

Amendment to the Appealability against Trade Remedial Investigations

An Amendment on Appealability

Section 125 of the Finance Bill 2023 introduced in the Union Budget has proposed amendments to Sections 9, 9A, and 9C of the Customs Tariff Act 1975 (CTA).

As per the Finance Bill 2023, this amendment has been proposed to amplify the intent and scope of the aforesaid provisions of the CTA.

A Legislative Answer to a Judicial Question

India follows a two-tiered procedure to levy anti-dumping/countervailing duties. First, the Directorate General of Trade Remedies (DGTR) conducts a detailed investigation of key parameters such as dumping/subsidy, injury, and causal link, pursuant to which it may make a recommendation to the Central Government (i.e., Ministry of Finance) for the levy of duty. If a positive recommendation for the levy of duty is made, the Ministry of Finance can levy (or not levy) the duty so recommended within three months from the date of such a recommendation made by the DGTR.

In numerous recently concluded investigations, the Ministry of Finance decided not to accept the DGTR's recommendations, whereby it did not impose the recommended duties. The Ministry of Finance's non-levy was signified either by (a) the issuance of an office memorandum; or (b) its inaction before the expiry of the three months. Accordingly, aggrieved domestic producers have filed various appeals under Section 9C of the CTA (i.e., provision prior to the proposed amendment under the Finance Bill, 2023) before the Hon'ble CESTAT against such decisions of the Ministry of Finance. Simultaneously, writs have also been preferred before the Hon'ble High Courts and the Hon'ble Supreme Court.

A key question of law in these appeals was whether or not an appeal lies against the Ministry of Finance's decision not to levy the duty. The Hon'ble CESTAT (in the cases heard thus far) has decided that an appeal lies against the Ministry of Finance's decision not to levy the duty. Particularly, the Hon'ble CESTAT, in one of the earliest such appeals i.e., *Jubilant Ingreiva*

Limited vs Union of India & others, Anti-dumping Appeal No. 50461 of 2021 held that the decision of the Ministry of Finance not to levy the duty is an "order of determination" under Section 9C of the CTA, whereby an appeal does lie against such an order.

Subsequently, the Hon'ble CESTAT also set aside several of such Ministry of Finance decisions and held as follows:

- The Ministry of Finance has the discretion to levy (or not levy) duty and is not duty-bound to impose the duty recommended by the DGTR.
- The Ministry of Finance exercises a quasi-judicial function, whereby it is required to offer reasons when it chooses not to impose the recommended duty.
- Accordingly, the office memorandum communicating the non-levy of duty was set aside, and the Ministry of Finance was directed to decide the matter afresh, with reasons to be provided.

Section 125 of the Finance Bill 2023 now proposes an amendment to Section 9C of the CTA, which is the governing provision for appeals before the Hon'ble CESTAT. The amendment appears to be intended to ensure that appeals can only be preferred against the DGTR's determination of dumping, injury, and causal link (often referred to as the Final Finding), which is rendered under the relevant rules prescribed under Sections 8B, 9, 9A and 9B of the CTA.

The other proposed amendments to Sections 9 and 9A of the CTA seem to have been made to clarify that the Central Government makes no determination of dumping, injury, or causal link.

Implications of the Proposed Amendment

- The Finance Bill 2023 proposes to make amendments to Section 9C of the CTA applicable retrospectively from 1 January 1995 in order to negate the issue at hand pending before the Courts.
- The above amendment, when brought into force, will have implications on all the CESTAT decisions rendered on the issue of whether an appeal lies against the Ministry of Finance's decision not to levy the recommended duties.
- It would be interesting to follow the developments of the pending matters before the Hon'ble High Courts and the Hon'ble Supreme Court, considering the retrospectivity of the amendments as well as the interpretation to be given to the proposed amendments.
- Depending on the outcome in the aforesaid matters, the aggrieved domestic industry may be only left with the choice of re-approaching the DGTR by filing a fresh petition subject to satisfying the prescribed rules.
- In addition to implications for existing appeals, the impact of the amendment on appellate challenges to future findings will also be interesting to follow.

