

Assessee cannot be deprived of filing an appeal due to non-constitution of the Arbitral Tribunal

The Hon'ble Orissa High Court in the matter of *M/s. BPS Steel Syndicate (P.) Ltd. v. Union of India [Writ Petition (Civil) No. 6518 of 2023]* held that M/s. BPS Steel Syndicate (P.) Ltd. ("**the Petitioner**") cannot be deprived of its statutory remedy to appeal due to the non-constitution of the Arbitral Tribunal.

An Order was passed by the Authority ("**the Respondent**") under the Central Goods and Services Tax Act, 2017 ("**the CGST Act**") / Odisha Goods and Services Tax Act, 2017 ("**the OGST Act**"). The Petitioner wanted to file an appeal under Section 122 of the CGST Act/the OGST Act in the exercise of powers conferred in Section 172 of the CGST Act. The Government of India based on the recommendations made by the GST Council issued the Central Goods and Services Tax (Ninth Removal of Difficulties) Order, 2019 on December 03, 2019 ("**the Removal of Difficulties Order**"), where Clause -2 talks about the calculation of removal of difficulties as:

- a. the "three months from the date on which the order is sought to be appealed against is communicated to the person preferring the appeal" in sub-section (1) of section 112, the start of the three months period shall be considered to be the later of the following dates:-
 - i. date of communication of order, or
 - ii. the date on which the President or the State President, as the case may be, of the Appellate Tribunal after its constitution under Section 109 of the CGST Act, enters office;
- b. the "six months from the date on which the said order has been passed" in Sub-Section (3) of Section 112, the start of the six months period shall be considered to be the later of the following dates:-

- i. date of communication of order, or
- ii. the date on which the President or the State President, as the case maybe, of the Appellate Tribunal after its constitution under Section 109 of the CGST, enters office.”

In tune with the said Removal of Difficulties Order, the Central Board of Indirect Taxes and Customs, GST Policy Wing *vide* Circular No. 132/2/2020-GST Dated 18th March, 2020 (**“the Circular”**) has come out with the clarification in respect of appeal having regard to non-constitution of the Appellate Tribunal which states as follows:

“4.2 The appellate tribunal has not been constituted in view of the order by Madras High Court in case of Revenue Bar Assn. v. Union of India and therefore the appeal cannot be filed within three months from the date on which the order sought to be appealed against is communicated. In order to remove difficulty arising in giving effect to the above provision of the Act, the Government, on the recommendations of the Council, has issued the Central Goods and Services Tax (Ninth Removal of Difficulties) Order, 2019 dated 3-12-2019. It has been provided through the said Order that the appeal to tribunal can be made within three months (six months in case of appeals by the Government) from that date of communication of order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.

4.3 Hence, as of now, the prescribed time limit to make application to appellate tribunal will be counted from the date on which President or the State President enters office. The appellate authority while passing order may mention in the preamble that appeal may be made to the appellate tribunal whenever it is constituted within three months from the President or the State President enters office. Accordingly, it is advised that the appellate authorities may dispose all pending appeals expeditiously without waiting for the constitution of the appellate tribunal.”

Hence, the High Court decided to dispose of the writ petition in the following terms with the consent of the parties that:

- i. Subject to verification of deposit of a sum equal to 20% of the remaining amount of tax in dispute, or deposit of the same, if not already deposited, in addition to the amount deposited earlier under Sub Section (6) of Section 107 of the CGST Act /OGST Act, the Petitioner must be extended the statutory benefit of stay under Sub-Section (9) of Section 112 of the CGST Act / the OGST Act. The Petitioner cannot be deprived of the benefit, due to non-constitution of the Tribunal by the Respondents themselves. The recovery of the balance amount and any steps that may have been taken in this regard will thus be deemed to be stayed.
- ii. The statutory relief of stay on deposit of the statutory amount, cannot be open-ended. For balancing the equities, therefore, the Court is of the opinion that since the Impugned Order is being passed due to non-constitution of the Tribunal by the Respondent, the Petitioner would be required to present/file his appeal under Section 112 of the CGST Act/ the OGST Act. Once the Tribunal is constituted and made functional, the President or the State President may enter the office. The appeal would be required to be filed observing the statutory requirements after coming into existence of the Tribunal, for facilitating consideration of the appeal.
- iii. In case the Petitioner chooses not to avail the remedy of appeal under Section 112 of the CGST Act /OGST Act before the Tribunal within the period which may be specified upon the constitution of the Tribunal, the Respondent would be at liberty to proceed further in the matter, in accordance with the law.

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