

SECTION 107 CGST ACT: PRINCIPLE
GOVERNING FILING OF APPEAL
BEFORE FIRST APPELLATE AUTHORITY.

BY
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The Section 107 of Central Goods & Service Tax, 2017 (hereinafter called the GST Act) says that any person aggrieved with the decision or order passed by the Adjudicating Authority may file an appeal before the Appellate Authority.

Section 107; Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Service Tax Act by an Adjudicating Authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

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2: Under Section 107 of CGST Act, an appeal may be preferred by “aggrieved person” under CGST Act, SGST Act and UGST Act against order or decision passed by the Adjudicating Authority. The Supreme Court in the case of Baldev Singh v. Surinder Mohan Sharma MANU/SC/0900/2002

held that an appeal under Section 96 of CPC would be maintainable only at the instance of a “person aggrieved” by and dissatisfied with the judgment and decree. While dealing with the concept of "person aggrieved", the Bench observed thus:

15. A person aggrieved to file an appeal must be one whose right is affected by reason of the judgment and decree sought to be impugned.

3: The Supreme Court in the case of Banarsi Vs. Ramphal [MANU/SC/0147/2003, has interpreted the word “aggrieved person” in the following words:-

It is settled by a long catena of decisions that to be entitled to file an appeal, the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree, he is not entitled to file an appeal.

4: A question now arises as to whether an appeal before the Appellate Authority lie only against the final judgment or final adjudication order or against any “order” passed by the Adjudicating Authority. In Section 107(1), the words used are “decision” or “order” which may not be “final judgment” or “final order” and there would be misc. order or may be even “interim order” or “misc order”. The word “order” has been interpreted by the Hon’ble Supreme Court and that of High Courts in the following judgments.

5: The Hon’ble Supreme Court in the case of Raj Kumar Shivhare vs. Directorate of Enforcement: MANU/SC/0249/2010

while defining the word “Order” as appearing in Section 35 of FEMA, observed as under:-

29. Therefore, in our judgment in Section 35 of FEMA, any `order' or `decision' of the Appellate Tribunal would mean all decisions or orders of the Appellate Tribunal and all such decisions or orders are, subject to limitation, appealable to the High Court on a question of law.

6: The Delhi High Court in the case of Batool Dawood Vs. Directorate of Enforcement : MANU/DE/0446/2015, while defining the word “Order”, has observed as under:-

In so far as Section 35 of the FEMA is concerned, it gives a right to an aggrieved party to prefer an appeal against "any" "order" or "decision" of the Appellate Tribunal. Therefore, an appeal, even against an interim order of the Appellate Tribunal, will be available to the petitioners.

7: In my view, the following types of orders (which are only by way of illustration) which are either in the nature of misc. order or interim orders, the appeal against which would lie before Appellate Authority.

- a) : Rejection of request for remission of duty/taxes
- b) : assessment of returns;
- c) : where the amount of tax determined to be payable by him as per the order exceeds the amount of tax paid by him on self-assessment basis; or
- d) : Where the assessee is denied the benefit of any

- exemption availed by him under the GST Acts and in his opinion, he is eligible for such exemption; or
- e): Where assessee is penalized for any contravention under GST Acts for which he is not liable; or
 - f): Refund Order
 - g): Interim order under Section 129E Customs Act, 1962
 - h): Order rejecting the request for summoning of witness for cross-examination;
 - i): Conditions imposed by the Department for provisional clearance of imported goods;
 - j): any other orders under various sections of the CGST/SGST Act/UGST Act affecting rights of party;
 - k): non-grant of permission, authorization, approval sought from proper officer under the Acts;

NON APPEALABLE ORDER

8: However, under Section 121 of CGST Act, there are certain orders which are not at all appealable:-

- a) An order transferring proceedings from one officer to another officer;
- b) An order of seizure or retention of books of account, registers and documents;
- c) An order sanctioning the prosecution under this Act;
- d) An order passed under Sec
- e) Section 80 of CGST Act,

9: Though no appeal may lie by virtue of bar of Section 121 CGST Act, however, there is no bar in challenging any of the aforesaid orders by way of writ petition under Article 226 of the

Constitution of India before the concerned High Court. It is always advisable to challenge by way of writ petition since there are bright chances of getting justice from Hon'ble High Courts.

WHETHER ORDER OF REMAND IS APPEALABLE

10: The question arise as to whether order of remand to either lower appellate authority or lower adjudicating authority is appealable. It is seen many a times, the Commissioner (Appeal) instead of deciding the appeal themselves remand the matter to the adjudicating authority when facts are not at all in dispute and no adjudication of factual matrix is called for.

11: The Supreme Court in the case of Union of India Vs. Umesh Dhaimode reported as MANU/SC/1463/1997 held that power to remand the matter to the authority below for fresh decision is inbuilt in the aforesaid provision.

12: The Gujarat High Court in the case of CCE, Ahmedabad v. Medico Labs reported in MANU/GJ/0635//2004 (Guj.) has also held that Commissioner (Appeals) continues to have power of remand even after the amendment of Section 35A(3) of the Central Excise Act, 1944 by Finance Act, 2001 w.e.f. 11-5-2001.

13: Now, in the GST regime, by virtue of Section 107(11) of CGST Act, the power of remand has been specifically taken away from the Appellate Authority and, therefore, Appellate Authority cannot now remand the matter to Adjudicating

Authority. In case, Appellate Authority yet remands, the said order could be challenged before Appellate Tribunal by way of an appeal. However, the Appellate Tribunal can always remand either to the Commissioner Appeal or to the Adjudicating Authority as there is no legal bar.

APPEAL BEFORE WHOM & PROCEDURE

14: Against Adjudication Order, the appeal, could be filed before (i) Joint Commissioner (Appeal), or Commissioner (A) in Form No. APL-1 electronically in accordance with Rule 108(1) of CGST Rule accompanied by the following:

- a) Form No.APL-1 containing information pertaining to appellant, details of tax, penalty and interest; nature of dispute and personal hearing sought;

14.1: An appeal has to be filed in Form No.APL-01 electronically and thereafter provisional acknowledgement shall be issued by the Department.

14.2: A hard copy of the appeal, in triplicate, (with Court Fee of Rs.1/- only to be affixed on First Page) accompanied by the impugned judgment/order and also accompanied by the documents/annexures, as below, shall be filed within a seven days from the days of electronic filing. A final acknowledgement indicating appeal number shall be issued in Form GST APL-02 to Appellant. The date of filing of appeal shall be date of issuance of provisional acknowledgement if hard copy is submitted within 7 days. If the hard copy is submitted

beyond seven days, then the date of filing of appeal would be date of submission of physical copy. Pl keep in mind that First Appellate Authority has no power to condone the delay beyond 30 days (i.e. 90 days + 30 days). In other words, the appeal can never be filed beyond 120 days.

b) Certified Copy of the impugned order/judgment/Order-in-original/ In certified copy not available, even simple self attested photocopy will do with court fee stamp of Rs.1/- to be affixed.

c): Statement of Facts explaining the issues involved, department's case in SCN, Appellant's case in Reply to SCN and findings of the Adjudicating Authority, Error of law/facts in Order-in-Original and lastly ground raised against each of the points/contentions/issues involved and sought to be challenged in the Appeal.

d): Copies of Annexures viz. (i) Show Cause Notice (ii) Reply to SCN (iii) Copies Annexures/evidence filed with Reply to SCN (iv) self certified copy of impugned order or OIO or judgment; (v) Copies of the Board Circulars referred to or relief upon in the appeal (vi) Original by way of additional evidence in the form of Chartered Accountant's Certificate (vii) Original/Certified Copy of the Expert Certificate (viii) Original/Certified Copy of Report from reputed Institute, Authority or (ix) Original/Certified Copy of Report from Independent Engineers/Architect/Professionals;

e) An application (on plain paper with court fee of Rs.1/- only) seeking filing of additional evidence – which has not been filed before Adjudicating Authority – on many occasions, the Adjudicating Authority goes beyond the terms of SCN, records findings on an issue which is not subject of matter of SCN and, therefore, to meet this adverse findings, file additional evidence/documents/affidavits/reports.

f): Certified Copies of Balance Sheets/Original Affidavits (on stamp paper of Rs.10/- duly notarized by Notary Public/Oath Commissioner) of Directors/Officers/Suppliers/Buyers/Third Party by way of evidence in support of the case of appellant;

g): Technical Literature obtained from (i) Technical Institutions (ii) Excerpts from Authoritative Literature (iii) Foreign Journal/Technical/Law Dictionary;

h): If E Mail of Departments/Appellant's E Mails is relied upon, pl furnish an Affidavit under Section 65B of Indian Evidence Act (on stamp paper of Rs.10/- duly notarized by either Oath Commissioner/Notary Public). Affidavit to be sworn by Authorized Signatory of Appellant.

h) Proof of evidence of Pre-deposit i.e. 10% of the amount of disputed tax – it could be either from Electronic Cash Ledger or Electronic Credit Ledger (Please see para 15 below).

i) Proof of payment of court fees/Authorization letter on Rs.50 stamp paper in favour of practicing professional such as CA/CS/CMA and Vakalatnama (Rs.2/- court fee stamp) in favour of Advocate.

j): Certified copy of Board resolution/Power of attorney (duly notarized by Notary Public) in favour of person who is signing the Appeal as a authorized signatory – Managing Director/Director /ED/VP/GM/Legal Head, on their own, has no authority or power to sign, verify and file appeal on behalf of appellant - Refer Order 29 Rule 1 CPC.

k): Give reference of decided cases against each of the issues involved in the appeal and attach photocopies of those judgments and relevant portion highlighted with marker;

l) Prepare Paper Book with Index and all pages fully page numbered – without page numbering, it is very difficult to seek attention of Adjudicating Authority at the time of personal hearing;

m) Signature of Authorized Signatory and also Authorized Representative/Vakalatnama holder;

14.3: In terms of Rule 109A inserted in CGST Rule, 2017 w.e.f. 15.11.2017, Appellate Authority for deciding appeals filed by the Appellant as well as by the Department have been prescribed as under:-

a) Commissioner (Appeal) where such decision or order is passed by the Additional or Joint Commissioner;

b) Any officer not below the rank of Joint Commissioner (Appeal) where such decision or order is passed by the Deputy or Assistant Commissioner or Superintendent;

Notification No.60/2018-CT dt.30.10.2018.

15: As per Section 107(6)(b) of CGST Act, 10% of the disputed amount of tax to be deposited by way of Pre-Deposit. It could be by way of reversal from accumulated amount of Cenvat Credit/ITC as per Section 49(4) of GST Act and if Cenvat Credit/ITC is not available – then deposit cash. No amount of penalty or interest is required to be deposited when 10% of disputed tax has been paid either by way of reversal of ITC/Cenvat or Cash. However, wherever disputed amount is only way of penalty, as per Section 107(6)(b), nothing is required to be deposited by way of “pre’-deposit” as a condition precedent for filing/registering of Appeal. The Gujarat Court in the case of Sunland Metal Recycling Vs. CCE MANU/GJ/0339/2014, it has been held that Cenvat is nothing but a Excise duty charged under Section 3 of Central Excise Act, 1944. The DB of Delhi High Court in the case of Jai Bharat Maruti Ltd Vs. CCE MANU/DE/0513/2009 has also held that Modvat is nothing but a Excise Duty.

16: By virtue of Section 107(7) of CGST Act, where the amount of 10% as mandated under Section 107(6)(b) has been deposited, the balance shall be deemed to be stayed and no recovery proceedings shall be initiated. The Board Circular No.1053/02/2017 dt.10.3.2017 also affirms this. It means, no separate order is called for as required under the Income Tax Act, 1961 when the appeal is filed before the bench of ITAT.

17: In the preceding paras, practice, procedure and law in relation to filing of an appeal before the First Appellate Authority has been discussed and in a Part-II to be released later, other legal issues pertaining to Appeal would be explained.