

THE DEVIL'S ADVOCATE

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Reference is drawn to the Board's Circular No.820/17/05-Ex. Dated 25.10.2005. The said Circular has just forwarded the judgment of the Hon'ble Supreme Court in the case of M/s. Sharp Industries Limited Vs CCE, Mumbai-III (2005 – TIOL – 119-SC-CX), without any further remarks / instructions. Notwithstanding the intention behind the said Circular, we are impressed by the following observations of the Supreme Court:

"It must be mentioned that the Department was represented before the Tribunal. The Department has again been negligent in not pointing out to the Tribunal that in the Appellants' own case and for this very period, it has already been held by the Tribunal that the product is classifiable under Tariff Heading 39.20."

Any litigation in a tax matter starts with a show cause notice, which is invariably adjudicated by the quasi judiciary, who are Revenue bureaucrats. The first appeal against the cases decided by any officer below the rank of a Commissioner, also lies before the Commissioner (Appeals), who is again a Revenue officer. Today, because of the sub-standard orders passed by bulk of the Revenue officers, the trust and belief on the judiciousness of such orders, among the trade is abysmally low. In such a dismal and desperate situation, the Hon'ble Tribunals come as the real Saviours to provide true solace. It is the first appellate fora, where we see and experience a genuine and neutral judiciary! And that's the reason the Hon'ble Tribunals are hailed to be the "GATEWAY OF JUSTICE!" Save a few cases that travel to the Hon'ble Supreme Court or High Courts, in bulk of the tax matters, the Tribunals spell the final word! Even the department recognizes and accepts the verdict of the Hon'ble Tribunal and ceases their litigation, except on crucial issues. In other words, being the ultimate fact-finding authority, the Hon'ble Tribunals are not only the Gateway but also the Destiny, for majority of the tax matters.

Ok. Now to the revenue involved in the tax litigations. It is a mind-boggling fact that, as on date, the amount of revenue that is locked in legal tussles before the various Benches of the Hon'ble Tribunal runs into crores and crores, which is estimated to be

equal to a parallel economy! And for the Government, the fate of this whopping amount of revenue is solely dependant on the efficient arguments and presentation skills of a bunch of dedicated officers, called the DRs! (Departmental Representatives).

On any given day, most of the advocates appear in either one or two cases only, to ensure better concentration. We can testify that the mental exhaustion after conducting every case is much more than the physical exertions after a marathon run! But our learned DRs are made to represent around 20 to 30 short matters and 15 to 25 regular matters, in a single day! If a single case itself demands so much of steam, the amount of steam that is required to handle so many cases on a single day is phenomenal! And it is not a single day affair, but it goes on and on...

As practicing advocates, we immensely know the dedicated efforts that every case requires and the amount of homework that goes into the preparation of a defense or an appeal! What applies to us, if not more, equally applies to the DRs too! As said above, if we all do so much of preparation for the one or two cases we appear on a single day, think of the preparation a DR needs to do for his/her long list of cases! Breathtaking but true! And for this preparation, do you know the infrastructure available to them? Pathetic! We are really afraid that whether all the DRs are equipped with the complete library for preparing their defence. Moreover, briefing the counsel about the issue, is an essential ingredient in an effective representation. It helps the appearing counsel to know the intricacies of the case and to respond spontaneously to the posers placed by the Bench or oppose the arguments of the opposite! In fact, "briefing" is a rudimentary requirement, which plays a pivotal role in the success of any case! Most of the advocate fraternity has the privilege of a detailed briefing, either from the client or from fellow counsels. But to our learned DRs, the "briefing" is their own reading and understanding of the "brief" case files given to them. With the number of cases the DRs are made to represent in a single day, they hardly have any time to completely go through the case file but have much lesser time only to have a cursory glance of the case records! This deprivation of "briefing" leads to inadequacy of preparation and often makes the DRs to resort to adjournments, which, many a times, irritate the Bench! It is strongly suggested that either the officer who was involved in making the case or the officer involved in deciding the case, may be made available to "brief" the DRs, well in advance, so that

the DRs are also adequately prepared and effectively present their case! Otherwise, the DRs shall only be playing the role of Devil's Advocate, by just standing at the opposite side and arguing just for the sake of argument!

To us, the DRs are the most dedicated lot on this planet, doing a thankless job! And what do the DRs get for doing such a thankless job? An out-of-turn promotion? An award for effective representation? A reward for the cases won? Nay! Unfortunately, it's all whiplashes and brickbats! There is no one to appreciate or give any incentive to the DRs, if a case is hard fought and won. But they are ready to nail them and seek explanations, when a fragile case is lost! We have witnessed the learned DRs, desperately defending tooth and nail, the clumsy and brittle orders passed by their counter parts! When subjected to judicial scrutiny, such cases get fall like nine pins, for want of legal approval! During such cases, the poor DRs are not only lay stranded as dismal witnesses but also invite the wrath of the Bench for arguing such flimsy cases! We strongly feel that the lack of proper briefing, inadequacy of infrastructure, overload, frail orders passed by the quasi judiciary, are the major reasons for the decline of quality output from the DRs, which has lead to such an observation by the Hon'ble Apex Court (*supra*)!

Before Parting...

In a recent judgment in the case of M/s VOLANT TEXTILE MILLS LTD Vs CCE, PUNE-II (2005-TIOL-1019-CESTAT-MUM), the Hon'ble Tribunal has observed as:

" We have heard Shri C.Lama, Ld. JDR, who has been recently posted in the Tribunal. He is not in a position to effectively argue the Department's case, being new to the work. We understand that as a part of the cadre review, new posts at the level of Commissioners, have been created and one officer in the rank of Commissioner has been posted as JCDR for every Bench of the Tribunal. We have not, however, found the JCDR attached to the Bench appearing in any single case or arguing any matter. Particularly, when cases involving high revenue such as this are listed for hearing or the appeal takes a totally new line of argument, it does not behoove the senior officers in the grade of Commissioners to allow such cases to be argued by very

junior departmental representatives newly posted, instead of they themselves arguing such matters. The Bench requires to be assisted by both sides, so that we can arrive at a proper decision. If the JCDRs are not to take any interest in their work and not argue cases in the Tribunal, we do not see any reason for the Government creating so many additional posts at the level of Commissioners”.

Netizens’ pensive attention is invited to Annexure – V of the TRANSFER/ PLACEMENT POLICY FOR GROUP 'A' OFFICERS OF THE INDIAN REVENUE SERVICE (C & CE), 2005, wherein, the post of a Commissioner at the Tribunal (JCDR), has been categorized as “Non-Sensitive!” Reserving our comments about this shameful categorization of the posts as “Sensitive” and “Non-Sensitive” by the Government, for our future article, we guess that whether such categorization of the JCDR post as “Non-Sensitive” by the Government, could be the reason behind the “Insensitivity” of the JCDR, not to be present in the courtroom!