

Chapter 8: Appeal to Commissioner (Appeal)

8.0 Appeals to Commissioner (Appeals) [Section 128 of the Customs Act, 1962]

1. Appeal against orders up to Additional Commissioner lies with Commissioner (Appeals)
2. Appeal against Commissioner (Appeals) lies directly to CESTAT
3. Period of limitation for appeal:

In case of Customs
Original period of limitation
2 months from the date of communication of the order
Extended period of limitation
1 month from the date of communication of the order
However, Commissioner (Appeals) cannot condone the delay beyond period of One month [<i>Amchong Tea Estate 2010 (SC)</i>]. W.e.f. 28-5-2012 same provision for S.T. appeals.

Case Law:

CCus & CEx. v Ashok Kumar Tiwari 2015 (37) STR 727 (All):

The High Court noted that section 3(35) of the General Clauses Act, 1897 also defines the expression “month” to mean a month reckoned according to the British calendar. Further, the day on which order was received by the assessee, had to be excluded while computing the period of limitation. Since the original period of limitation and the period within which delay could be condoned expired on a public holiday, the assessee filed the appeal on the next working day. Therefore, Commissioner of Central Excise (Appeals) had the jurisdiction to condone the delay.

Example: The assessee received the adjudication order on 08.10.2011 and filed an appeal against the said order before Commissioner of Central Excise (Appeals) on 09.04.2012 along with an application for condonation of delay.

However, the Commissioner dismissed the appeal as being time barred and declined to condone the delay. The Commissioner (Appeals) has jurisdiction to condone the delay?

Decision: The Commissioner of Central Excise (Appeals) had the jurisdiction to condone the delay in filing of appeal by the assessee as the same had been filed within the stipulated time prescribed for the same [*CCus & CEx. v Ashok Kumar Tiwari 2015 (37) STR 727 (All)*].

Note: 8th April 2012 Sunday (also Easter a regional holiday).

4. Appeal should also state statement of facts and grounds of appeal. New grounds of appeal generally not allowed.
5. In general appeals can be finalized within 6 months from the date on which it is filed.
6. Committee of Commissioners can file an appeal if the Commissioner (Appeals) has given a decision in favour of assessee, if it is of the opinion that the order is not legal or proper.
7. Appeal against the order of Principal Commissioner or Commissioner or Commissioner (Appeals) lies with Tribunal, except following (Sec. 129DD of Customs Act, 1962):
 - Loss of goods occurring in transit from the factory to warehouse
 - Rebate of duty on goods exported
 - Goods exported without payment of duty

In the aforesaid matters, Tribunal has no jurisdiction, but revision application can be filed with Central Government [Section 129DD of Customs Act, 1962] within 3 MONTHS. The Central Government of India can annul or modify the order. In all other matters, appeal lies with Tribunal. Revision application can be filed by the assessee or the Commissioner of Customs.

Revision application can be filed with Central Government **along with fee of ₹200 if the amount, interest and penalty ≤ ₹1,00,000, otherwise ₹1,000**. An officer of the rank of Joint Secretary hears the issue and passes orders on behalf of Central Government of India.

Therefore, while mandatory pre-deposit would be required to be paid in cases of drawback, rebate and baggage at the first stage appeal before Commissioner (Appeals), no pre-deposit would be payable in such cases while filing appeal before the Joint Secretary (Revision Application) [Circular No. 993/17/2014-CX, dated 5-1-2015].

8. Commissioner (Appeals) cannot remand the matter to lower adjudicating authority.
9. *w.e.f. 06.08.2014* to enable Commissioner (Appeals) also [apart from CESTAT and Court to take into consideration the fact that a particular order being cited as a precedent decision on the issue has not been appealed against for reasons of low amount (the Customs Act, 1962 in section 131BA).

Case Law:

Chakiat Agencies v UOI 2015 (37) STR 712 (Mad)

Facts of the case: The assessee filed an appeal to Commissioner, but mistakenly gave it to the adjudicating officer who had passed the original order. The appellate authority rejected the appeal on the ground that the appeal was not received in time in his office.

Decision: The High Court noted that the appeal had been preferred in time but reached different wing of the same building. Since, the appeal was received by the adjudicating officer who has passed the original order, he ought to have sent it to the other wing of the same building, but he had not done the same. Therefore, the order passed by the appellate authority cancelling the appeal on the ground that it was not received in time, could not be accepted.

The High Court directed the appellate authority to entertain the appeal of the assessee and to pass appropriate orders on merits and in accordance with law, after affording him an opportunity of being heard.

Case Law:

Raja Mechanical Co. (P) Ltd. (2012) (SC)

ASSESSEE CLAIM: Commissioner (Appeals) rejected the appeal on the ground of limitation. Therefore, the order passed by the original authority would merge with the orders passed by the first appellate authority.

Decision: an appeal is dismissed on the ground of limitation and not on merits that order would not merge with the orders passed by the first appellate authority.

Judgment is given in favour of department and against the assessee.

Case Law:

Commissioner of C.Ex., Mumbai III v Tikitar Industries 2012 (277) ELT 149 (SC)

ASSESSEE CLAIM:

If Revenue accepts judgment of Commissioner (Appeals) on an issue for one period, then it should be precluded to make an appeal on the same issue for another period

Decision: Since, the Revenue had not questioned the correctness or otherwise of the findings on the conclusion reached by the first appellate authority, it may not be open for the Revenue to contend this issue further by issuing the impugned (i.e. disputed the truth) show cause notices on the same issue for further periods.

Case Law:

C.C.E. & S.T. (LTU), Bangalore v Dell Intl. Services India P. Ltd. 2014 (33) STR 362 (Kar)

8.1 Can the Committee of Commissioners review its decision taken earlier under section 86(2A) of the Finance Act, 1994, at the instance of Chief Commissioner?

Decision: The Karnataka High Court held that once the Committee of Commissioners, on a careful examination of the order of the Commissioner (Appeals), did not differ in their opinion against the said order of the Commissioner (Appeals) and decide to accept the said order, the matter ends there. The said decision is final and binding on the Chief Commissioner also. The Chief Commissioner is not vested with any power to call upon the Committee of Commissioners to review its order so that he could take decision to prefer an appeal. Such a procedure is not contemplated under law and is without jurisdiction.

Case Law:

M/s Venus Rubbers v The Additional Commissioner of Central Excise, Coimbatore 2014 (310) ELT 685 (Mad.)

Decision: The High Court held that there is no provision of law under the Central Excise Act, 1944 which gives power to the Commissioner (Appeals) to review his order. However, such a power is available to the Tribunal under section 35C(2) of the Central Excise Act, 1944 to rectify any mistake apparent on the record. The High Court elaborated that when there is no power under the statute, the Commissioner (Appeals) has no authority to entertain the application for review of the order.

Case Law:***Enestee Engineering Pvt. Ltd. v UOI 2016 (41) STR 0061 (Bom)***

Facts of the Case: The adjudication order was passed and was forwarded to the assessee. However, assessee did not receive the same. It learned about the order only after receipt of a letter from the Superintendent, nearly after two years, directing it to pay the dues as per said order. Thereafter, a copy of that order was made available to the assessee.

Point of Dispute: The appeal filed by the assessee against the said order was rejected by the Commissioner (Appeals) as well as by the Tribunal, as being barred by limitation.

The assessee contended that the appeal could not be held to be barred by limitation as no order was received by it.

Decision: The High Court noted that the period of limitation prescribed under erstwhile section 85(3) [now section 85(3A)] of the Finance Act, 1994 to prefer an appeal against order-in-original is 3 months [now 2 months]. The said period begins from the date of receipt of the decision or the order of adjudicating authority. Further, section 37C(2) of the Central Excise Act, 1944 stipulates that every decision/order passed or any summons/notice issued under the said Act is deemed to have been served on the date on which such decision, order or summons is tendered or delivered by post or is affixed in the prescribed manner.

Thus, a perusal of section 37C (as supported by erstwhile section 85(3) [now section 85(3A)] of the Finance Act, 1994) shows insistence upon the service of such adjudication order upon the assessee. Hence, the observation in the Tribunal's order that the order-in-original had been forwarded to the assessee on a particular date was not sufficient in the eyes of law to start computing the period of limitation.

The High Court observed that neither the order of Commissioner (Appeals) nor the order of Tribunal recorded a finding that the adjudication order was actually tendered to the assessee on a particular date or received by him on a particular date.

The High Court quashed and set aside both the orders - order of Commissioner (Appeals) and the order of Tribunal, and placed back the matter for fresh consideration before Commissioner (Appeals).

Committee of Commissioners/Chief Commissioners cannot review the same order twice under CEx., Customs and Service Tax law

The power of review of order of Commissioner (Appeals) or order of Principal Commissioner/Commissioner as an adjudicating authority vests with the Committee of Commissioners and Committee of Chief Commissioners respectively and there is no provision for reviewing the same order twice. [*Instruction F. No. 390/Review/36/2014 JC, dated 17.03.2016*].