertaining' appeal by Commissioner (Appeals) or CESTAT. There is no provision that once the pre-deposit is made, the recovery of balance amount will be stayed. Technically, department can start recovery of balance amount. Hence, till the issue is clarified by CBE&C, it is highly advisable to file stay application, along with the appeal.

**Whether the word 'include' used in a statutory definition enlarges the scope of preceding words or restricts their scope?**

**Ramala Sahkari Chini Mills Ltd. v CCEx. 2016 (334) ELT 3 (SC)**

**Decision:** The Supreme Court referring to the case of *Regional Director, Employees' State Insurance Corporation v High Land Coffee Works of P.F.X. Saldanha and Sons & Anr.* [(1991) 3 SCC 617] held that the word "include" in a statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction.

**Guidelines for conduct of personal hearings in virtual mode under Customs Act, 1962**

**The Central Board of Indirect Taxes & Customs**, on account of recent outbreak of COVID-19 (Coronavirus) vide Instruction No. F. No. 390/Misc/3/2019-JC, dated 27th April, 2020 has issued guidelines & decided that personal hearing, in respect of any proceeding under Customs Act, 1962, given by various authorities, such as Commissioner (Appeals), original adjudicating authorities and Compounding authority, may be conducted through video conferencing facility. This would also facilitate importers, exporters, passengers, advocates, tax practitioners and authorized representatives to maintain social distancing while performing their work at ease, from a place of their choice.

**The guidelines for the conduct of virtual mode of personal hearing through video conferencing facility are as under:—**

- (i) In any proceedings before appellate or adjudicating authority under the Customs Act, 1962, the party, either as an **appellant or a respondent**, shall give his consent to avail the personal hearing before such authority, **through video conferencing facility**, at the time of filing his appeal or immediately after the issue of this instruction, in the case of pending appeals/adjudication matter. He should also indicate his email address for correspondence etc.
- (ii) The **date and time of hearing along with a link for the video conference shall be informed in advance to the appellant/respondent** or their consultant/counsel and the concerned commissioner representing revenue through the official email or electronic media of the adjudicating/appellate authority, giving the details of officer-in-charge who would provide assistance to the party, for conducting the virtual hearing. This link should not be shared with any other person without the approval of the adjudicating/appellate authority.
- (iii) The **advocate/consultant/authorized representative**, appearing on behalf of the party, in virtual hearing, **should file his vakalatnama** or authorization letter along with a copy of his photo ID card and contact details to the adjudicating/appellate authority **through official e-mail address of the concerned authority after scanning the same**. All persons participating in the video conference should be appropriately dressed and maintain the decorum required for such an occasion.
- (iv) Virtual hearing through **video conference shall be held from the office of adjudicating/appellate authority** or any official video conference facility set up in the office of the adjudicating/appellate authority.
- (v) **The virtual hearing through video conference will be conducted through available applications like VIDYO**, or other secured computer network. The appellant/respondent should download such application

in their computer system/laptop/mobile phone beforehand for ready connectivity during virtual hearing, and join the video conference at the time allotted to them, as given in point (ii) above.

- (vi) In case **where the party/his representative wishes to participate** in the virtual hearing proceeding along with their advocate, they should do so under proper intimation to the adjudicating/appellate authority as mentioned at point (ii) above. They may participate in **virtual hearing along with their advocate/ authorized representative or join the proceedings from their own office.**
- (vii) **The submissions made by the appellant or their representative through the video conference will be reduced in writing** and a statement of the same will be prepared, which shall be known as "**record of personal hearing**". A soft copy of such record of personal hearing in PDF format will be sent to the appellant through email ID provided by advocate/appellant/respondent, within one day of such hearing.
- (viii) If the, appellant/their representative wants to **modify the contents of e-mailed record of personal hearing, they can do so and sign the modified record**, scan and **send back the signed record of personal hearing** to the adjudicating/appellate authority.
- (ix) If, however, the appellant/their representative do not resend the above e-mailed record of personal hearing within 3 days of receipt of such e-mail as at point (viii) above, it will be presumed that they agree with the contents of e-mailed record of personal hearing and adjudicating authority/appellate authority will proceed to decide the case accordingly. **No modification in e-mailed record of personal hearing will be entertained after 3 days of its receipt by appellant/their representative.** The date of receipt of the email by the appellate/adjudicating authority will not be counted for this purpose.
- (x) The **record of personal hearing submitted in this manner shall be deemed to be a document for the purpose of Customs Act, 1962 in terms of section 138C of the said Act, read with Section 4 of the Information Technology Act, 2000.**
- (xi) If the party/ advocate **prefers to submit any document including additional submissions during the virtual hearing**, he may do so by self-attesting such document and a scanned copy of the **same may be emailed to the adjudicating/appellate authority immediately after virtual hearing** and in no case after 3 days of virtual hearing. The date of the hearing will be excluded for this purpose.
- (xii) **Any official representing the Department's side can also participate in the virtual hearing through video conferencing.** The Commissionerate concerned shall inform the details in advance regarding such participation, on receipt of intimation as mentioned at point (ii) above.