Pre deposit – Deadlier than before?

(G. Natarajan, Advocate, Swamy Associates)

The recent decision of the Hon'ble Supreme Court in the case of **Rajkumar Shivkare Vs AD, ED – 2010 – TIOL – 29 SC FEMA (Yet to be reported in ELT)**, has stirred the proverbial hornet's nest, not because the case related to cricket betting, but for other reasons. Based on the provisions of FEMA, the Apex Court has come to the conclusion that when an appellate remedy to the High Court is available against any order of the Tribunal passed in an appeal, no writ petitions can be entertained against the interim orders of the Tribunal, directing pre deposit of the disputed demands, pending consideration of the appeal. As the statutory provisions under Central Excise and Customs, in the matter of appeal against Tribunal orders are also analogous to the provisions of FEMA, this judgment from the Apex Court has come as a rude shock.

No, doubt under section 35 G of the Central Excise Act, and Section 130 of the Customs Act, an appeal shall lie to the High Court against "every order passed in appeal by the Appellate Tribunal". But, such appeal would lie, only when the High Court is satisfied that the case involves a "substantial question of law".

While deciding the stay petitions against pre deposit, the Tribunals normally take into account the "financial hardship" of the appellant represented by their Profit and Loss accounts and existence of a prima facie meritorious case for the appellant. In this connection, it is relevant to refer to the decision of the Hon'ble High Court of Calcutta in **Bongaigaon & Refinery Petrochem Limited VS CCE – 1994 (69) ELT 193 (Cal),** wherein it has been held that "undue hardship" contemplated above would also refer to the existence of a strong prima facie case. It may be observed that the orders on stay petitions often involve exercise of discretion by the Tribunal. Such orders of pre deposit, may not often lead to a substantial question of law, as they are normally based on a prima facie view and exercise of discretion. In the absence of a question of law, no appeal would lie to the Hon'ble High Court, as per the relevant provisions.

In this connection, the following may be quoted from the decision of the Hon'ble High Court of Delhi in the case of **UOI Vs Classic Credit Limited 2009 (236) ELT 12 (Del).**

> *10. In the case of Ruby Rubber Industries v. Commissioner of Central Excise, [1998 (104) E.L.T. 330 (Cal.) = 1999 (63) ECC 17], also rendered by the Calcutta High Court, it was held as follows :*
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> *"...I am unable to accept the contention of the respondents that the writ petition is not maintainable, as an appeal lies under Section 35L, of the Act against an order passed by the Tribunal disposing of the application for stay and pre-deposit."*
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> *Section 35L(b) clearly provides that any order having a relation to the rate of duty of excise or to the rate of duty of excise or to the value of goods for purposes of assessment will be appealable to the Supreme Court. Although much emphasis has been laid on the expression, "among other things", used in the said section by the learned Counsel appearing for the respondent, in my view, such expression does not mean that appeal will lie against all orders passed by the Tribunal including an order passed in the*

matter of pre-deposit.

11. The judgment in Ruby Industries was followed by the learned single Judge of the same Court in the context of Section 35G of the Central Excise Act, 1944 in Tijiya Steel Pvt. Ltd. and Anr. v. Union of India and Ors., (2007) 2 CALLT 358. In the said decision it was held that an order directing the pre-deposit or an order waiving pre-deposit may not involve any question of law far less a substantial question of law and hence may not be appealable. In any case, such an order cannot be said to be an order in the appeal but it is an order incidental to the hearing of the appeal. It cannot, therefore, be said that the petitioner has an adequate efficacious alternative remedy.

12. The same learned Judge in Crystal Cable Industries Ltd. and Anr. v. Union of India and Ors. MANU/WB/0402/2006 held that the expression "every order passed in appeal by the Appellate Tribunal" is qualified by a rider, that is, satisfaction of the High Court that the case involves a substantial question of law. An appeal to the High Court is, therefore, not automatic. The condition precedent for entertaining an appeal is the satisfaction of the High Court of the case involving a substantial question of law.

Moreover, the question as to whether the existence of an alternative appellate remedy would completely oust the writ jurisdiction of the High Courts has also been time and again considered by various Courts.

Quoting further from the Classic Credits case, supra,

13. Article 226 of the Constitution of India does not impose any limitation on the power of the High Court to issue writs, even where there is an alternative remedy. Where there is an efficacious alternative remedy this Court refrains from exercising its extraordinary jurisdiction. The power regarding alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. This Court should not reject an application under Article 226 of the Constitution of India where the remedy, if any, of appeal is uncertain as in the case appeals under Section 35, which depend on subjective satisfaction of the High Court of existence of a question of law.

14. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, the Supreme Court held that :

"16. Rashid Ahmed v. Municipal Board, Kairana laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid and Son v. Income Tax Investigation Commission which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, unless there are good grounds therefore, which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in

exceptional circumstances.

17. A specific and clear rule was laid down in State of U.P. v. Mohd. Nooh as under:

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs v. Ranichand Sobhraj Wadhwani [1983 (13) E.L.T. 1327 (S.C.)] and was affirmed and followed in the following words :

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court"."

15. In U.P. State Cooperative Land Development Bank Ltd. v. Chandra Bhan Dubey and others, (1999) 1 SCC 741, scope and ambit of Article 226 of the Constitution of India was explained as follows :

"...The Constitution is not a Statute. It is fountainhead of all the Statutes. When the language of Article 226 is clear, we cannot put shackles on the High Courts to limit their jurisdiction by putting an interpretation on the words which would limit their jurisdiction. When any citizen or person is wronged, the High Court will step in to protect him, be that wrong be done by the State, an instrumentality of the State, a company or a co-operative society or association or body of individuals, whether incorporated or not, or even an individual. Right that is infringed may be under Part III of the Constitution or any other right which the law validly made might confer upon him...."

16. In the said judgment, while enunciating the wide scope of Article 226 of the Constitution, the Court nevertheless reiterated the self-imposed restrictions on the exercise of such right in the following words :-

"... But then the power conferred upon the High Courts under Article 226 of the Constitution is so vast, this Court has laid down certain guidelines and self-imposed limitations have been put there subject to which the High Courts would exercise jurisdiction, but those guidelines cannot be mandatory in all circumstances. The High Court does not interfere when an equally efficacious alternative remedy is available or when there is an established procedure to remedy a wrong or enforce a right. A party may not be allowed to bypass the normal channel of civil and criminal litigation. The High

Court does not act like a proverbial "bull in a china shop'" in the exercise of its jurisdiction under Article 226."

17. In Ram and Shyam Company v. State of Haryana and others, (1985) 3 SCC 267, the Court explained the rule of exhaustion of alternative remedy in the following terms :

"The rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion, a self-imposed restraint on the court, rather than rule of law. It does not oust the jurisdiction of the Court. Where the order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it, would lie to the High Court under Article 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government. An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits."

18. In our considered opinion, an appeal under Section 35 is not ordained or an automatic procedure. The condition precedent for entertaining an appeal is the satisfaction of the High Court that the case involves a question of law as contemplated by Section 35 of the Act. The relief under Article 226 can be refused on the ground of existence of alternative remedy only if that alternative remedy is effective and equally efficacious. Evaluation of circumstances which warrant waiver of pre-deposit would fall within the purview of Article 226 of the Constitution of India.

19. In view of the foregoing discussion, in our opinion, a writ petition against an order of pre-deposit under Section 35 of the Act is clearly maintainable.

Further, the Hon'ble Bombay High Court has observed as below in the case of **Bhasir Oil Mills Vs UOI – 1990 (47) ELT 305 (Bom).**

The rule of exhaustion of statutory remedies had been always held to be a rule of discretion and not a rule which would affect the jurisdiction of the High Court to entertain a writ petition notwithstanding the availability of an adequate remedy. See - State of U.P. v. Mohd. Norb (AIR 1958 SC 556) and M/s. Baburam v. Antarim Zilla Parishad, now Z.P. Muzaffarnagar (A.I.R. 1969 S.C. 556). Two well-recognised exceptions to the rule of exhaustion of statutory remedies are also pointed out in the aforesaid judgments. Even in the Dunlop Company's case itself the Supreme Court has pointed out such well recognised exceptions to the normal rule of exhausting of statutory remedies. It has pointed out that where the question of validity of the enactment itself is raised or where the orders are per se without jurisdiction, it is open to the High Court to entertain a writ petition notwithstanding the fact that there is an alternative statutory remedy.

Further, the Hon'ble High Court of Allahabad has observed as below, in the case of **Shahnaz Ayurvedics Vs CCE – 2004 (173) ELT 337(All).**

11. Thus, the law can be summarized that rule of exclusion of the writ jurisdiction is not a law. Discretion should be exercised by the writ Court considering the facts and circumstances involved in each case. But where there has been violation of the principle of natural justice or failure of any rule of fundament procedural or Tribunal places erroneous interpretation on the statutory provision, or exceeds its jurisdiction, writ petition can be entertained, even if the Statute provides for appeal/revision.

The Apex Court itself has observed as below in the case of **A.V. Venkateswaran Vs Ramchand Sobhraj Wadhwani – 1983 (13) ELT 1327 SC.**

> **9.** We see considerable force in the argument of the learned Solicitor-General. We must, however, point out that the rule that the party who applies for the issue of a high prerogative writ should, before he approached the Court, have exhausted other remedies open to him under the law, is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which Courts have laid down for the exercise of their discretion. The law on this matter has been enunciated in several decisions of this Court but it is sufficient to refer to two cases. In *Union of India* v. *T.R. Varma,* 1958 SCR 499 at pp. 503-504, Venkatarama Ayyar speaking for the Court said:
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> "It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke that special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but, as observed by this Court in *Rashid Ahmed* v. *Municipal Board, Kairana,* AIR 1950 S.C. 163, `the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs.' vide also *K.S. rashid and Son* v. *The Income-Tax Investigation Commission,* AIR 1954 S.C. 207. And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226, unless there are good grounds therefore."
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> There is no difference between the above and the formulation by Das C.J., in *State of Uttar Pradesh* v. *Mohammad Nooh,* 1958 SCR 595 at pp. 605-607, where he observed :
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> ".....It must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well-established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are

numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

After referring to a few cases in which the existence of an alternative remedy had been held not to bar the issue of a prerogative writ, the learned Chief Justice added:

"It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no fault of his own may in a proper case obtain a review by certiorari."

In the result this Court held that the existence of other legal remedies was not *per se* a bar to the issue of a writ of certiorari and that the Court was not bound to relegate the petitioner to the other legal remedies available to him.

Further, in the case of **Assotech Realty (P) Limited VS State of UP – 2007 (7) STR 129 (All)**, the Hon'ble High Court of Allahabad has observed as below.

12. In the case of L.K.Verma v. HMT Ltd. and another, (2006) 2 SCC 269, the Apex Court has held as under :-

"20. The High Court in exercise of its jurisdiction under Article 226 of the Constitution, in a given case although may not entertain a writ petition inter alia on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. Despite existence of an alternative remedy, a writ court may exercise its discretionary jurisdiction of judicial review inter alia in cases where the court or the tribunal lacks inherent jurisdiction or for enforcement of a fundamental right or if there has been a violation of a principle of natural justice or where vires of the act is in question. In the aforementioned circumstances, the alternative remedy has been held not to operate as a bar. [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others, (1998) 1 SCC 1, Sanjana M.Wig v. Hindustan Petroleum Corpn. Ltd., (2005) 8 SCC 242, State of H.P. v. Gujarat Ambuja Cement Ltd. and another, (2005) 6 SCC 499]."

13. In the case of Star Paper Mills Ltd. v. State of U.P. and others, 2006 AIR SCW 5782, the Apex Court has held as follows :-

"5. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in State of Himachal Pradesh and Ors. v. M/s. Gujarat Ambuja Cement Ltd. and Anr. (2005 (6) SCC 499).

6. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High

Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

7. Constitution Benches of this Court in K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors. (AIR 1954 SC 207); Sangram Singh v. Election Tribunal, Kotah and Ors. (AIR 1955 SC 425); Union of India v. T.R. Varma (AIR 1957 SC 882); State of U.P. and Ors. v. Mohammad Nooh (AIR 1958 SC 86); and M/s. K.S. Venkataraman and Co. (P) Ltd. v. State of Madras (AIR 1966 SC 1089), held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

8. Another Constitution Bench of this Court in State of Madhya Pradesh and Anr. v. Bhailal Bhai etc. (AIR 1964 SC 1006) held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in N.T. Veluswami Thevar v. G. Raja Nainar and Ors. (AIR 1959 SC 422); Municipal Council, Khurai and Anr. v. Kamal Kumar and Anr. (AIR 1965 SC 1321); Siliguri Municipality and Ors. v. Amalendu Das and Ors. (AIR 1984 SC 653); S.T. Muthusami v. K. Natarajan and Ors. (AIR 1988 SC 616); R.S.R.T.C. and Anr. v. Krishna Kant and Ors. (AIR 1995 SC 1715); Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors. (AIR 2000 SC 2573); A. Venkatasubbiah Naidu v. S. Chellappan and Ors. (2000 (7) SCC 695); and L.L. Sudhakar Reddy and Ors. v. State of Andhra Pradesh and Ors. (2001 (6) SCC 634); Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Anr. v. State of Maharashtra and Ors. (2001 (8) SCC 509); Pratap Singh and Anr. v. State of Haryana (2002 (7) SCC 484) and G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer and Ors. (2003 (1) SCC 72).

9. In Harbans Lal Sahnia v. Indian Oil Corporation Ltd. (2003 (2) SCC 107), this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

10. In G. Veerappa Pillai v. Raman and Raman Ltd. (AIR 1952 SC 192); Assistant Collector of Central Excise v. Dunlop India Ltd. (AIR 1985 SC 330); Ramendra Kishore Biswas v. State of Tripura (AIR 1999

SC 294); Shivgonda Anna Patil and Ors. v. State of Maharashtra and Ors. (AIR 1999 SC 2281); C.A. Abraham v. I.T.O. Kottayam and Ors. (AIR 1961 SC 609); Titaghur Paper Mills Co. Ltd. v. State of Orissa and Anr. (AIR 1983 SC 603); H.B. Gandhi v. M/s. Gopinath and Sons (1992 (Suppl.) 2 SCC 312); Whirlpool Corporation v. Registrar of Trade Marks and Ors. (AIR 1999 SC 22); Tin Plate Co. of India Ltd. v. State of Bihar and Ors. (AIR 1999 SC 74); Sheela Devi v. Jaspal Singh (1999 (1) SCC 209) and Punjab National Bank v. O.C. Krishnan and Ors. (2001 (6) SCC 569), this Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

11. If, as was noted in Ram and Shyam Co. v. State of Haryana and Ors. (AIR 1985 SC 1147) the appeal is from "Caeser to Caeser's wife" the existence of alternative remedy would be a mirage and an exercise in futility. There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

12. The above position was recently highlighted in U.P. State Spinning Co. Ltd. v. R.S. Pandey and Another [(2005) 8 SCC 264]."

14. Applying the principles laid down in the aforesaid cases to the facts of the case in hand, we find that challenge to the initiation of action including imposition of tax on the constructions undertaken has been made on the ground that it is wholly without jurisdiction. Thus, we are not inclined to throw away the petitions on the ground of alternative remedy.

A voyage through the above would reveal the following.

- Orders of the Tribunal in matters of pre deposit are interim in nature and are often passed on the basis of prima facie view of the matter, in exercise of discretion.
- More often, it would be difficult to frame a substantial question of law, in such interim orders of the Tribunal.
- Existence of a substantial question of law is a must to pursue the appellate remedy against the orders of the Tribunal, in High Courts.
- Existence of an alternative remedy is not an absolute bar over the writ jurisdiction of the High Courts and the High Courts can still exercise their writ jurisdiction, where there is an error of jurisdiction, violation of the principles of natural justice, challenge to a legal provision, etc.
- A wrong exercise of such discretion by the Tribunal would be a jurisdictional error.
- As a result writ petitions against orders of pre deposit passed by the Tribunals are maintainable, till the apple cart is toppled by the recent decision of the Hon'ble Supreme Court.

Before parting…

A layman's query. Be it a writ petition or appeal, what difference does it make for the poor litigant?

One probable difference could be the fact that writ petitions on such pre deposit orders are often disposed off in short time, unlike the near to decade waiting period for the appeals to be disposed.