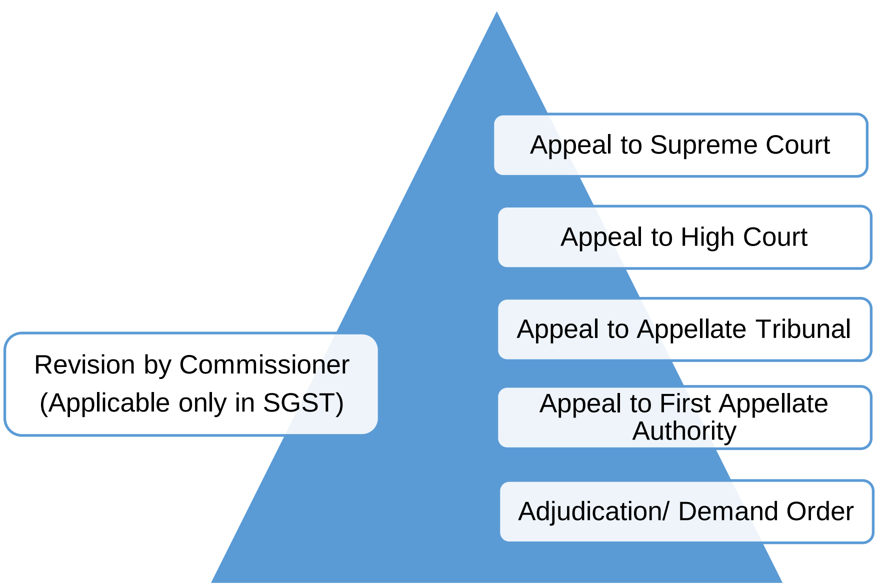
No Stay Applications under GST. Boon or a Bane!!

Saurabh Singhal & Tushar Aggarwal[1]

Statement of Bengal Chief Minister Mamta Banerjee directing Finance Minister Dr. Amit Mitra (chairman of empowered committee of State Finance Ministers on GST) *"GST is long pending. Within the next two meetings ensure its passage. Build a consensus to do it"* combined with the publication of Draft Model GST Law on the website of Ministry of Finance, Government of India, has again revived hopes of GST becoming a reality in the complex federal structure of India.

Draft Model GST Law consist of Draft CGST/ SGST Act and IGST Act. CGST & SGST Act contain separate appellate provisions, whereas IGST Act borrows appellate provisions of CGST Act. Appellate provisions under the Model GST Law provide for the following hierarchy of appellate remedy (highest being mentioned at the top):



Demand and Recovery provisions under Section 51 of the Model GST Law empowers a proper officer to issue show cause notice on the taxpayer and pass adjudication orders demanding tax, interest and penalty from the taxpayer. Further, provisions under Section 35 of the Model GST Law requires a taxpayer to discharge his dues including amount demanded in an adjudication order.

[1] The authors are Principal Associates in Lakshmikumaran & Sridharan, New Delhi & Gurgaon, respectively

Appellate provisions under Model GST Law provides for a mandatory pre-deposit (10% of the amount in dispute) as a pre-condition for filing appeal before the First Appellate Authority as well the Appellate Tribunal.

The above provisions on one hand provides for a fixed amount as mandatory pre-deposit for filing of appeal, while on the other hand provide for statutory mandate on the taxpayer to pay amount demanded in the adjudication order. This raises a natural question that whether in addition to mandatory pre-deposit a taxpayer is also required to file an Application for Stay of Recovery of demand while exercising its appellate remedy.

For an answer to this, parallel can be drawn from similar provisions introduced in Central Excise Law vide Finance (No.2) Act, 2014. Erstwhile Section 35F of the Central Excise Act, 1944 provided that person desirous of filing appeal shall deposit the amount in dispute as pre-condition for entertaining the appeal. Further, the Appellate Authority was empowered to dispense off with such deposit. With the introduction of Finance (No.2) Act, 2014 entertainment of appeal was made subject to deposit of mandatory pre-deposit of a specified percentage of disputed demand. Further, the powers of the Appellate Authority to dispense off with pre-deposit were removed.

It was in this background, that the Finance Minister in his budgetary speech 2014-15 stated that *"to expedite the process of disposal of appeals, amendments have been proposed in the Customs and Central Excise Acts with a view to* ***freeing appellate authorities from hearing stay applications*** *and to take up regular appeals for final disposal".* Thereafter, Central Board of Excise & Customs (CBEC) vide **Circular No. 984/8/2014-CX dated 16.09.2014**, clarified that post amendment in Section 35F of Central Excise Act, 1944 no coercive recovery of amount in excess of mandatory pre-deposit shall be made during the pendency of appeal.

Cue regarding non-obligation to file stay application can also be taken from Section 90 of Model CGST/ SGST Act. The said section provides that notwithstanding an appeal filed before High Court or Supreme Court, sums due under the order against which appeal is filed shall be payable by the taxpayer in accordance with the order. There is no such non-obstante provision to provide for payment of amount due in cases of appeal filed before First Appellate Authority or Appellate Tribunal. This provision further acknowledges the non-obligation to file stay application in appeal filed before First Appellate Authority or Appellate Tribunal.

However, the question of obligatory Stay Applications under Model GST Law will remain in doubts till the time similar clarifications as in the case of excise law are issued under GST

Regime. Also, under Model GST Law, there is an additional provision empowering the department to file application praying for increase in the amount of pre-deposit in cases involving tax demand of rupees 25 Crore and above.

Though provision regarding mandatory pre-deposit as pre-condition for filing appeal, by doing away with the need for filing stay applications and time and money in the litigation related thereto, may ease up and expedite the process of appeal under the upcoming indirect tax regime of GST, it comes as a havoc for taxpayers when arbitrary/ biased demand orders are passed and taxpayers are left with no other option but to pay mandatory pre-deposit to avail statutory appellate remedy. In my opinion, provided the mandatory pre-deposit amount is reasonable, the savings in terms of reduced litigation cost & time and earning in terms of increased foreign investment is a much more boon for the taxpayers and the government than the bane caused by undue burden to very few taxpayers.

This article was published in www.taxindiaonline.com