

PECULIAR FEATURES OF APPEAL UNDER GST

By : CA Ashok Batra

A. K. Batra & Associates, New Delhi

PECULIAR FEATURES OF APPEAL UNDER GST

By : CA Ashok Batra

A. K. Batra & Associates, New Delhi

Introduction

What is Appeal?

- In Wharton's law Lexicon- The word 'appeal' is defined as the **judicial examination of the decision by a higher court of the decision of an inferior court.**
- It is a remedy provided by the law for getting a decree of lower court or authority corrected when a party to a litigation is aggrieved.

Right to Appeal – Nature of

- Is right to file an appeal a natural or inherent right? It is described as a creature of statute

Ganga Bai vs. Vijayakumar–AIR 1974 SC 1126

“There is a **basic distinction between the right of suit and right of appeal**. There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one’s peril, bring a suit of one’s choice. It is no answer to a suit, however frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeal is quite the opposite. **The right of appeal inheres in no one, and, therefore, an appeal for its maintainability must have the clear authority of law.** That explains **why the right of appeal is described as a creature of statute.**”

Right to Appeal – Nature of

➤ Appeal –Is it creature of a statute?

Anant Mills Ltd. vs. State of Gujarat –AIR 1975 SC 1234 “...The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions.”

➤ State of Maharashtra vs. MahboobS. Allibhoy–1996 (85) ELT 22 (SC)

“It is well settled that an appeal is a creature of a statute. Unless a statute provides for an appeal and specifies the order against which an appeal can be filed, no appeal can be filed or entertained as a matter of right or course.”

Right to Appeal – Nature of

➤ Right to appeal –Is it a vested right?

GarikapatiVeerayyavs. SubhiahChoudhary–AIR 1957 SC 540

- i. That the legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
- ii. The **right of appeal is not a mere matter of procedure but is a substantive right.**
- iii. The **institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.**

Right to Appeal – Nature of

- iv. The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exercise as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced **such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.**
- v. This **vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.”**

Right to Appeal – Nature of

- Right of appeal –Can it be claimed by implications?
 - **AIR 1977 Ker. 32**
 - “Unless a right of appeal is specifically given under a statute, such a right cannot be claimed or exercised. **If such a right is given under the statute, the exercise thereof cannot be denied. Conversely, such a right cannot be inferred by implication.**”

Appeal – Who can file it?

- Can a third party earn the locus-standi to file appeal as person aggrieved?
 - Northern Plastics Ltd. vs. Hindustan Photo Films Mfg.Co. Ltd.-1997 (91) ELT 502 (SC)

“It is true that the phrase '**person aggrieved**' is wider than the phrase '**party aggrieved**'. But in the entire context of the statutory scheme especially sub-section (3) of Section 129A it has to be held that **only the parties to the proceedings before the adjudicating authority** Collector of Customs could prefer such an appeal to the CEGAT and the adjudicating authority under Section 122 can prefer such an appeal only when directed by the Board under Section 129D(1) and not otherwise.

Appeal – Who can file it?

.....

But in order to earn a locus standi as 'person aggrieved' other than the aggrieved party before the Collector of Customs as an adjudicating authority it must be shown that such a person aggrieved being third party has a direct legal interest in the goods involved in the adjudication process. It cannot be a general public interest or interest of a business rival as is being projected by the contesting respondents before us.” –

Judgment was in the context of Custom

Appeal – Who can file it?

➤ Usha B. Agarwal vs. CCE –2009 (243) ELT 492 (Bom) – In the context of Excise

10. O.N.G.C. took up the matter in appeal up to the Commissioner (Appeals) and thereafter did not take any steps. It is the Petitioner who has to pay the excise duty. It is the Petitioner's contention that classification as done by the Revenue is not correct and accordingly he is entitled to refund of duty paid. In our opinion, such person can be said to be person aggrieved as prejudice has been occasioned to him by O.N.G.C. in not preferring an appeal and the appellant having to pay the excise duty which in his opinion is not payable. **Considering the scheme of Central Excise Act, the appellant would not have any other remedy as an application for refund would only be maintainable if the order of assessment is set aside and not otherwise. The appellant would therefore, be left with no remedy at law. The Appellant therefore, has demonstrated the prejudice that would be occasioned. It is in that context that this court rightly had directed the appellant to move an application to seek relief to prefer an appeal.** The tribunal unfortunately misread the judgment of this court and proceeded to examine whether an appeal itself lies. It is true that the tribunal in its judgment has noted that conferring a right on the person other than manufacturer may create adverse impact on the ordinary claim of the Revenue and fiscal administration. **In our opinion, this can be met by holding that the person aggrieved who is allowed to prefer an appeal would only be entitled to prefer appeal to the extent of the prejudice suffered by inaction of the original assessee through whom he claims the relief. This would rule out the possibility of matter going down the chain.**

Appeal – Who can file it?

Under the CGST Act, the person authorized to file are as under

- S.107 (1) -Any person aggrieved
- S.107 (2) –Commissioner empowered to file an appeal
- S. 112 (1) –Any person aggrieved.....
- S.112 (3) –The Commissioner empowered to file an appeal...

Is a letter demanding the tax an appealable order ?

Chief Commissioner, LTU, Bangalore vs. TMT India Pvt. Ltd. -2019 (19) STR 5 (Kar.)- Approved in 2012 (27) STR J111 (Supreme Court)

18. Having regard to the fact that in the instant case, the **Additional Commissioner on 23-12-2004 had held that the activity of the assessee does not come within the purview of service tax**, it can be construed that the said order made on 23-12-2004 by the Additional Commissioner is by an adjudicating authority subordinate to the Commissioner of Central Excise, having regard to the definition of “Central Excise Officer” under Section 2(a) of the Central Excise Act, 1944.

18. Therefore, the **Commissioner of Central Excise had to give an opportunity of being heard to the respondent-assessee before passing an order as per Section 84.** As already noted, without giving an opportunity to the assessee, the order dated 23-1-2004 was reversed and further the order dated 23-12-2004 was held to be void ab initio and nullified and hence, the exercise of power, if under Section 84 by the Commissioner of Central Excise in the instant case was vitiated by not complying with the mandatory requirements stated therein.

20. **Under the circumstances, the respondent-assessee rightly invoked the appellate remedy by filing an appeal under Section 86(1) of the Finance Act. The Tribunal was therefore, justified in holding that the Communication dated 9-1-2006 was an order which was appealable before the CESTAT and that the said order was passed without complying with the principles of natural justice and thereby setting aside the same by allowing the appeal.** Consequently, any show-cause notice that has been issued, by virtue of order dated 9-1-2006 also does not have any validity in the eye of law there being infraction of Section 73 and 84 of the Finance Act, 1994.

COMPARISION

➤ **Direct v Indirect Taxes**

- Pre deposit
- Appeal against assessment/adjudication order by department
- Manner of drafting

➤ **Pre GST v GST**

- Limited power of condonation
- Not more than three adjournments
- Directory time limit of one year for disposal
- Notified appellate authority in place of commissioner (Appeal)

Initiation of Litigation

- **First step towards litigation and no recovery without issuance of SCN**
 - ✓ M/s LC Infra Projects Pvt Ltd vs UOI [2019 – TIOL – 1660 – HC – KAR – GST dated 22.07.2019]
 - ✓ Assistant Commissioner CGST, Chennai versus M/s Daejung Moparts Pvt Ltd [2020 – TIOL – 358 – HC – MAD - GST]
 - ✓ Mahadeo Construction company versus UOI [2020 – TIOL – 850 – HC – Jharkhand] dated 21.04.2020

Basic Fundamentals

- All the order against which appeal can be filed are known as appealable orders.
- Therefore, all the **orders of the adjudicating authority or any other order passed by any officer other than those mentioned under Section 121 of the CGST Act are known as appealable orders.**
- 2(4) *“adjudicating authority” means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the [Central Board of Indirect Taxes and Customs], the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, [the National Appellate Authority for Advance Ruling,] [the Appellate Authority, the Appellate Tribunal and the Authority referred to in sub-section (2) of section 171];*
- Assessment in terms of **Sec 61** if not consented by taxable person SCN need to be issued by the proper officer.

Non – appealable decisions and orders

Section	Legal Provisions
121 of CGST Act, 2017	<p><i>Notwithstanding anything to the contrary in any provisions of this Act, no appeal shall lie against any decision taken or order passed by an officer of central tax if such decision taken or order passed relates to any one or more of the following matters, <u>namely</u>:-</i></p> <ul style="list-style-type: none"><li data-bbox="570 679 2405 811"><i>(a) an <u>order of the Commissioner or other authority empowered to direct transfer of proceedings from one officer to another officer</u>; or</i><li data-bbox="570 858 2405 989"><i>(b) an <u>order pertaining to the seizure or retention of books of account, register and other documents</u>; or</i><li data-bbox="570 1036 1977 1096"><i>(c) an <u>order sanctioning prosecution</u> under this Act; or</i><li data-bbox="570 1143 2372 1203"><i>(d) an <u>order passed under section 80</u> (payment of tax in installments)</i>

Upon issuance of Adjudication Order

First Appellate Authority

- u/s 107 of CGST Act.
- Read with Rule 108,109 and 112
- **Within 3 + 1 months from date of communication.**

Appeal to Tribunal

- u/s 112 of CGST Act.
- Read with Rule 110,111 and 112
- **Within 3 + 3 months from date of communication**

Appeal to High Court

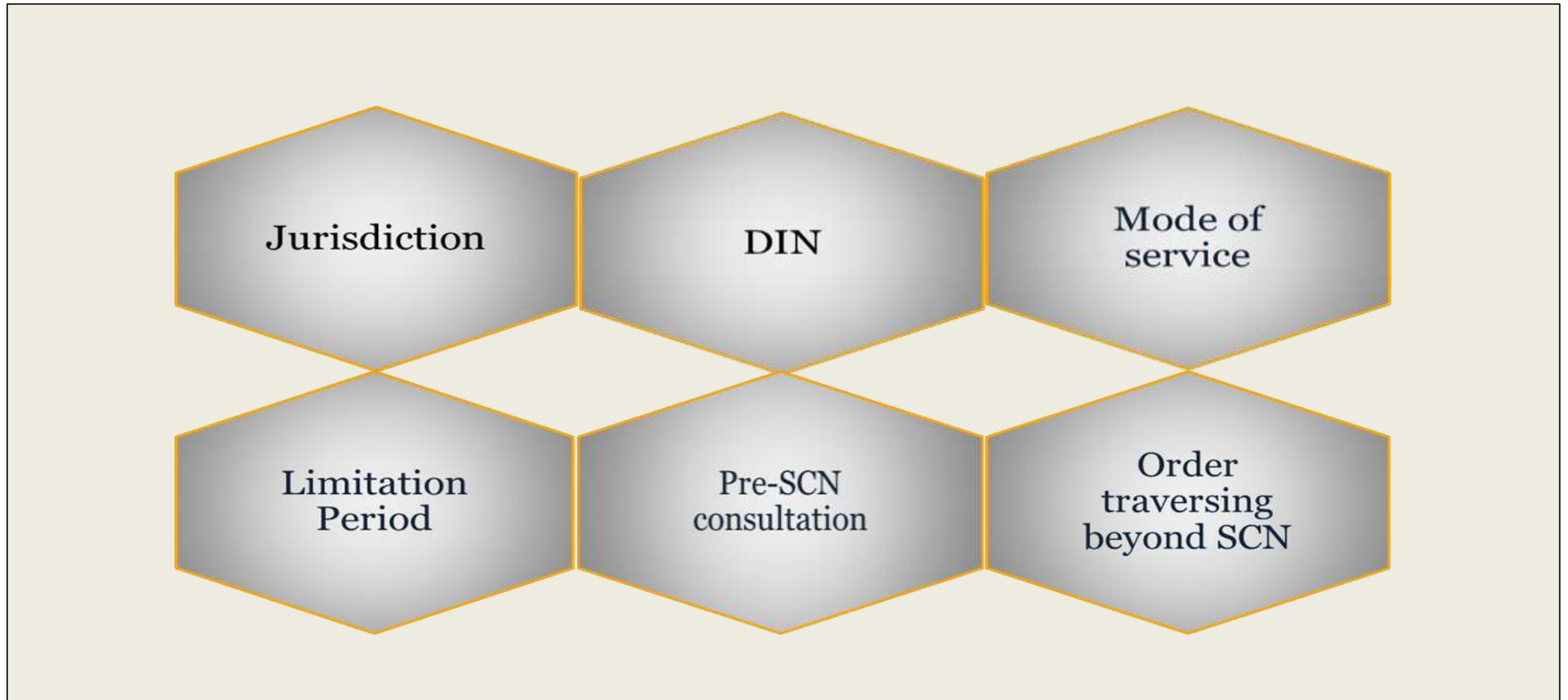
- u/s 117 of CGST Act.
- Read with Rule 114
- Within 180 days + as may be allowed by High Court.

Appeal to Supreme Court

- u/s 118 of CGST Act.
- Read with Rule 115
- Within 60 days from date of Communication

ORDER OF APPEAL IN GST

Elements to be looked into while filing an Appeal against the Impugned Order



DIN

- CBIC vide its **Circular No 128/47/2019 – GST** has mandated that in all the communications (except in exceptional circumstances) with the assessee (including on e-mails), Document Identification No is required to be mentioned.
- DIN can be confirmed by the assessee online at **Cbic.gov.in**
- All the communication with the assessee which does **not contain** DIN shall be treated **invalid** and shall be considered as never been issued.

Jurisdiction

- Ensure whether authority passing the order had jurisdiction to pass the order.
- Governed by the provisions of **Section 3 to Section 6** of CGST Act, 2017.
- **N/N – 02/2017** – CT dated 19.06.2017 specifies the jurisdiction.
- **Monetary limits** are also to be verified.

Modes of Service

Sec. 169 of CGST Act, 2017 (Applicable where no specific mode provided in section)

□ (1) Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by **any one of the following methods**, namely :—

- Initial modes
- By tendering directly or through **registered post / speed post / approved courier with acknowledgement** due or proof of delivery
 - By sending **communication to registered e-mail id.**
 - **By making it available on GSTN portal**
 - **By publication in a local newspaper**

To be followed as last resort

If not-serviceable in above manner, by affixing to a conspicuous (attracting notice/attention) part of the place of business or usual place of residence

If cannot be serviced in above two ways, then by affixing on the Notice Board of the Officer or the authority issuing the Notice

Modes of Service

➤ M/s Kashi Bartan Bhandar versus State of UP and ors [2018 – TIOL – 2897 – HC – ALL – GST]

- ❑ In view of the above, we are of the definite opinion that the **petitioner was not served with any show-cause notice before passing of the impugned order and service through affixation could not have been resorted to in the facts and circumstances of the case. **The order impugned, therefore, is in violation of the principles of natural justice.****
- ❑ Fresh SCN need to be issued and may be all or most of the demand has become time barred.

Modes of Service

- RAM PRASAD SHARMA VERSUS THE CHIEF COMMISSIONER AND ANOTHER [2020 (11) TMI 787 – MP HC] – **GST Regime**
- The State in its reply has provided no material to show that show-cause notice/order No.10 dated 10.06.2020 **was uploaded on website of revenue.**
- In fact, learned AAG, Shri Mody, fairly **concedes** that the show-cause notice/order **was communicated to petitioner by Email and was not uploaded on website of the revenue**
- It is trite principle of law that when **a particular procedure is prescribed to perform a particular act then all other procedures/modes except the one prescribed are excluded.**
- This principle becomes all the more stringent when statutorily prescribed as is the case herein.

Time Limitation

- Order cannot be issued beyond the time limit mentioned u/s 73(10) and 74(10).
- In view of Section 74 (2), SCN is required to be **issued** at least 6 months prior to the time limit of issuing order which is 5 years from **“DUE DATE”** for furnishing annual return of relevant f/y or date of erroneous refund [i.e. within 4 years 6 months from due date of annual return].
- Annual Return f/y 17-18: 31.01.2020, Order can be passed up to 30.01.2025. Order passed after this date is invalid.
- SCN issued after 31.07.2024 will be time – barred.

Pre SCN Consultation

Amadeus India Pvt Ltd. vs Principal Commissioner, Central Excise, Service Tax [2019 (5) TMI 669 – Delhi HC] dated 08.05.2019

- “18. In the present case, the Court is satisfied that **it was necessary** in terms of para 5.0 of the Master Circular dt. 10.03.2017 **for the Respondent to have engaged with the Petitioner in a pre SCN consultation**, particularly, since neither of the exceptions specified in para 5.0 were attracted
- 19. Accordingly, without expressing any view on the merits of the case of either party, **the Court sets aside the impugned SCN** dated 4th September 2018 and relegates the parties to the stage prior to issuance of impugned SCN ”

Order traversing beyond SCN

- The adjudicating authority has to pass his order within the parameter of the allegations levelled in the show cause notice.
- In the case of Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd. [(2006) 7 SCC 592], the apex court while delivering judgment under para 16 held that, the department cannot travel beyond the scope of the show cause notice.

ACTUAL DEFAULT

- ❖ Pay amount of tax and interest within 30 days of issuance of SCN and penalty will be waived [**Section 73 (8)**]
- ❖ Pay amount of tax, interest and penalty (equal to 25% of tax), within 30 days of issuance of SCN [**Section 74(8)**]
- ❖ Where any person served with an order issued under sub-section 74(9) (Adjudication order) pays the tax along with interest payable thereon and a penalty equivalent 50% of such tax within 30 days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded. [Section 74(11)]

ACTUAL DEFAULT

- ❖ Tax liability is to be discharged on cum-tax basis [Rule 35]
- ❖ If there is no default and assessee wants to litigate, move to grounds on merits
- ❖ Advise to comply in future

Elements to be checked to identify a valid order

Non – Speaking Order

Relevant
Provisions

Procedural
Lapse

Relevant
Provisions

Computation
Aspect

Principle of Natural Justice

- ❖ **Non-speaking order**
 - ❖ Submissions of the Appellant not considered
 - ❖ Findings not recorded in the order
 - ❖ No discussion on the defenses or the case law relied by the appellant
- ❖ Principle of ***Audi Alteram Partem*** – ***No body should be condemned unheard***
- ❖ Before passing any order, an **Opportunity of personal hearing** should be granted to the person aggrieved as provided in law .

Non – Speaking Order

- ❖ Non- Speaking orders are **not valid in the eyes of law.**
- ❖ **All submissions of the Appellant**, documentary evidences submitted should be considered.
- ❖ The **order should contain** the **detailed discussion** of the case and the findings of the authority.
- ❖ The **order be clear on the basis of which it has been passed.**
- ❖ **As held in Kishan Lal v. UOI [1998] 97 Taxman 556 (SC), a speaking order reduces arbitrariness. A reasoned order speaks for itself.**

Non – Speaking Order

- ❖ In the case of TATA ENGINEERING & LOCOMOTIVE CO. LTD. VERSUS COLLECTOR OF C. EX., PUNE [2006 (23) E.L.T. 360 (SC)], the Apex Court held that the **tribunal while passing the order has not recorded the findings in detail and therefore set aside the order being cryptic and non-speaking.**
- ❖ In State of Punjab v. Bhag Singh, 2004 (164) E.L.T. 137 (S.C.), the Apex Court was considering a case where the High Court had dismissed the appeal without giving any reasons. The Court held that reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of mind, all the more when its order is amenable to further avenue of challenge. **The absence of reasons has rendered the High Court order not sustainable.**

Opportunity of being heard

- ❖ In the case of Harbans Lal v. Commissioner [1993 (67) E.L.T. 20 (SC)] it was held that if the order is passed by the authority without providing the **reasonable opportunity of being heard to the person affected by it adversely will be invalid and must be set aside.**
- ❖ In the case of CIT v. Panna Devi Saraogi [1970] 78 ITR 728 (Cal.), it was held that the **opportunity of being heard should be real, reasonable and effective.** The same should not be for name sake. It should be a paper opportunity.

Relevant Provisions

- ❖ GST Provisions have changed constantly. So it must be ensured that order has been passed keeping in view all the amendments.
- ❖ SCN must be issued in accordance with the provisions applicable at the time of supply such as:
 - ✓ *No demand of RCM on supplies from URP w.e.f. 13.10.2017*
 - ✓ *No demand on Developer under RCM prior to 01.04.2019*
 - ✓ *Disallowance of Input Tax Credit on certain supplies w.e.f. 01.02.2019 [Motor vehicles > 13 passengers]*

Interpretation Issues

- ❖ **Demand of ST/GST on transfer of Land Development Rights**
 - ✓ Not a supply in view of Schedule III

- ❖ **Composite Supply versus Mixed Supply**
 - ✓ Intention of the parties derived from Agreement
 - ✓ 'Naturally Bundled' Case Laws from Service Tax

Interpretation Issues

❖ Notice Pay Recovery

- ✓ Employer has not 'tolerated' any act of employee but has permitted a sudden exit in lieu of compensation: M/s GE T & D India Ltd. vs. DC of Excise -[2020-VIL-39-MAD-ST] dated 07.11.2019

❖ Denial of Exemption

- ✓ Scope of exemption entry.
- ✓ Exemption Notifications are subject to strict interpretation – CCI vs. Dilip Kumar & Co. [2018 (7) TMI 1826 - SUPREME COURT] dt. 30.07.2018. Distinguished in Mother Superior Citation ???

❖ Intermediary Services provided to foreign entities

- ✓ Scope of Services as per terms of agreement
- ✓ Manner of Consideration

Interpretation Issues

- ❖ **Dispute w.r.t. Transaction Value:**
 - ✓ Settled Case Laws from Excise Laws

- ❖ **Amount incurred as 'pure agent' included in value of supply**
 - ✓ Conditions of Rule 33 are to be complied with
 - ✓ Relevant Case Laws from Service Tax

- ❖ **Classification of Goods**
 - ✓ Interpretation of relevant Entry from CTA, 1975
 - ✓ Decided Case Laws from Customs Act, 1962

Procedural Aspect

- ❖ **Substantive benefits cannot be denied** on basis of procedural lapses.
 - ✓ Credit cannot be denied for no mention of STC of recipient on tax invoice. (Procedural lapse on part of service provider)
 - ✓ Seeking registration under GST for availing ITC is **not procedural**. [Sec. 16(1) of CGST Act]
- ❖ TRAN-1 judgments under GST are based on this principle.

Procedural Aspect

❖ *M/S SIDHARTH POLYSACKS PVT. LTD. VS. COMR (APPEALS), CGST, CCE, JAIPUR [2020 (3) TMI 197 - CESTAT NEW DELHI] dated 11.02.2020*

*“It is seen that the credit was availed by the appellant after reflecting the same in their RG-23A Part-I and Part-II registers. **It is well settled law that substantive benefit cannot be denied on the basis of procedural lapses, if any.** The appellant had their head office and the address stands shown inasmuch as orders might have placed from the head office”*

Procedural Aspect

❖ *Dal Chand versus Municipal Corporation, Bhopal and another, 1984 (2) SCC 486*

*:"... There are no ready tests or invariable formulae to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. **The weighing of the consequence of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory....."***

Computational Aspect

- ❖ Best Judgment Assessment cannot be made on arbitrary basis.
- ❖ Manner of recording a transaction in books of account cannot be a basis for determining tax liability.
 - ✓ *M/s Deltax Enterprises vs CCE, New Delhi [2017 (12) TMI 966 – CESTAT – Delhi]*
*“In the **absence of specific allegation** with reference to the **nature of service** or the **service recipient** it is not tenable to hold an income of the appellant even if it is admitted to be an actual income, as consideration for a taxable service.”*

Computational Aspect

Difference between Balance Sheet, 26AS, & ST-3 Returns

M/S M.P. LADHU UDYOG NIGAM LTD Vs. CCE & ST, BHOPAL [2018 (2) TMI 1410 - **CESTAT NEW DELHI] dated 15/01/2018**

- ❖ *“..SCN did not give any reason to allege short levy except the difference between balance sheet and the ST-3 returns...In the present case, neither the notice nor the lower authorities have justified the demand for short levy or short payment of tax with any **cogent reason**. The burden of explaining the difference amount being not taxable income has been shifted to the appellant. This will be against the very basis of tax levy. It is the Department which alleged short payment and at least **basic preliminary supporting evidence** of such short payment has to be made so that the appellant can defend their case*

Appeal before the first Appellate Authority - Sec 107

Sec 107 (1) specifically provides that ‘**any person aggrieved by any decision or order** passed under the Act or the SGST Act or UTGST Act **by an *adjudicating authority**, may appeal to such ***Appellate Authority**, in prescribed manner.

Sec 2 (4) - “adjudicating authority” means any authority, appointed or authorized to pass any order or decision under this Act, but does not include the Central Board of Indirect Taxes and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the National Appellate Authority for Advance Ruling, the Appellate Authority, the Appellate Tribunal and the Authority referred to in sub-section (2) of section 171.

Sec 2 (8) - “Appellate Authority” means an authority appointed or authorized to hear appeals as referred to in **section 107**;

Appeal before the first Appellate Authority - Sec 107

❖ Appellate Authority appointed under Rule 109 A

- Commissioner (Appeals) for Orders passed by Additional or Joint Commissioner
- Jt. Commissioner (Appeals) for Orders passed by AC/ DC/ Supt.

❖ Time limit of filing of appeal with the Appellate Authority

- For any aggrieved person – 3 months from the date of communication of such order to such person
- For Department - 6 months from the date of communication of such decisions

Pre – Deposit:

- **Admitted tax to be paid in full**
- **For filing an appeal a pre deposit of 10% of amount of tax in dispute arising from the order (subject to a maxi. INR 25 crs + 25 SGST) [as per Sec 107 (6)]**

Manner of filing first Appeal – Rule 108,109 and Rule 112

➤ Forms for Appeal

- The aggrieved person files appeal in Forms GST APL – 01.
- The Department issues acknowledgement in Forms GST APL – 02.

➤ Appeal/Application to be filed electronically or otherwise.

➤ **Certified copy of the Order to be submitted within 7 days of filing the appeal/application [R.108(3) & R. 109(2)]**

- Final acknowledgement in FORM GST APL-02
- Proviso to R. 108 (3) – Certified copy filed.

➤ **Certified copy filed within 7 days: Date of filing appeal shall be the date of provisional acknowledgement.**

➤ **Certified copy filed after 7 days: Date of filing appeal shall be the date of final acknowledgement.**

Powers of Revisional Authority – Sec 108

- This section gives the **revisional authority power to revise** any **order passed** by a **subordinate authority**.
- In the **said revision**, authority may **enhance or modify or annul** the **previous order**.
- Order passed by the revisional authority is the final order against which **Appeal can be filed to higher courts**.
- **Any person aggrieved by any order issued by the adjudicating authority or appellate authority** under the provisions of the Act **may prefer an Appeal before the relevant appellate forum**.

Powers of Revisional Authority – Sec 108

➤ **Scope of Rectification u/s 161** is confined to mistakes apparent on the face of record for which no further examination is required.

➤ The **aggrieved person cannot re-argue the case on merits** by filing rectification application before the same authority.

Appeal vs Rectification:

- Rectification is filed before the same authority whereas Appeal is filed before the superior authority.
- **One should file both ROM and appeal so that appeal does not become time-barred.** Scope of appeal against order of ROM is very limited.

Constitution of Appellate Tribunal and Benches thereof – Sec 109

Appellate Tribunal and Benches :

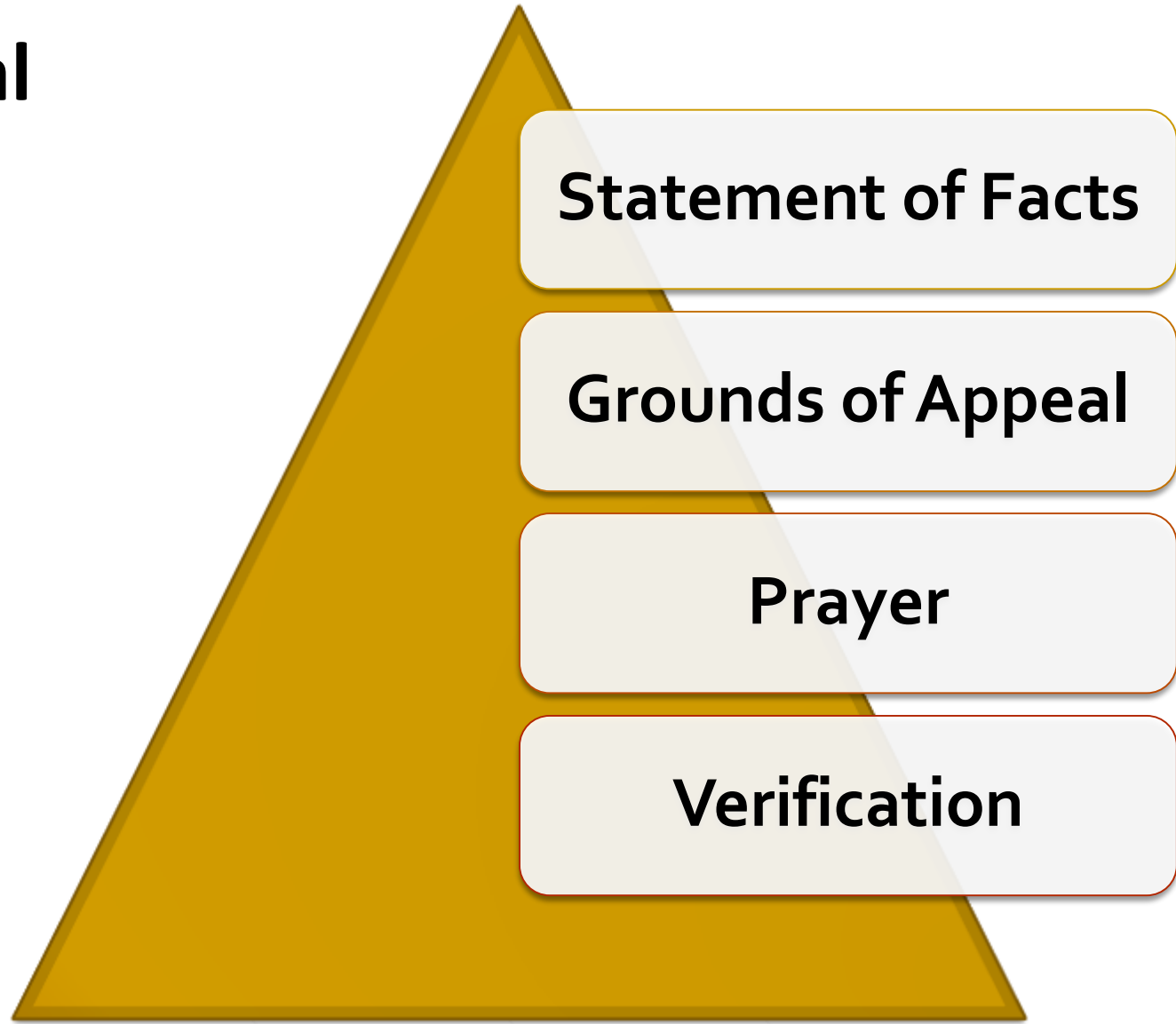
- **National Bench** also known as Regional Bench situated at **New Delhi**.
- **State Bench** also known as Area Bench situated in various states.
- **Regional Benches will hear the cases** where **one of the issues** is related to place of supply. Any appeal against there order would lie before the Supreme Court.
- **State Benches will hear appeals** in cases involving matters **other than** determination of place of supply. Any appeal against there order would lie before the High Court.

Appellate Tribunal – Sec 112

Appellate Tribunal and Benches :

- Fees for filing an appeal with the Tribunal is Rs 2000/- for every Rs. 1,00,000/- of demand, which shall not exceed Rs.50,000/- in any case.
- Every appeal needs to be heard and decided within 1 year, to the extent possible.
- **Application Form** for appeal **GST APL -05** to be filed electronically and accordingly a provisional acknowledgement to be issued.
- **Memorandum of cross – objection** to be submitted in FORM GST APL – 06.
- Copy of order appealed against to be submitted within seven days of filing of GST APL - 05 and a final acknowledgement indicating the appeal no.s is issued in form APL -02.
- **Admitted Tax to be paid in full.**
- For filing an appeal a **pre deposit of 20% of amount** of tax in dispute arising from the order (**subject to a maxi. INR 50 crs + 50 SGST**) [as per Sec 112 (8)]. This is in addition to the amount deposited u/s 107.

Structure of an Appeal



Drafting an Appeal - Statement of facts:

- **Firstly**, ensure that there is **complete control over the facts** of the case.
- **Facts need to be put forth** with great **deal of clarity**.
- **Reference** can be made to the **financial statements, appellant's web – site, interaction with the clients, returns** and **other related documents**.
- Here, a **brief** about the **appellate, nature of business**, transactions under consideration and **events that lead to the present Appeal**.
- Summarize the findings of the **impugned order precisely**.
- **Write the facts with reference** to the allegations leveled at the time of issuance SCN and the findings recorded in the adjudication order.

Drafting an Appeal - Grounds of Appeal:

- **Widest possible grounds** should be taken in Appeal.
- Grounds of Appeal should be **simple, clear, precise, concise, and without any ambiguity.**
- In case of more than one issue involved in Appeal, draft **separate ground** for separate issue.
- In case of more than one ground involved in Appeal, **preference of grounds** should be decided.
- Avoid using long sentences.

Drafting an Appeal - Grounds of Appeal: Misc.

- **Timely extension to avoid an ex – prate order**
- If case is not strong on merits, advised to deposit the tax under protest. Interest meter comes to halt.
- Reply to be drafted on exhaustive basis and all grounds to be taken ‘ without prejudice to each other’.
- Request for additional grounds to be mentioned
- Only 3 adjournments of personal hearing be sought on the basis of sufficient cause. (sec 75(5) of the CGST Act,2017)

Drafting an Appeal - Grounds of Appeal: Misc.

- All grounds in the SCN should be taken in appeal as well if no relief by adjudicating authority.
- **All the findings of the authority need to be addressed.**
- **Evidence should be provided for all the submissions/ Pleas.**
- Ensure **politeness but firmness** in all communication with tax authorities.

Drafting an Appeal – Additional Grounds of Appeal:

- **Additional Legal Ground can be added at the discretion of Appellate Authority if the omission was not willful or unreasonable – Sec 107(10).**
- **Additional evidence before Appellate Authority [Rule 112]:**
 - ✓ Adjudicating/ Appellate Authority refused to admit
 - ✓ Applicant was prevented by sufficient cause
 - ✓ Order passed without giving an opportunity of being heard
 - ✓ Reasons to be recorded in writing
 - ✓ Can suo moto call for evidence

Drafting an Appeal – Additional Grounds of Appeal:

➤ Law relating to 'Additional Grounds' Jute Corporation of India vs CIT – 1991 (51) ELT 176 (SC)

“There may be several factors justifying the raising of such new plea in appeal, and each case has to be considered on its own facts. If the Appellate Asstt. Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course **while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason.** He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. **The satisfaction of the Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose**

Memorandum of Cross Objection - Concept

- Party against whom an appeal is filed may file MOCO u/s 112(5) of CGST Act.
- In State of Tamil Nadu vs. TVL Jeevan Lal Ltd. reported as 1997(91) E.L.T. 268(S.C.)- Hon'ble Supreme Court has, inter alia, held that **if one party files appeal against part of the order which is against him, other party can file cross objections in respect of part of order which is against him, as the entire order comes within the purview of Appellate Authority.**
- In CCE vs. Godrej & Boyce Mfg. Co. Ltd. reported as (2009) 233 E.L.T. 446 (Bom. HC DB), it was inter alia held that even if appeal was not filed, cross objection can be filed. **Cross objection is treatable as appeal against that part of order only against which no appeal has been preferred.**
- MOCO should be filed within 45 days of receiving the notice that appeal has been filed.
- GSTAT can condone the delay for a maximum period up to 45 days on the sufficient cause.

Drafting an Appeal – Doctrine of Merger

The **Doctrine of Merger** can be better understood from the following observations of the **Supreme Court** in a landmark decision in the case *Kunhayammed v. State of Kerala (2000) 113 Taxman 470 (SC)*.

Where an appeal or revision is provided before a superior forum against an order, passed by a Court, Tribunal or any other authority and **such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges with the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.**

- ▶ The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge.

Exercise of Writ Jurisdiction

- ❖ **Writs can be filed to High Court as per Article 226 of the Constitution of India.**
- ❖ **A writ can be filed:**
 - When the vires of the Act is required to be challenged,
 - When there is a violation of principle of natural justice,
 - Where the alternative remedy is onerous or burdensome or inadequate,
 - The order or proceedings are wholly without jurisdiction.
- ❖ **A writ petition cannot be filed in case where alternatively suitable, equally efficacious remedy is available to the party.**
- ❖ **General principles, wide powers to the constitutional courts looking to the facts of each case**

Demand and Recovery Provisions related to Appeals – Sec 75

Will **any modification in tax amount by the Appellate Authority or Tribunal** have **any impact on interest or penalty** ?



- (8) Where the Appellate Authority or Appellate Tribunal or court modifies the amount of tax determined by the proper officer, **the amount of interest and penalty shall stand modified accordingly**, taking into account the amount of tax so modified

- If an **issue is already pending with the Appellant Authority** (Tribunal, High Court or supreme Court) in appeal filed by the Department. **How would it impact limitation period in similar other cases ?**

- **75 (11)** An issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, **the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated** by way of issue of a show cause notice under the said sections.

➤ Where it has been held by the Appellate Authority or Tribunal that notice u/s 74(1) is not sustainable. Can this case be taken up by PO under Sec 73(1) ?

➤ Sec 75(2) *Where any Appellate Authority or Appellate Tribunal or court concludes that the **notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, **the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.*****

Appeal to High Court – Sec 117

- **Any person aggrieved by any order passed by the State Bench or Area Benches of the Appellate Tribunal** may file an appeal to the High Court.
- **High Court may admit such appeal, if it is satisfied that the case involves a substantial question of law and shall formulate the same.**
- **The Appeal is to be filed within a period of one hundred and eighty (180) days** from the date on which the order appealed against is received by the aggrieved person.
- ***The High Court may entertain an appeal after the expiry of the said period if it is satisfied that there was sufficient cause for not filing it within such period.***

Appeal to High Court – Sec 117

- The High Court may determine **any issue which—**
 - (a) has **not been determined by the State Bench or Area Benches; or**
 - (b) has **been wrongly determined** by the **State Bench or Area Benches**, by reason of a **decision on such question of law.**
- The appeal be heard by at least two judges of High Court and be decided according to the majority.
- Where there is **no such majority**, the Judges shall state the point of law upon which they differ and the case shall, then, **be heard upon that point only, by one or more of the other Judges of the High Court** and **such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.**

Appeal to Supreme Court – Sec 118

- An appeal to the Supreme Court can be made against :
 - The **order passed by** the National Bench or Regional Benches of the Appellate Tribunal;
or
 - any judgment or order passed by the High Court in an appeal made under section 117 in any case which, on its own motion or on an application made by or on behalf of the party aggrieved, immediately after passing of the judgment or order, **the High Court certifies to be a fit one for appeal to the Supreme Court.**
- The provisions of the **Code of Civil Procedure, 1908**, (5 of 1908.) would apply to the appeals to the Supreme Court.
- *Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 117 in the case of a judgment of the High Court.*

Thank You.

Appeal: Pre vs Post GST

Appellate remedy available for orders passed by different authorities

	Order passed by :	Pre GST :Appellate Authority	Post GST : Appellate Authority
➤	All officers up to & including Additional Commissioner	<ul style="list-style-type: none"> • Commissioner (Appeals) 	
❖	Deputy or Assistant Commissioner or Superintendent		<ul style="list-style-type: none"> • Officer not below the rank of Joint Commissioner (Appeals)
❖	Additional or Joint Commissioner		<ul style="list-style-type: none"> • Commissioner (Appeals)

	Order passed by :	Pre GST :Appellate Authority	Post GST:Appellate Authority
➤	Principal Commissioner of Central Excise, Commissioner of Central Excise, Commissioner (Adjudication) of DGCEI, DRI, Commissioner (Appeals)	• CESTAT	-
➤	Commissioner (Appeals)	• CESTAT* (in certain cases the order of Commissioner (Appeals) shall lie before the Joint Secretary (Revision Application))	-
❖	<ul style="list-style-type: none"> • Joint Commissioner (Appeals) or Commissioner (Appeals) u/s 107 • Revisionary Authority u/s 108 	-	• GSTAT

***In the following cases, appeals against order of Commissioner (Appeals) shall lie before the Joint Secretary (Revision Application):**

(A) In Central Excise cases:

- a. a **case of loss of goods**, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse
- b. a **rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India**
- c. **Goods exported outside India** (except Nepal or Bhutan) without payment of duty
- d. **credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of the Central Excise Act or the rules made thereunder and such order is passed by the**
- e. Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No.2) Act,1998]

(B) In Service Tax Cases:

If the matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service.

	Order passed by :	Pre GST	Post GST
➤	CESTAT	<ul style="list-style-type: none"> • Supreme Court (Classification and valuation cases) • High Court (other than classification and valuation matters) 	-
➤	High Court	<ul style="list-style-type: none"> • Supreme Court 	-
❖	State/ Area bench of Appellate Tribunal	-	<ul style="list-style-type: none"> • High Court
❖	Appellate Tribunal (in case of inter state transactions) or High Court	-	<ul style="list-style-type: none"> • Supreme Court

Thank You.
