Adjudication and Appeal Mechanism under Indirect Taxes

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1.0 Introduction

Generally we come across two terms "assessment" and "adjudication". Both have their own colour and odour. But if we consider practical view point both the terms are considered to have almost the same meaning. Let us discuss the terms in brief

Assessment is derived from the word "assess" which means evaluation, estimation judgment, opinion etc. We usually use this word in reference to examination results, determination of tax liability by own self and even by the tax officers.

Adjudicate on the other hand means to hear or try and decide judicially. Hence *adjudication* means giving a decision.

Hence forth it could be said that in the context of service tax the Central Excise Officers are empowered to assess the correctness of the data filed in returns or recorded in books. In case he is doubtful about the same he is empowered to further investigate the matter and adjudicate the same as per the provisions of the Act.

2.0 Modes of Assessment

2.1 Self-Assessment

"Self-assessment" means that the person responsible will have to assess himself his tax liability and then comply with the requirements. Therefore *in context of service tax when an assessee looking to the value of the taxable service provided by him assess the tax liability and pays accordingly is "self-assessment*". Means where the assessee himself finds out whether a particular service rendered is taxable or not, what rate of service tax is applicable to him and after assessing his liability he himself discharges the same, such compliance is nothing but self-assessment and in India in most of the taxes whether it is direct or indirect tax self-assessment is the base and the Government expects the assessee himself to be responsible and tax compliant.

Section 70 deals with this particular concept of Self-Assessment. This concept was introduced with effect from 16.07.2001 so far as service tax is concerned. Let us understand the provisions of Section 70 and try to find out what happened to this section during last 20 years.

Prior to 16.10.1998

This section was as under:

2.1.1 Section 70(*1*) *Every person responsible for collecting the service tax shall furnish or cause to be furnished to the Central Excise Officer in the prescribed form and verified in the prescribed manner, a quarterly return, within fifteen days of the end of the preceding quarter, showing—*

(*a*) *the aggregate of payments received in respect of the value of taxable services;*

(*b*) *the amount of service tax collected;*

(*c*) *the amount of service tax paid to the credit of the Central Government; and*

(*d*) *such other particulars as may be prescribed.*

2.1.2 Section 70(2) *In the case of any person who, in the opinion of Central Excise Officer, is responsible for collecting service tax under this Chapter but who has not furnished a return under sub-section* (*1*)*, the Central Excise Officer may, before the expiry of the quarter in which the return is to be furnished, issue a notice to such person and serve it upon him, requiring him to furnish within thirty days from the date of service of the notice the return in the prescribed form and verified in the prescribed manner setting forth the prescribed particulars.*

2.1.3 Section 70(3) *Any person responsible for collecting the service tax who has not furnished the return within the time allowed under sub-section* (*1*) *or sub-section* (*2*) *or having furnished a return under sub-section* (*1*) *or sub-section* (*2*) *discovers any omission or wrong statement therein, may furnish a return or a revised return, as the case may be, at any time before the assessment is made.*

Above provisions are given just for the reference and historical understanding of section. In details it is not discussed here.

From 16.10.1998 to 15.07.2001

2.1.4 Section 70 *Every person liable to pay the service tax shall furnish or cause to be furnished to the Central Excise Officer, a return in such form and in such manner and at such frequency as may be prescribed.*

Up till this period there was no concept of self-assessment only process was that all service providers liable to pay service tax were required to furnish the service tax returns in the prescribed form and manner and also within the prescribed time limit and frequency.

From 16.07.2001 to 13.05.2005

2.1.5 Section 70 *Every person liable to pay the service tax shall **himself assess the tax due** on the services provided by him and shall furnish to the*

Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.

<u>This was the amendment which brought in the self-assessment concept first time under the service tax.</u>

Current Situation

2.1.6 Section 70(1) *Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.*

2.1.7 Section 70(2) *The person or class of persons notified under sub-section* (*2*) *of section 69 shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.*

<u>By this amendment first time the concept of late fees for delayed furnishing of return was introduced.</u>

Hence to conclude we can say that self-assessment comprises of all the below:

(a) Every one responsible for payment of service tax shall assess himself the liability of service tax on the services provided or to be provided.

(b) Once the liability is ascertained he should file a service tax return in the prescribed manner and form to the Superintendent of Central Excise.

(c) Return should be filed according to the frequency prescribed.

(d) In case filing of return is not within the time limit specified i.e. delayed filing, the late fee should be paid along with the return.

(e) Maximum amount of late fees that can be imposed is rupees Twenty Thousand.

The above is the procedure as on date for self-assessment under the service tax law.

2.2 Best Judgment Assessment

Section 72 of the Finance Act specifies the provisions relating to the best judgment assessment. This section also has a history and has been revised from time to time. Even once this section was omitted by the Finance (No. 2) Act, 2004 with effect from 10.09.2004.

Let us check the provisions of this section prior to its omission i.e. prior to 10.09.2004 and then the provisions after its insertion with effect from 10.05.2008.

Section 72 Prior to 10.09.2004

2.2.1 Section 72 *If—*

(*a*) *any person fails to make the return under section 70, or*

(*b*) *any person having made a return fails to comply with the provisions of section 71, or*

(*c*) *the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise is not satisfied with the correctness or the completeness of the accounts of the assessee,*

the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise, after taking into account all the relevant material which he has gathered, shall, by an order in writing, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

From 10.05.2008 onwards

This section was inserted by the Finance Act 2008 as a new section dealing with best judgment assessment:

2.2.2 Section 72 *If any person, liable to pay service tax,—*

(*a*) *fails to furnish the return under section 70;*

(*b*) *having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,*

the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

As per the above provision it could be said that a Central Excise Officer can make the best judgment statement, if

(a) assessee fails to furnish the service tax return required under section 70;

(b) assessee has filed the return but has calculated tax not in accordance with the provisions of the act and the rules.

Central Excise Officer shall follow the procedure for best judgment assessment as under:

(i) Central Excise Officer (CEO) shall by way of notice ask for the documents,

books of accounts, bank accounts, receipt books, income tax returns etc to be produced;

(ii) Once he receives the documents he should scrutinize and assess the value of taxable services for the service rendered by him and also the amount received against the service rendered.

(iii) After assessment if the CEO comes out with the fact the service tax is under paid or under assessed by the assessee, he should immediately issue notice to the assessee mentioning clearly about the tax liability and also the manner in which such tax liability is determined.

(iv) Opportunity of being heard should be given by the CEO to the service provider and also CEO shall entertain the written reply, if any, of the service provider.

(v) Then at last Central Excise Officer shall pass an order in writing determining the manner in which the value of taxable service has been determined and the service tax payable thereon.

2.2.3 General Principles in Best Judgment Assessment:

(a) The Best Judgment Assessment cannot be based on wild guess and should be based on some materials. Raghubar Mandal v. State of Bihar [1957] 8 STC 770 (SC).

(b) Available material on hand with the assessee should be taken into account.

(c) Opportunity of being heard should be given to the assessee.

(d) The Act and Rules also have to be followed.

(e) The principle of natural justice should be followed by the Assessing Authority.

(f) Before the expiry of period within which the return filed under section 70 can be revised, the best judgment assessment cannot be initiated.

Author wants to clarify one thing here that the concept of best judgment statement is not there in Central Excise Act. It is in the Income Tax Act and the VAT Act. Best Judgment assessment should be made according to the best principles laid down by various courts.

2.3 Assessment

Section 71 deals with assessment. This section has also undergone changes various times during last 18 years of the lifespan of service tax law. *Even this section was omitted with effect from 10.09.2004 which had put a full stop on assessment procedure and only self-assessment was applicable.* Authority to

verify the returns filed was given under section 71 which has been deleted by Finance (No. 2) Act 2004.

Let us briefly see the provisions of "assessment" under section 71 prior to its deletion **w.e.f. 10.09.2004**

2.3.1 Section71(1) *The Superintendent of Central Excise may, on the basis of information contained in the return filed by the assessee under section 70, verify the correctness of the tax assessed by the assessee on the services provided.*

2.3.2 Section71(2) *The Superintendent of Central Excise may require the assessee to produce any accounts, documents or other evidence as he may deem necessary for such verification as and when required.*

2.3.3 Section71(*3*) *If on verification under sub-section* (*2*)*, the Superintendent of Central Excise is of the opinion that service tax on any service provided has escaped assessment or has been under-assessed, he may refer the matter to the Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise, who may pass such order of assessment as he thinks fit*

From the above one thing to be noted is that Superintendent of Central Excise had the power to verify the correctness of return but he has no powers to pass any order. Basically the procedure was

(a) Superintendent of Central Excise on the basis of return filed by the assessee used to verify the correctness of the data.

(b) In the course of such verification he may ask for documents or other evidences that he thinks will be necessary for verification of correctness of the data in the return filed.

(c) If on the verification of documents, it is found by the Superintendent of Central Excise, that the service tax has escaped assessment or has been under assessed, he can refer the matter to Assistant Commissioner or Deputy Commissioner.

(d) Assistant Commissioner or Deputy Commissioner may pass the order as they deem fit.

Now the provisions of this section 71 regarding "Assessment" has been deleted with effect from 10.09.2004.

Therefore, one thing that could be said regarding assessment is that now on or after 10.09.2004, there is no concept of verification of records by the Superintendent to whom the return of service tax is filed. It's only self-assessment on which the total reliance is placed by the Government and therefore we all shall, comply with the tax responsibilities as honest citizens of the country and, contribute in the growth of the same.

2.4 Provisional Assessment

As per the discussion up till now it is clear that assessment is something related to assessing the final tax liability during a particular period for which the declaration is to be given in a specified form to the Central Excise Officer.

Now it is "provisional assessment". As per the dictionary meaning the term *provisional* means arranged for the present time only and likely to be changed in the future. Hence the term provision is generally defined as temporary arrangement. Therefore we can say that provisional assessment is an assessment that is not final in fact it is temporary assessment which is bound to change at the time of the final assessment.

Let us now proceed towards the statutory provisions in relation to provisional assessment. In Service Tax Rules 1994 there are three sub rules to Rule 6 which provides for the provisional assessment.

Sub rule (4), (5) and (6) of Rule 6 of Service Tax Rules 1994 provides for the statutory provisions in relation to provisional assessment. Let us discuss one by one:

2.4.1 Sub Rule (4) of Rule 6 of Service Tax Rules 1994:

Where an assessee is, for any reason, unable to correctly estimate, on the date of deposit, the actual amount payable for any particular month or quarter, as the case may be, he may make a request in writing to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, giving reasons for payment of service tax on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, on receipt of such request, may allow payment of service tax on provisional basis on such value of taxable service as may be specified by him and the provisions of the Central Excise (*No. 2*) *Rules, 2001, relating to provisional assessment except so far as they relate to execution of bond, shall, so far as may be, apply to such assessment.*

This sub rule is applicable where

(a) Assessee not able to estimate the actual liability on the date of deposit of tax.

(b) Assessee shall request Assistant Commissioner/Deputy Commissioner of Central Excise to allow him to pay on provisional basis.

(c) AC/DC shall go through the written request and if they are satisfied they may allow depositing service tax on provisional basis as per the calculations done by the assessee.

(d) All the provisions of provisional assessment mentioned in Central Excise (No 2) Rules 2001 shall apply in case of service tax also except the

provision for execution of bond for provisional assessment.

2.4.2 Sub Rule (5) of Rule 6 to Service Tax Rules 1994

Where an assessee under sub-rule (*4*) *requests for a provisional assessment he shall file a statement giving details of the difference between the service tax deposited and the service tax liable to be paid for each month in a memorandum in Form ST-3A accompanying the quarterly or half-yearly return, as the case may be.*

This sub rule specifies that in case where the assessee has requested for provisional payment of tax, he should find the difference between tax deposited provisionally and the actual tax liability of the month/quarter. Such difference should be noted in a memorandum in Form ST-3A and that memorandum form should be accompanied by the periodic service tax return.

Kindly note that if the periodic service tax return is not accompanied with the memorandum in form ST-3A it does not mean that the assessment is not provisional. The requirement of this form is for the purpose of enabling the Assessing Officer to make the correct final assessment.

2.4.3 Sub Rule (6) of Rule 6 to Service Tax Rule 1994

Where the assessee submits a memorandum in Form ST-3A under sub-rule (*5*), *it shall be lawful for the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, to complete the assessment, wherever he deems it necessary, after calling such further documents or records as he may consider necessary and proper in the circumstances of the case.*

Once the memorandum in Form ST-3A is submitted along with the service tax return, AC/DC shall complete the assessment and in case they require any further documents, records for completion of assessment they should call for and complete the assessment.

3.0 Adjudication Proceedings

As discussed above adjudication is a process where the authority hears the assessee on a particular matter and decides in regards to dispute judicially. In other words the need to adjudicate arises in case there is some dispute as regards to taxability, exemption, etc. between the Central Excise Officers and the assessee.

The following are the circumstances in which the dispute arises and as a result the need for adjudication arises:

(a) Where the return is filed by the assessee and the range officer finds any short payment of tax or non-payment of tax or erroneous refund.

(b) Where the anti-evasion wing of the department on the basis of its intelligence find out some tax evasion.

(c) Where the name of the assessee is selected for Audit by the service tax department and during the course of audit some evasion or wrong availment of credit, or wrong claim of exemption is found.

(d) Where the Intelligence wing i.e. DGCEI has initiated action against the assessee.

(e) In case of CAG Audit, if any dispute arises.

In the above mentioned situations the need for adjudication arises and the same is done by following the under mentioned steps.

I. Summoning the assessee under Section 14 of the Central Excise Act 1944 and collecting the evidences and documents that could help the adjudicating authority to decide on the dispute.

II. Once the documents and other records are collected the department calculates the liability of the assessee and if it funds that there is some short payment or non-payment of tax or erroneous refund, the authority issues the show cause notice. The show cause notice is issued by the Central Excise Officers as per the following monetary limit:

Sr. No.	**Central Excise Officer**	**Amount of Service Tax or CENVAT credit specified in a notice for the purpose of adjudication**
(1)	(2)	(3)
(1)	Superintendent of Central Excise	Not exceeding Rs. one lakh (excluding the cases relating to taxability of services or valuation of services and cases involving extended period of limitation)
(2)	Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise	Not exceeding Rs. five lakhs (except cases where Superintendents are empowered to adjudicate)
(3)	Joint Commissioner of Central Excise	Above Rs. five lakhs but not exceeding Rs. fifty lakhs
(4)	Additional Commissioner of Central Excise	Above Rs. twenty lakhs but not exceeding Rs. fifty lakhs
(5)	Commissioner of Central Excise	Without limit

In respect of the above powers of adjudication conferred on the Superintendents, it is clarified as under,—

(i) The Superintendents would be competent to decide cases that involve Service Tax and/or CENVAT credit upto Rs. one lakh in individual show-cause notices.

(ii) They would not be competent to decide cases that involve taxability of services, valuation of services, eligibility of

exemption and cases involving suppression of facts, fraud, collusion, wilful mis-statement etc.

(iii) They would be competent to decide cases involving wrong availment of CENVAT credit upto a monetary limit of Rs. one lakh.

III. Show-cause notice shall be issued within the time limit prescribed under the Act else the same shall not be treated as valid. The time limit as per Section 73(1) of the Finance Act is:

(a) In normal circumstance the Central Excise Officer can issues the show-cause notice at any time within 18 months (one year up to 27.05.2012) from the relevant date on the person chargeable with the service tax wherein he may be asked as to why he should not pay the amount specified in the notice.

(b) Where the short payment or non-payment or erroneous refund is on account of

(i) Fraud; or

(ii) Collusion; or

(iii) Wilful misstatement; or

(iv) Suppression of facts; or

(v) Contravention of any provisions of the chapter or the rules made thereunder with the intention to evade payment of service tax.

In the above cases the time limit of 18 months shall be substituted by 5 years i.e. notice shall be served within 5 years from the relevant date.

IV. Relevant date is to be calculated keeping in mind the following:

Situation	**Relevant Date**
Where periodic service tax return is to be filed by assessee	Date of Filing of such return
Where the return is not filed	Due date of filing of such return
Other Cases where tax has escaped assessment	Due date for payment of service tax
Where service tax is provisionally assessed	Date of adjustment of service tax after final assessment
Where erroneous refund	Date of refund

V. Show-cause notice shall be replied and defended by the assessee. Not only that the asseessee shall be given an opportunity of being heard in person by the adjudication authority and then once the assessee is heard the adjudicating authority shall decide on the dispute and pass a speaking order.

VI. Depending on the order of the adjudication the assessee has the option whether to proceed for further litigation or settle the matter as per the order passed by the authority.

4.0 Appeal Proceedings

An assessee, who is aggrieved by the order of any authority under the provisions of service tax, may file an appeal against the order at various places i.e. Appeal to Commissioner (Appeals), Appeal to Appellate Tribunal, Appeal to High Court etc.

Procedure prior to appeal

Step 1	Receiving the order of the Adjudication Authority
Step 2	If order is passed by an officer below the range of Commissioner, then first Appeal lies before the Commissioner (Appeals) under section 85 of the Finance Act and Rule 8 of the Service Tax Rules, 1994, and
	If order is passed by an officer equal or higher to the rank of Commissioner or the Commissioner (Appeals), then Appeal lies before the CESTAT under section 86 of the Finance Act and Rule 9 of Service Tax Rules, 1994.

4.1 Procedure for Appeal to Commissioner (Appeals)

4.1.1 Fill the Form ST-4

4.1.2 File the Stay Application

In case of the order where there exists some service tax liability and the same is not paid off by the assessee due to some legitimate belief and reasons that the liability will not arise.In such case along with the ST-4, (Form of appeal against the order of an officer below the rank of commissioner), application for grant of stay or waiver of pre deposit shall also be made. Application shall also include the reasons why the waiver from pre deposit shall be granted. It shall be clearly mentioned by the appellant that on the following reasons he believes that the liability will not arise and hence the order of the appeal will be in his favour. *Now because of the amendment of the Finance (No.2) Act 2014 dated 06.08.2014, Commissioner (Appeal) will not entertain any appeal unless the appellant has deposited seven and half percent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute. But this amendment does not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act 2014.*

4.1.3 Submit the Appeal (Form ST-4)

The prescribed time limit within which the appeal in Form No ST-4, shall be filed with the Commissioner of Central Excise (Appeals) is *two months* (with effect from 28.05.2012, earlier to this it was three months) from the date of receipt of the order by the aggrieved party (Sub Section 3A of Section 85 inserted by the Finance Act 2012).

Important here is that the appeal forms along with the necessary and prescribed documents shall reach the office of Commissioner (Appeals) within this time frame of *two months.* Mere posting of appeal documents is not sufficient.

A proviso has been provided to newly inserted sub section 3A of Section 85, which says that Commissioner (Appeals) *has the power to condone the delay for a further period of one month* provided he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the specified time limit of two months.

Following documents to be enclosed with Appeal Application:-

1. Application of Appeal in form ST-4.
2. Copy of order appealed against.
3. Application for Stay (u/s 35F).
4. Copy of Show Cause Notice.
5. List of cases relied upon.
6. Proof of deposit of Service Tax.
7. Duly authorized representative can also appear on behalf of the appellant under power of attorney duly court fee stamped. Court fee are Rs 50/- if counsel is Chartered Accountant. Court fees of Rs 1.25/- and stamp of Rs 5/- towards welfare fund if counsel is advocate and also can be filed Vakalatnama.
8. Rs 5/- (Stamp) is paid as fees at the time of filing the appeal.

Important Points to be noted

1. Each document (of all sets) is required to be self-attested by appellant. Form ST-4 and stay application is required to be signed with stamp.*Many a times the officer also insists to give the documents attested by some gazetted officer or by any superintendent of central excise and customs. This purely depends on the person sitting in the office of Commissioner (Appeals).*
2. Foolscap paper (Legal)- Typed in Double Space – One sided.
3. Paper book format with Page Numbering and proper indexing.

4.1.4 Receive the Acknowledgement

After the submitting Appeal application with all documents the assessee receives the acknowledgement of the said submission from the respective office of Commissioner (Appeals).

4.1.5 Hearing for Stay Application

Generally before allowing the final hearing of the matter, Commissioner (Appeals) provides the hearing for stay application, if any, filed with ST-4. As per the proviso to Section 35F of the Central Excise Act, 1944 the Commissioner (Appeals) shall wherever possible decide the matter of stay application within 30 days from the date of its filing. Commissioner (Appeals) may grant the stay of demand subject to certain conditions such as partial pre deposit etc.*Now because of the amendment of the Finance(No.2) Act 2014, Commissioner (Appeal) will not entertain any appeal unless the appellant has deposited <u>seven and half percent</u> of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute. But this amendment does not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act 2014.*

4.1.6 Final Hearing for Appeal

Once the conditions attached to the order on application for stay of demand are met and complied with by the appellant the Commissioner (Appeals) provides the final hearing on the Appeal application. If at the time of making the application under ST-4 the appellant has asked for personal hearing opportunity then the same is mandatorily provided by the Commissioner (Appeals) and then on the basis of merits of the case and the type of presentation and submission at the time of hearing final order is passed by the Commissioner (Appeals).

<u>Brief Check List for assessee preferring appeal under section 85</u>

1.	Appeal shall be filed with 2 months from date of receipt of order.
2.	Relief claimed in appeal shall be clearly mentioned.
3.	Proof of deposit of service tax, which is under appeal, must be attached to the appellate form. Where the payment is not made the application for grant of stay or waiver of pre deposit shall also be made. Applications shall also include the reasons why the waiver from pre deposit shall be granted.
4.	Specific request for ➢ Grant of personal hearing; ➢ Request for additional evidence or documents to be furnished where furnishing of the same earlier was not done due to reasons beyond the control of the assessee. ➢ Also seeking permission to grant leave, to amend, alter or annul any other grounds taken in the grounds of appeal.
5.	Where the application for appeal is submitted beyond the permissible time limit of 2 months, the application for condonation of delay shall be filed

	along with the appeal.
6.	Duly authorized representative can also appear on behalf of the appellant under power of attorney duly court fee stamped.
7.	Copy of the order appealed against along with the relevant SCN shall be filed along with the appeal.

4.2. Procedure for Appeal to Appellate Tribunal (CESTAT) by Assessee (Section 86)

Appeal to tribunal is popularly terms as second appeal. When an assessee is aggrieved by the order of the first appellate authority then the appeal lies with the second appeal authority i.e. Appellate Tribunal. As discussed in the above part of this chapter a person aggrieved by the order of the authority below the rank of commissioner can prefer an appeal to the Commissioner Appeals and then thereafter once the commissioner appeals passes the order and if the assessee is still not satisfied with the order passed he can prefer second appeal to the Appellate Tribunal.

But cases where the adjudication order is passed by the Commissioner of Central Excise and the assessee feels aggrieved by the order, he may prefer an appeal to the Appellate Tribunal.

4.2.1 Fill the Form ST-5

4.2.2 File the Stay Application

In case of the order where there exists some service tax liability and the same is not paid off by the assessee due to some legitimate belief and reasons that the liability will not arise. In such case along with the ST-5, (Form of appeal to be filed), application for grant of stay or waiver of pre deposit shall also be made. Such application shall be made along with the requisite fee of Rs 500. Application shall also include the reasons why the waiver from pre deposit shall be granted. It shall be clearly mentioned by the appellant that on the following reasons he believes that the liability will not arise and hence the order of the appeal will be in his favour. *Now because of the amendment of the Finance(No.2) Act 2014, Tribunal will not entertain any first appeal, unless the appellant has deposited <u>seven and half percent, and in case of second appeal, unless the appellant has deposited</u>ten percent, of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute. But this amendment does not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act 2014.*

4.2.3 Submit the Appeal (Form ST-5)

Appeal (Form ST-5) should be submitted within 3 months from the date of receipt of the order of such adjudicating authority. Condonation of delay was to be filled without any time limit.

Following documents to be enclosed with Appeal Application:-

1. A copy of the Order appealed against (one of which shall be a certified copy) in four copy.
2. Proof of payment of the fees for appeal.
3. Application under section 35F for stay/dispensation of pre-deposit with fee of Rs. 500, if pre-deposit is not made.*Finance (No.2)Act 2014 has amended Section sub section (6A) of Section 86 which has now omitted the words "for grant of stay". It means that not stay application with Rs 500 fee are not to be submitted. This amendment is the result of amendment in Section 35F of the Central Excise Act 1944.*
4. Copy of Show Cause Notice, supporting and relied upon documents (as per requirement) (Self-attested).
5. List of cases relied upon.
6. Duly authorized representative can also appear on behalf of the appellant under power of attorney duly court fee stamped. Court fee prescribe as par the Stamp Act.
7. Fees for appeal:

Sr. No.	Demand (Service Tax, Interest & Penalty)	Fee Payable
1	Upto Rs.5 Lakh	Rs.1,000/-
2	Above Rs.5 Lakh but upto Rs.50 Lakh	Rs.5,000/-
3	Above Rs.50 Lakh	Rs.10,000/-

8. Demand draft is to be prepared in name of Assistant Registrar.

Important points to be noted

1. Each document (of all sets) is required to be self-attested by appellant. Form ST-5 and stay application is required to be signed with stamp. *Many a times the officer also insists to give the documents attested by some gazetted officer or by any superintendent of central excise and customs. This purely depends on the person sitting in the office of Commissioner (Appeals).*
2. Foolscap paper (Legal) - Typed in Double Space – One sided.
3. Paper book format with Page Numbering and proper indexing.

4.2.4 Receive the Acknowledgement

After the submitting Appeal application with all documents the assessee receives the acknowledgement of the said submission from the respective office of Customs, Central Excise & Service Tax Appellate Tribunal (CESTAT).

4.2.5 Hearing for Stay Application

Generally before allowing the final hearing of the matter, CESTAT provides the hearing for stay application, if any, filed with ST-5. CESTAT shall decide the matter of stay application as soon as possible. CESTAT may grant the stay of demand subject to certain conditions such as partial pre deposit etc.*Now this step is not relevant since the Finance (No.2) Act 2014 has amended Section sub section (6A) of Section 86 which has now omitted the words "for grant of stay". It means that not stay application with Rs 500 fee are not to be submitted. This amendment is the result of amendment in Section 35F of the Central Excise Act 1944.*

Here we can say that once the prescribed percentage of pre deposit is deposited by the appellant the requirement of stay hearing becomes redundant.

4.2.6 Final Hearings for Appeal

Once the conditions attached to the order on application for stay of demand are met and complied with by the appellant the honorable CESTAT provides the final hearing on the Appeal application. If at the time of making the application under ST-5 the appellant has asked for personal hearing opportunity then the same is mandatorily provided by the CESTAT and then on the basis of merits of the case and the type of presentation and submission at the time of hearing final order is passed by the Customs, Central Excise & Service Tax Appellate Tribunal (CESTAT).

<u>Procedure in Brief - Appeal before CESTAT</u>

1.	Appeal to the Appellate Tribunal filed by an assessee shall be made in ST-5 in quadruplicate.
2.	Appeal shall be accompanied by Copy of order appealed against, Copy of Order in Original and Copy of Show Cause Notice.
3.	Appeal should be accompanied by proper authorization in favour of the authorized representative duly court fee stamped.
4.	Appeal shall be filed within three months from the date on which the order against which the appeal is preferred is received. But in case of Appeal by department i.e. by Chief Commissioner or Commissioner this time limit of filing the appeal is Four months of the date on which the order sought to be appealed against is received.
5.	Commissioner or any Central Excise Officer or the assessee as the case may be, on receipt of the notice that an appeal has been filed by the other party, within 45 days of receipt of the notice file a Memorandum of Cross Objection and such memorandum shall be disposed off by the Tribunal as if it were an appeal filed by the other party. Memorandum

	of Cross objection is required to be filed in form ST-6 in quadruplicate.
6.	Tribunal may admit appeal or cross objection memorandum after the relevant period if it is satisfied that there was sufficient cause for not filing the same within the stipulated period.
7.	Relief claim in the appeal should be very clearly mentioned.
8.	If the assessee has preferred the appeal he shall pay the fee in favour of Assistant Ragistrar, CESTAT payable at place where office of the Tribunal is situated. Whereas in can of appeal preferred by department no fee is to be paid.
9.	Specific request for ➢ Grant of personal hearing; ➢ Request for additional evidence or documents to be furnished where furnishing of the same earlier was not done due to reasons beyond the control of the assessee. ➢ Also seeking permission to grant leave, to amend, alter or annul any other grounds taken in the grounds of appeal.
10.	Tribunal shall exercise the same power and follow the same procedure as it exercises and follows in hearing and making orders and Central Excise Act, 1944.

4.3 Procedure for Appeal to Appellate Tribunal (CESTAT) by Department (Section 86)

Department also can file the appeal against the order of Commissioner or Commissioner (Appeals) to Appellate Tribunal. Procedure of appeal is as follows:

4.3.1 Fill the Form ST-7

4.3.2 Submit the Appeal (Form ST-7)

Appeal (Form ST-7) should be submitted within 4 months from the date of receipt of the order of the adjudicating authority against whose order the appeal is preferred. Condonation of delay can be filled without any time limit.

Following documents to be enclosed with Appeal Application:

1. A copy of the Order appealed against (one of which shall be a certified copy) in four copy.
2. Authorization for filing appeal viz. Review order.
3. Copy of Show Cause Notice, supporting and relied upon documents (as per requirement).

Important points to be noted:

1. Foolscap paper (Legal) Typed in Double Space – One sided.
2. Paper book format with Page Numbering.

4.3.3 File a Memorandum of Cross Objection

Assessee on the receipt of the notice that an appeal has been filed by the Department, within 45 days of receipt of the same shall file a Memorandum of Cross Objection and such memorandum shall be disposed off by the Tribunal as if it were an appeal filed. Memorandum of Cross Objection is required to be filed in form ST-6. (*Discussed in the later part of the chapter)*

4.3.4 Hearings for Appeal

Once the cross objection is received by the CESTAT. It provides hearing wherein both the parties i.e. department and assessee, or their authorized representatives have to represent their case and argue so as to convince the jury. Then thereafter the honorable Appellate Tribunal on the basis of merits of the case decide the matter and pronounces the final order.

4.4. Procedure for file Memorandum Of Cross Objections by Opposite Party – Assessee or Department Sec 86

4.4.1 Fill Form ST-6

4.4.2 Submit the Memorandum of Cross Objection (Form ST-6)

Commissioner or any Central Excise Officer or the 18ssesse as the case may be, on the receipt of the notice that an appeal has been filed by the other party, within 45 days of receipt of the notice file a Memorandum of Cross Objection. And all the documents are same as prescribed in Step III of Commissioner (Appeals).There is no fee for filing Memorandum of Cross Objection.

4.5 Authorized Representative

As per section 35Q of the Central Excise Act , 1944 the following persons can be the authorized representatives:

(a) his relative or regular employee; or

(b) any legal practitioner who is entitled to practise in any civil court in India; or

(c) any person who has acquired such qualifications as the Central Government may prescribe for this purpose.

232B. Qualifications for authorized representatives.-For the purposes of clause (c) of sub-section (2) of section 35Q , an authorized representative shall include a person who has acquired any of the following qualifications namely:—

1. a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949); or
2. a Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959 (23 of 1959); or

3. a Company Secretary within the meaning of the Company Secretaries Act, 1980 (56 of 1980) who has obtained a certificate of practice under section 6 of that Act; or
4. a post-graduate or an Honours degree holder in Commerce or a post-graduate degree or diploma holder in Business Administration from any recognised university; or

a person formerly employed in the Department of Customs and Central Excise or Narcotics and has retired or resigned from such employment after having rendered service in any capacity in one or more of the said departments for not less than ten years in the aggregate.