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Research Paper

(Abridged)

Waiver of Pre-Deposit for Appeals under GST

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Research Paper on “Waiver of Pre-Deposit under GST”

Introduction:

Tax laws in India provide for the concept of “pre-deposit” in case where an assessee goes for appeal against an order passed by a lower authority/court. Usually, such pre-deposit is a fixed percentage of the amount of tax, interest or penalty disputed. This concept of pre-deposit under tax laws was brought to ensure safeguard of interests of both the revenue as well as taxpayer and also to discourage filing of frivolous appeals.

Pre-deposits find mention in the erstwhile indirect tax law as well (Section 35F of Central Excise Act, 1944). It is also applicable under Customs law (129E of Customs Act, 1962). The same concept has been continued in the GST regime as well under Sections 107(6) and Section 112(8) for appeals to first Appellate Authority and to the Tribunal respectively.

Given the intention behind the concept of pre-deposit, it is mandatory that the amount of pre-deposit as required by law is to be made upon filing of appeal to Appellate Authority or the Tribunal. However, in certain rare and exceptional cases, waiver of pre-deposit was allowed. In the erstwhile Central Excise law and the Customs law, waiver of pre-deposit by the Appellate Authority was allowed upon filing of stay applications. However, this was amended w.e.f. 6th August 2014 and this power given to Appellate Authorities to waive pre-deposit was removed. Accordingly, the taxpayers began approaching the High Courts through writ petitions for waiver of pre-deposit and the High Courts have even allowed such waiver in rare and deserving cases.

In this research paper, the concept and legality pre-deposit is discussed, along with circumstances in which waiver of pre-deposit was allowed by the High Courts/Supreme Court and its implications under GST regime.

Provisions under erstwhile indirect tax regime:

Central Excise/Service Tax laws:

It is interesting to note that the concept of a fixed percentage of pre-deposit in Central Excise/Service Tax and Customs was introduced vide Finance (No.2) Act, 2014 w.e.f 16th August 2014, wherein 7.5% of duty was required to be paid as pre-deposit for appeal to Commissioner (Appeals) and 10% in case of appeals to the Tribunal, for both Central Excise/Service Tax and Customs.

Prior to the said amendment, Section 35F of Central Excise Act, 1944, which was introduced in Finance Act, 2007 w.e.f. 11th May 2007, provided that in case of appeal, the person shall deposit with the adjudicating authority, whole of the duty demanded or the penalty levied. However, where the Commissioner (Appeals) or the Appellate Tribunal is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, **may dispense with such deposit** subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

However, in the Speech of Budget 2014, when fixed percentage of pre-deposit was introduced, the Hon'ble Finance Minister stated as follows:

"252. 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."

Further, the proviso which provided for dispensation of pre-deposit was also removed from Section 35F, thus, mandating the requirement of pre-deposit. The amendment was similarly made in Section 129E of Customs Act, 1962 vide Finance (No.2) Act, 2014.

The provisions of Section 35F pre and post amendment has been extracted hereunder for your reference:

[Pre-amendment \(valid upto 15-08-2014\):](#)

Section 35F. Deposit, pending appeal, of duty demanded or penalty levied.-

*Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, **deposit with the adjudicating authority the duty demanded or the penalty levied:***

*Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the **deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit** subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.*

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

Explanation.-For the purposes of this section "duty demanded" shall include , -

- (i) amount determined under section 11D;*
- (ii) amount of erroneous CENVAT credit taken;*
- (iii) amount payable under rule 57CC of Central Excise Rules, 1944;*
- (iv) amount payable under rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004;*
- (v) interest payable under the provisions of this Act or the rules made thereunder."*

Post amendment (w.e.f. 16-08-2014 to 30-06-2017):

"35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal-

*The Tribunal or the Commissioner (Appeals), as the case may be, **shall not entertain** any appeal-*

- (i) under sub-section (1) of section 35, unless the appellant has deposited **seven and a half per cent. of the duty**, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute-in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or] Commissioner of Central Excise;*
- (ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;*
- (iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has **deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:***

*Provided that the amount required to be deposited under this section **shall not exceed rupees ten crores:***

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

Explanation.- For the purposes of this section "duty demanded" shall include,-

- (i) amount determined under section 11D;*
- (ii) amount of erroneous Cenvat credit taken;*
- (iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.]"*

State VAT Laws:

In case of State VAT laws, the pre-deposit provisions varied from state to state. For instance, Section 82(3) of the Rajasthan VAT Act, 2003 that no appeal shall be entertained by the Appellate Authority unless accompanied by satisfactory proof of payment of the whole of undisputed tax amount and a pre-deposit of 10% of disputed tax amount.

Further, Section 74 of the Delhi VAT Act provides that no objection against an appeal would be entertained unless the whole of undisputed tax amount is paid. It also provides that the Commissioner may, after giving to the dealer an opportunity of being heard, may direct the dealer to deposit an amount deemed reasonable, out of the amount under dispute, before such objection is entertained. In case of Karnataka VAT Act, under Section 62, deposit of undisputed tax amount is mandatory and for the remaining disputed tax, payment is required to be made in accordance with the order against which appeal is made.

Provisions under GST:

The extracts of relevant provisions under CGST Act, 2017 relating to pre-deposit is as under:

Section 107 (for appeal to Appellate Authority):

“(6) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent. of the remaining amount of tax in dispute arising from the said order, subject to a maximum of twenty-five crore rupees, in relation to which the appeal has been filed.

Provided that no appeal shall be filed against an order under sub-section (3) of section 129, unless a sum equal to twenty-five per cent. of the penalty has been paid by the appellant.”

Section 112 (for appeal to GST Tribunal):

“(8) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him, and

*(b) a sum equal to twenty per cent. of the remaining amount of tax in dispute, **in addition to the amount paid under sub-section (6) of section 107**, arising from the said order, subject to a maximum of fifty crore rupees, in relation to which the appeal has been filed.”*

The provisions are summarised hereunder:

In case of appeal to the first Appellate Authority i.e., Commissioner (Appeals),

- a) Pre-deposit of 10% of tax in dispute to be paid
- b) Such pre-deposit shall be subject to maximum of Rs. 25 Crores.
- c) In case of appeal filed against order u/s 129(3) i.e., in relation to detention and seizure of goods and conveyance in transit, 25% of the penalty amount shall be payable as pre-deposit.

In case of appeal to GST Tribunal (which is yet to be established):

- a) Pre-deposit of 20% of tax in dispute to be paid, in addition to the 10% paid when appeal was made to Commissioner Appeals as per Section 107(6). Thus, the assessee ends up paying a cumulative of 30% of the disputed tax amount when appeal is made to the Tribunal.
- b) Such pre-deposit shall be subject to a maximum of Rs. 50 Crores.

Given this background, let us now proceed to analyse whether payment of pre-deposit is mandatory and if there are any cases where such pre-deposit may be waived off.

Whether payment of pre-deposit is compulsory?

From the language of Section 107(6) and 112(8), it appears that payment of pre-deposit is mandatory before filing an appeal as the sections begin with the words “no appeal shall be filed”. Also, the GST portal as it stands currently, is also designed in such a way that appeal cannot be filed without payment of pre-deposit. Additionally, going by the basic motive behind introduction of pre-deposit, i.e., to avoid frivolous appeals, it is generally required that pre-deposit be paid before filing an appeal under GST.

Here, it is also important to understand the difference in wordings between erstwhile law and GST. Section 35F of Central Excise Act and Section 129E of the Customs Act uses the words “*The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal*”. Against this, the words used in GST is “**no appeal shall be filed**”.

The term “entertain” in this context has been analysed by the Supreme Court in the case of Lakshmi Rattan Engineering Works Ltd. v. Asst. Commr. of Sales Tax [AIR 1968 SC 488]. This decision was provided in the context of proviso to Section 9 of the Uttar Pradesh Sales Tax Act which provides that that no appeal against an assessment **shall be entertained** unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such instalments thereof as may have become payable.

The following was observed by the Supreme Court in this case:

- a) The dictionary meaning of the word 'entertain' was brought to the Court's notice by the parties, and both sides agreed that it means either **"to deal with or admit to consideration"**. The Court is also of the same opinion. However, the question is, at what stage can the appeal be said to be entertained? Is it entertained when it is filed or is it 'entertained' when it is admitted and the date is fixed for hearing or is it finally 'entertained' when it is heard and disposed of?
- b) **It was also observed that if the legislature intended that the word -'file' or 'receive' was to be used, there was no difficulty in using those words.** It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State. It has used the word 'entertain' and it must be accepted that it has used it advisedly.
- c) The Allahabad High Court judgement in the case of Dhoom Chand Jain Vs. Chamanlal Gupta [AIR. 1962 All 547] was relied upon wherein it was held that the word 'entertain' in its application bears the meaning 'admitting to consideration', and therefore when the court cannot refuse to take an application which is backed by deposit or security, it cannot refuse judicially to consider it.
- d) The Court finally held that *"We are of opinion that by the word "entertain" here is **meant the first occasion on which the court takes up the matter for consideration.** It may be at the admission stage or if by the rules of that Tribunal the appeals are automatically admitted, it will be the time of hearing of the appeal. But on the first occasion when the court takes up the matter for consideration, satisfactory proof must be presented that the tax was paid within the period by limitation available for the appeal."*

Thus, it could be said that under erstwhile law and Customs law, appeal may be filed without pre-deposit but such appeal shall not be entertained or considered by the Appellate Authority unless pre-deposit is made.

However, under GST, the term "no appeal shall be **filed**" is used. The change in the wordings have caused change in interpretation as well. *Prima facie*, it could be said that under erstwhile law and Customs law, no appeal shall be entertained/considered unless pre-deposit is paid. Such "entertainment" or "consideration" comes as a step next to "filing" of appeal, taking the view of Supreme Court in the case of Lakshmi Rattan Engineering Works Ltd.

Thus, it could be said that under erstwhile law and Customs Law, an appeal may be 'filed' without pre-deposit, but such appeal would not be entertained/considered unless pre-deposit is made. However, under GST law, since the words "no appeal shall be filed" is used, it could be interpreted to mean that

appeal cannot be “filed” in the first place if pre-deposit is not made (this being how the GST portal is also designed). This, *prima facie*, gives a view that pre-deposit is mandatory.

However, going by the principle of justice equity and good conscience, there have been scenarios where the payment of pre-deposit has been waived off. It may also be noted in the erstwhile law and in Customs, prior to amendment in 2014, the Act itself allowed the Commissioner to waive off the pre-deposit. But this was removed post the 2014 amendment. Similarly, under GST also, such waiving power has not been given to the Commissioner/Tribunal.

There have been circumstances where pre-deposit was waived by the High Courts citing reasons such as financial hardship, etc. We would now be discussing on various judgements/scenarios wherein waiver of pre-deposit was granted by the High Courts and Supreme Court under Customs and erstwhile excise and service tax law.

However, before that, it would be pertinent to understand the constitutional validity of pre-deposit under indirect taxation.

Constitutional validity of pre-deposit:

In this regard, it is relevant to analyse the Supreme Court judgement in the case of Satya Nand Jha Vs UOI [2017 (349) E.L.T. A155 (S.C.)] wherein it was held that the provisions of Section 35F of Central Excise Act, 1944 is constitutional even post amendment in 2014. Following were the observations of the Supreme Court:

1. The Jharkhand High Court in its impugned order had held that earlier Section 35F of Central Excise Act, 1944 required that duty demanded and penalty has to be deposited in full before filing appeal with exception that appellate authority had discretion to waive off pre-deposit partially or fully taking into consideration *prima facie* merits, financial hardship and keeping Revenue's interest. Under new provision assessee has been given more benefit inasmuch as now full deposit of duty and penalty is not required to be made. Now from beginning 92.5% or 90% of tax is not required to be deposited and appeal can be filed just by paying 7.5% or 10% of duty or penalty.
2. Thus, in all cases assessee gets this benefit and that too, the maximum amount to be deposited has a cap of Rs. 10 crores. Thus, the earlier provision of Section 35F of the Act, 1944 has been much diluted by the substituted **Section 35F which cannot be called arbitrary.**
3. **No two classes are created** by this substituted Section 35F of the Act, 1944. It is assessee themselves, who are creating these two classes by not wanting to deposit the tax at the rate of

7.5% or 10% of the duty demanded or penalty levied, as the case may be, for filing appeal. Otherwise the statute permits everyone to prefer an appeal.

4. **The right of appeal has not been taken away per se. It is settled law that legislature while granting the right of appeal, can always impose conditions for exercise of such right. In absence of any special reason, there is no legal or constitutional impediment to the imposition of such conditions. Under new provisions ex facie 92.5% or 90% of dues is already waived by the Statute itself. Accordingly, condition of 7.5% or 10% payment as pre-deposit cannot be called illegal.**
5. In earlier provision in view of discretion available with appellate authority, endless litigations were arising out of waiver applications. All these endless litigations have been brought to an end. Looking to the very meagre percentage of the amount to be deposited and legislative competence, Section 35F as substituted cannot be said to be violative of Article 14 of the Constitution of India much less of Article 19(1)(g) of the Constitution of India.
6. Further amended provisions may be benefited for some litigants. For example in case pertaining to period prior to 6-8-2014, if the company and few of its Directors have preferred appeals prior to this date and they were compelled to pay 100% of dues and another left over Director files appeal after this date, then he will be benefited with a pre-deposit of 7.5% or 10%.
7. Merely because in one case the assessee is getting benefit and in the other he is not, the substituted Section 35F cannot be termed as unconstitutional. Whenever, any cutoff date is prescribed, there are bound to be few persons who will fall on the wrong side of the cutoff date. This fact neither makes the classification void nor the provision unconstitutional.
8. Thus, there is no reason to quash Section 35F and is constitutionally valid.

It is well settled that pre-deposit provisions are constitutionally valid. This may be followed under GST law as well and Section 107(6) and 112(8) would be said to be constitutional. However, there are cases where the High Courts allowed waiver of duty due to certain reasons (even after amendment in 2014). We would now be discussing on such cases.

Scenarios where pre-deposit was waived:

As discussed in earlier paragraphs, post amendment in 2014, the Central Excise/Service tax and Customs law provided for a mandatory, fixed percentage of pre-deposit for filing appeals. Further, the provision allowing waiver of pre-deposit at the discretion of the authorities was also removed. In GST law also, a similar provision for mandatory, fixed percentage of pre-deposit is given. Further, there is no provision for waiver of pre-deposit in Sections 107 and 112.

Thus, it would be relevant to analyse judgements for waiver given for appeals post 2014 in case of appeals under GST. Although the GST law used the term “no appeal shall be **filed**” as against “no appeal shall be **entertained**” under erstwhile law and Customs law, the judgements discussed hereunder could be relied upon for seeking waiver for pre-deposit for GST appeals, under the umbrella of the “Principle of Justice, Equality and Good Conscience”.

Further, certain judgements provided relating to pre-2014 amendment provision or under State VAT laws would also be necessary to analyse. The below judgement under State VAT law and Section 35F of Central Excise Act (pre-amendment) would be relevant in this regard. Although many State VAT laws and the Central Excise law (pre-amendment) consisted of provisions allowing for relief, which is not present in GST or Central Excise/Service Tax and Customs post 2014, referring to these judgements would provide adequate guidance as to scenarios where relief from pre-deposit may be given.

It is important to understand the judgement in the case of Ravi Gupta Vs Commissioner of Sales Tax, Delhi [2009 (237) E.L.T. 3 (S.C.)], wherein the Supreme Court pointed out 3 factors which needs to be considered for waiver of pre-deposit. The Court was observed as below:

*“Three things are to be considered by the Tribunal while dealing with the application for dispensing with the pre-deposit. They are: **the prima facie case, balance of convenience and irreparable loss...***

*“...It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be **undesirable to require the assessee to pay full or substantive part of the demand.** Petitions for stay-should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. **There can be no rule of universal application in such matters** and the order has to be passed keeping in view the factual scenario involved. **Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest.** Where denial of interim relief may **lead to public mischief, grave irreparable private injury or shake a citizens’ faith** in the impartiality of public administration, interim relief can be given.*

Thus, it is well settled that there is no hard-and-fast rule for where pre-deposit may be waived. It depends on the facts and circumstances of the case how strong is the case presented.

Similar cases where pre-deposit has been waived is discussed hereunder and has been categorised for ease of reference. The judgements pertain to provisions post amendment in 2014, unless specified otherwise.

Scenario 1: Financial hardship of the assessee

a) Mohammed Akmam Uddin Ahmed & Ors. Vs. Commissioner Appeals Customs And Central Excise & Ors 2023 (5) TMI 23 - Delhi High Court: It was observed as follows:

- Prior to the amendment of Section 129E of the Customs Act, a discretion was available to the Central Excise and Service Tax Appellate Tribunal [hereinafter referred to as "CESTAT"] to consider financial hardship and accordingly determine the pre-deposit amount post the amendment.
- However, it further held that the jurisdiction of the High Court under **Article 226 cannot be taken away and that such power should be used only in rare and deserving cases** where a clear justification is made out for such interference.

b) Vijay Chauhan Vs Commissioner of Customs (Export) [2019 (365) E.L.T. 864 (Del.)]:

- Mandatory pre-deposit of 7.5% of amount demanded by adjudication order passed in SCN issued after amendment brought in Section 129E of Customs Act, 1962 by Finance Act, 2014 w.e.f. 6-8-2014.
- Petitioners pleading that adjudication order passed without affording them opportunity of hearing. Affidavit filed by them also indicating that they are employee as a driver and roadside tea vendor not having sufficient means.
- In such peculiar circumstances, condition of mandatory pre-deposit of 7.5% of amount demanded is waived in its entirety and appeals before Commissioner (Appeals) directed to be heard on merits without insisting on any pre-deposit.

c) Shubh Impex Vs UOI [2018 (14) G.S.T.L. 4 (Del.)]:

- The direction to deposit Rs. 1.27 crores as a pre-condition for hearing of the appeal, in the facts of the present case and in view of the nature of the controversy involved, would dep-rive and deplete the petitioner of his cash-in-hand and would completely disable and paralyse business operations.

- Condition and requirement to make complete pre-deposit of Rs. 1.27 crores would not be appropriate and correct given the financial condition and background of the petitioner, who would suffer financial breakdown and irreparable harm.
- Thus, this case falling in rare cases where invoking of writ jurisdiction proper to order reduction in pre-deposit. Petitioner directed to make a pre-deposit of Rs. 5 lakhs instead of Rs. 1.27 Crore in addition to Customs duty levied as per classification declared by him and file appeal to First Appellate Authority within 21 days. Further, the Commissioner (Appeals) is directed to decide appeal on merits.

Scenario 2: When a matter has attained finality in courts:

a) Hindustan Petroleum Corpn Ltd Vs Commissioner of Central Excise [2015 (322) E.L.T. 262 (Kar.)]:

- This pertains to Section 35F as it stood prior to amendment in 2014.
- The observations of the Court were as follows:
 - When an appeal is filed, law contemplates deposit of duty and therefore, necessarily assessee has to seek relief of stay of the said order. The present case is one such case where the stay is granted subject to the condition that 50% of the duty is paid.
 - In fact, for the subsequent period, on the date the order of stay was passed, which is impugned in this case, the tribunal allowed the appeal and granted the relief. Certainly, **the Tribunal ought to have taken note of the earlier judgment which is affirmed by the Apex Court, which was rendered on the day the interim stay was granted.**
 - **It is a discretionary order to exempt them from depositing the duty, which has not been done.** Such an attitude of the Government encourages the department to file appeals notwithstanding the declaration of the law by Apex Court and the High Court cannot be a silent spectator. The interim order of the Tribunal is set aside.
- The case was then remanded back to the Tribunal to be taken up on merits and the whole of pre-deposit requirement was waived off.

b) G.D. Goenka World Institute Vs UOI [2021 (52) G.S.T.L. 3 (S.C.)]:

- The Court observed that the Assessment Order calling upon the appellant to pay tax on an erroneous understanding of the status of the appellant cannot be countenanced. In

that case, the appellant may not be asked to pursue the remedy of appeal and as a consequence, obliged to deposit the pre-deposit amount.

- The fact that the appellant is not covered by the category of assessee engaged in commercial training and coaching services, was not disputed by the Department before the Court.
- Further, the Court observed that the issue on merits has been directly answered in favour of the appellant vide decisions in M/s. ITM International Pvt. Ltd. v. CST, Delhi and IILM Undergraduate Business School v. CCE, Delhi [2017 (7) G.S.T.L. 448 (Tri. - Del.) and 2018 (10) G.S.T.L. 345 (Tri. - Del.)] respectively. These decisions have attained finality.
- The Court also held that *"to do substantial justice in exercise of our plenary powers under Article 142 of the Constitution of India, we order that the demand raised in Order-in-Original dated 31-12-2015 be effaced from the record. As such, no demand towards subject tax could be levied and collected against the appellant in the fact situation of the present case."*
- It was held that the demand is thus, erroneous and the Department cannot demand pre-deposit.

Scenario 3: Other cases where waiver may be allowed

When matter appealed is contentious:

a) BMM Ispat Ltd Vs C.C., C. Ex. & Service Tax [2016 (331) E.L.T. 363 (Bom.)]:

- There were issues with classification relating to import of coal (whether steam of bituminous) becoming contentious on Chennai Bench of Tribunal taking a different stand from decisions of other Co-ordinate Benches and referring matter to Larger Bench. **In view of this unconditional waiver of pre-deposit ordered.**
- However, the Department is at liberty to seek modification of this order in event of Tribunal being unable to take up and dispose of appeals expeditiously.

When a matter is pending in the Supreme Court:

b) Tarini Minerals (P) Ltd Vs UOI [2021 (50) G.S.T.L. 494 (Ori.)]:

- In this case, since the issue of service tax liability on mining royalty is pending in the Supreme Court, and an interim order was passed by the Apex Court, it was held that:
"It is open to the petitioner to bring all these facts before the appellate forum by filing interlocutory application seeking waiver of pre-deposit of the amount for entertaining the appeal. If such application is filed, the appellate authority shall consider the same

taking into consideration the orders passed by the Apex Court and pass appropriate order in accordance with law."

Scenarios where pre-deposit was NOT waived:

Scenario 1: Pre-deposit is mandatory

a) ITC Ltd Vs CESTAT, Chennai [2021 (377) E.L.T. 549 (Mad.)]:

- In this case, the assessee approached the High Court only for waiver of pre-deposit, since the assessee had already debited the Personal Ledger Account with some amount of duty, during investigation by the Department.
- The Court observed that irrespective of the fact whether the issues is covered on merits or not and covered by an order of the Tribunal for the previous period, the petitioner is required to pre-deposit 7.5% of the disputed tax and/or penalty or both together at the stage of the first appeal before the second respondent Commissioner of Central Excise (Appeals) and another sum of 2.5% totalling to 10% at the stage of Appeal before the first respondent Tribunal. This statutory minimum cannot be waived.
- It was also observed that the idea of rationalizing this amount to a statutory minimum is to spur final hearing of the appeal by the Tribunals and Commissioner (Appeals). Further, the Registry of the first respondent is really not concerned with the merits of the case and therefore, cannot waive the amount.
- Therefore, it is not possible under the scheme of the amendment to the Act for the petitioner to expect the Registry of the first respondent Tribunal to adjudicate the same. Therefore, the challenge to the impugned communication on the score has to fail.
- It would have been different if the petitioner had challenged the order impugned before the first respondent Tribunal before this Court. Since the writ petition is predicated and a different relief is sought for and is confined to only the issue relating to pre-deposit, **this Court is unable to grant the relief as prayed for notwithstanding few decisions of the other High Courts granting relief to the assesseees as the jurisdiction of this Court under Article 226 of the Constitution of India is intended to effectuate the law and not abrogate it.**

b) M/s Pioneer Corporation Versus UOI [2016 (6) TMI 437 - Delhi High Court]:

- Section 35F of the CE Act as it stood prior to 6th August 2014, a discretion was available to the CESTAT to consider the financial hardship and accordingly determine the pre-deposit amount. That discretion has been consciously sought to be curtailed and thus

an amendment was made to Section 35 requiring making of a pre-deposit of 7.5% in all cases subject to an upper cap of ₹ 10 crores.

- A direction, therefore, to the CESTAT that it should waive the pre-deposit would be contrary to the express legislative intent expressed in the amended Section 35F with effect from 6th August, 2014.
- While, the jurisdiction of the High Court under **Article 226 of the Constitution to grant relief notwithstanding the amended Section 35F cannot possibly be taken away**, the Court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out for such interference.
- The Court held that it is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of the pre-deposit as far as the Petitioner's appeal before the CESTAT is concerned

Scenario 2: Financial hardship unsubstantiated

a) M/S Nava Raipur Atal Nangar Vikas Pradhikaran Vs UOI [2023 (5) TMI 862 - Chhattisgarh High Court]:

- The High Court observed that the words in the amended Section 35F indicated that on and after the date of its enforcement an Assessee in appeal was required to deposit the stipulated percentage of duty and if it failed to do so, the CESTAT shall not entertain the appeal.
- It was also observed that the reason assigned in the writ petition is only of financial crises during Covid-19 Pandemic period. However, documents like balance sheet filed along with the petition would show that the petitioner is in profit after the Covid-19 Pandemic period.
- Thus, waiver of pre-deposit was not granted. However, the Court extended time by 3 months for the petitioner to pay the pre-deposit amount to contest the case in CESTAT.

b) Bharat Heavy Electricals LTD. Vs Union of India - 2015 (316) E.L.T. 84 (M.P.)

- This relates to provisions prior to amendment in 2014.
- A demand of Rs. 12 crores was raised on the assessee and the petitioner was directed to deposit Rs.4 crores and remaining amount was waived.
- The Appellant sought waiver of entire amount on the ground that the Appellant has a very good case on merits and their appeal is likely to be allowed.

- Since there was no ground of financial hardship or economic constrain or showing any reason on the part of petitioner as to why the amount cannot be deposited, the waiver of such amount was denied.

Scenario 3: High Court cannot intervene

- a) M/s. Vish Wind Infrastructure LLP Vs Additional Director General (Adjudication) [2019 (8) TMI 1809 - Delhi High Court]:

- The High Court held as follows:

*"It is trite that **no court can issue a direction to any authority, to act in violation of the law. A reading of Section 35F of the Central Excise Act reveals, by the usage of the peremptory words "shall not" therein, that there is an absolute bar on the CESTAT entertaining any appeal, under Section 35 of the said Act, unless the appellant has deposited 7.5 % of the duty confirmed against it by the authority below***
- The two provisos in Section 35F relax the rigour of this command only in two respects, the first being that the amount to be deposited would not exceed ₹ 10 crores, and the second being that the requirement of pre-deposit would not apply to stay applications or appeals pending before any authority before the commencement of the Finance (No.2) Act, 2014, i.e. before 6th August, 2014."

- b) Ankit Mehta Vs Commissioner, CGST Indore [2019 (3) TMI 1342 - Madhya Pradesh High Court]

- It was held that amended Section 129E does not empower the Tribunal or the Commissioner (Appeals) to waive the pre-deposit or to reduce the pre-deposit. Thus, the High Court is also not inclined, keeping in view the statutory provision of law to waive or reduce the pre-deposit and, therefore, no case for interference is made out in the matter.

Scenario 3: Undue Delay in Appeal

- a) S.M. International Vs CESTAT - 2010 (260) E.L.T. 176 (Del.):

- This case pertains to the provisions prior to amendment in 2014.
- In this case, the petitioner was filed for waiver of pre-deposit of interest due to unfavourable order of the Commissioner (Appeals). The Court held as follows:
*"The Commissioner (Appeals) also observed that prima facie the appeal was hopelessly time barred. In making this observation, naturally the Commissioner (Appeals) took into consideration order-in-original passed on 30-3-1999. **Even the submission of the petitioner is that this order was received late and from the date of the receipt of***

the order, appeal was filed within time, it was necessary for the petitioner to challenge the order dated 23-3-2004. Therefore, we are of the opinion that on a valid ground given by the Tribunal waiver of the receipt of the pre-deposit is not accepted. In such circumstances, we are also of the opinion that petitioner has not been able to make out a case of undue hardship.”

Impact under GST

The judgements discussed above relate to Central Excise/Service Tax and Customs laws. However, such judgements may be used as precedents under GST as well (specifically those case laws given based on amended pre-deposit provisions). Since GST law also provides for fixed rate of pre-deposit without any provision allowing for waiver of pre-deposit.

Resultantly, basis the case laws discussed above, the pre-GST provisions post amendment of section 35F would squarely apply under GST laws in case an assessee wishes to submit an application for waiver of such pre-deposit. Given that the GST Tribunal would be established soon, these judgements could help guide the taxpayers and professionals regarding scenarios where they can approach the High Court for waiver of pre-deposit.

Summary of the cases where appellant may/may not apply for waiver of pre-deposit:

Cases where waiver of pre-deposit may be granted	Cases where waiver of pre-deposit may NOT be granted
Where Financial hardship can be substantiated or no means to remit such amount	When provision mandates per-deposit, then no waiver can be provided
Where the issue has already been settled in favour of the assessee by higher courts	Where Financial hardship is not substantiated and in cases of fraud, etc.
Where pre-deposit would lead to financial breakdown and irreparable harm to him	Where higher courts cannot intervene
When matter appealed is contentious	Undue delay in submission of application
When a matter is pending in the Supreme Court	

Action points by the taxpayers:

- a) In case of financial hardship, it is important for the taxpayer to comprehensively substantiate that it is facing financial difficulties and payment of pre-deposit would render its business into loss/closure. This would especially be helpful for sick companies.

The taxpayer needs to ensure to provide proper documentation such as Financial statements and bank statements to prove financial hardship to the Court. In case of an Individual/proprietorship, the taxpayer could additionally provide proof of income statements such as bank statements, Income tax returns etc.

- b) Assessee has to ensure the defects, if any, in the proceedings are cleared, before submission of application.
- c) The Indian judicial system follows rules of equity in the court of justice. The doctrine of '*Delay or Laches*' is thus an equitable doctrine. It is based on the maxim "*Vigilantibus non dormientius aequitas subvenit*" which means equity aids the vigilant and not the ones who sleep over their rights. Therefore, Assessee must be pro-active and ensure that the submissions are done within prescribed timelines for claiming the benefit of waiver of pre-deposit.
- d) In case where the department litigates any issue which has already attained finality and is favourable to the assessee, then the assessee may chose to file petition before the High Court for waiver of pre-deposit citing cases such as Hindustan Petroleum Corpn Ltd Vs Commissioner of Central Excise [2015 (322) E.L.T. 262 (Kar.)] and G.D. Goenka World Institute Vs UOI [2021 (52) G.S.T.L. 3 (S.C.)]

Conclusion:

The provisions of GST law specifically mandates for a fixed percentage of pre-deposit to be paid before appealing to Commissioner (Appeals) and the GST Tribunal. The provision was introduced by the Government with an intention to reduce frivolous appeals and to protect the revenue. However, there are circumstances where the High Court has waived-off the payment of pre-deposit for the petitioners on just and equitable grounds such as financial hardships, etc. But such scenarios are not generalised and depends on case-to-case basis.

There is neither a hard-and-fast rule regarding waiver of pre-deposit, nor the High Court allows waiver for all petitioners. The taxpayer who wishes to file a Writ Petition with the High Court shall be required to substantiate comprehensively as to why they are eligible for waiver of pre-deposit.

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