

# CBEC Clarification on mandatory 'pre-deposit' provisions

September 19, 2014



## CBEC Circular

Ministry of Finance (FinMin) vide. Circular 984/08/2014-CX dated September 16, 2014 has clarified on mandatory 'pre-deposit' provisions as enacted under Finance Act (No. 2), 2014. Detailed clarification has been issued by Department on issues like quantum of deposit, adjustment of amount paid during investigation and recovery proceedings. It also covers procedural aspects relating to the manner of making pre-deposits and claiming of refund.

### We bring you the gist of the latest FinMin Circular:-

S.No.	Particulars	FinMin clarification
1.	Quantum of deposit	<p>A. In case of appeal against Commissioner (Appeals) order before Tribunal, pre-deposit of 10% is payable on amount of duty demanded or penalty imposed by Commissioner (Appeals), not Adjudicating Authority .</p> <p>B. In case of penalties imposed under different Acts, pre-deposit is to be calculated on aggregate of such penalties imposed.</p>
2.	Amount adjustment towards pre-deposit during investigation	<p>A. Payment made during the course of investigation / audit, before filing of appeal, to the extent of 7.5% / 10% (subject to limit of Rs 10 Cr) shall be considered as pre-deposit u/s 35F of Central Excise Act / Sec 129E of Customs Act.</p> <p>B. Date of filing appeal in aforesaid case shall be deemed to be the date of deposit made in terms of said sections.</p>
3.	Recovery Proceedings	<p>Clarifies non-recovery of balance amount i.e. in excess of 7.5% / 10% pre-deposited, during pendency of appeal through coercive measures, provided assessee shows proof of pre-deposit and copy of appeal memo filed with appellate authority.</p> <p>However, Recovery action can be initiated only after the disposal of the case by the Commissioner (Appeal) / Tribunal in favour of the Department. <u>For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F / 129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme court.</u></p>

S.No.	Particulars	FinMin Clarification
4.	Refund of Pre-Deposit	<p>A. Process of refund envisaged u/s 11B of Central Excise Act / Sec 27 of Customs Act inapplicable to pre-deposits. Therefore, jurisdictional Commissioner must refund pre-deposit with interest within 15 days of receipt of assessee's letter seeking refund. Further, clarifies that refund along with interest would still be payable unless stayed by competent Appellate Authority.</p> <p>B. In case of partial remand where portion of duty is confirmed in Revenue's favour, adjustment is allowed out of the pre-deposit amount and interest.</p>
5.	Refund procedure	A letter along with Xerox copy of order in appeal or CESTAT order (consequent to which deposit becomes returnable ) would be sufficient to claim refund.
6.	Procedure / Manner of making pre-deposit	Assesseees can use e-payment facilities, wherever possible and proof of the payment has to be submitted before appellate authority.

## Our Comments

Out of all the issues discussed in the aforesaid Circular, the most important issue which created a lot of buzz recently is the new Section 35F of Central Excise Act, 1944 pertaining to recovery of balance amount during pending appeal.

The provisions of new section 35F of the Central Excise Act, 1944 inserted vide the Finance Act, 2014 had raised an issue as to "what about the balance amount" (after the deposit of mandatory amount of 7.5% / 10%). Since the system of filing stay application for staying recovery proceedings before the Commissioner (Appeals) / CESTAT was there, it becomes a matter of concern for the assessee as to what would be the fate of the balance amount. Can the department restart recovery proceedings during pendency of appeal? The new Section 35F unlike earlier Section 35F nowhere makes it obligatory to deposit the duty / penalty before filing the appeal. The only provision is to deposit the amount equivalent to 7.5% / 10% of duty / penalty as the case may be. The power to stay recovery proceedings are no longer there with the Commissioner (Appeals) / CESTAT.

### **FinMin Clarification on Recovery action vide Circular 984/08/2014-CX dated September 16, 2014**

Para 4.3 of the Circular states that

*"Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeal) / Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F / 129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment."*

However, the aforesaid clarification seems to be contrary to the clarification at para 4.2, which says no coercive measures for recovery of balance amount shall be taken during pendency of appeal. It leads to one conclusion that no coercive measures are to be taken after the passing of adjudication order (at whatsoever level), if the assessee has filed an appeals either before the Commissioner (Appeals) or CESTAT. At the same time, as per circular, the department is at liberty to stay recovery proceedings, once an order by appellate authority has been passed, in favour of department.

The above classification is not in spirit of new section 35F primarily because it nowhere makes obligatory to deposit the total amount. Moreover, the situation that recovery not to be done against order of the Commissioner and recovery to be done against order of the Commissioner (Appeal) seems to be not justifiable. Such a situation has not been visualized in new section 35F and stretching it by way of clarification would create anomalies. It would also result in accumulation of writ petitions before the respective High Courts. The clarification needs immediate review to that extent.

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