

STAY AT BAY – II

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"Wit without discretion is a sword in the hand of a fool"

- Spanish Proverb

All said and done, "Stay" is an indispensable evil, that too, in the last quarter of the fiscal year, when the Revenue is on an overdrive. In the first part, we raised an apprehension as to the status of the "stay of recovery" under this new Section 35F of CEA. In this part, let's deal with some ground realities, which may cause irreparable injuries.

All these years, Section 35F of CEA read as under:

" 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. "

Despite the various predatory consequences the erstwhile caused to one and all, it had a soothing part in the proviso, which is the discretion to dispense with the deposit, on fitting circumstances, either on merits or on financial hardships. In other words, despite the menace, we were able to put forth the grounds and demonstrate that a deposit would cause undue hardship and get absolute waiver of pre-deposit in deserving cases. But now, the mandatory prescription of 7.5%/10%, hailed to be blessing may also be a curse in disguise. With the pre-deposit made mandatory for all the appeals to be entertained by the appellate authorities, without any discretion either to the merits of the case or to the financial status of the appellant, may also lead to a disaster.

For example, what would be the status of the periodical notices, where one has already obtained an absolute waiver in his previous case? With this present provision, even in such cases, he has to deposit the mandatory pre-deposit, which would be absolutely against logic, reasoning or the cardinal principles of law.

We all know that, today, the entire quasi- judiciary has become a totally spineless, whereby, the entire adjudication has become a real mockery. In most of the cases, regardless of the defence or the settled legal position, the adjudicating authority proceeds to confirm the demand like a robot. Today it's a common trend among the quasi- judiciary, to confirm the demands somehow without any application of mind or law, just to save their skin. In such circumstances, this mandatory prescription would cause a deadly impediment. It may be a fact that such frivolous orders would be ultimately thrown to bin, but with the one-lakh pendency at CESTAT, their destiny would be stretched over a decade. In such instances, the mandatory deposit would also be lying for years thus causing severe injury to the appellant.

Further, it is an unwritten gospel that department issues protective show cause notices either based on an audit para or a CERA objection. Many times,

they also proceed to confirm such demands. Further they also issue notices and religiously confirm them on well-settled issues with scant respect for the higher judicial forum. In all such cases, presently, the CESTAT gives a complete waiver at the threshold. But with this mandatory pre-deposit and with no discretion, the appellants would be required to deposit huge money, which is going to be a real menace that the existing.

Further, today the penalty is being used an ugly tool by the adjudicating authorities. They impose sky-high penalties in many cases without assessing the gravity of the offence or gauging the *mens-rea*. For example, we have witnessed imposition of 100% penalties, running to many crores, in the coal classification cases, which has been recently struck down by the CESTAT that there is no reason to impose any penalty in such cases. This is just one hay from the stack and there are many more such instances. Now with this mandatory prescription being for both duty and penalty, the poor appellants would be required to deposit 7.5%/10% even for such mammoth and unwarranted penalties at the first place.

Last but not the least, today, there is a provision to waive off the pre- deposit under Section 35F of CEA, considering the acute financial status of the appellant. With this new mandatory provision, there is no such discretion left, which would only make the sick to dead.

Before Parting...

As per the new Section 35F, while filing an appeal before the Commissioner (Appeals), against an order passed by a lower authority, an assessee would pay 7.5 % of the duty demanded / penalty. If a favourable order is not received from the Commissioner (Appeals) and further appeal is filed before the Tribunal, as per sub section (iii) above, 10 % of the duty demanded / penalty should be paid. As 7.5 % of the duty demanded / penalty has already been paid while filing appeal before the Commissioner (Appeals), the

assessee is required to pay only additional 2.5 % .

But the TRU letter reads as:

*"Section 35F is being substituted with a new section to prescribe a mandatory fixed pre-deposit of 7.5% of the duty demanded or penalty imposed or both for filing appeal with the Commissioner (Appeals) or the Tribunal at the first stage **and another 10% of the duty demanded or penalty imposed** or both for filing second stage appeal before the Tribunal."*