A CURSE IN DISGUISE - II

(S.Jaikumar, Advocate, Swamy Associates)

"An ounce of discretion is worth a pound of wit"

- an old English adage

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 demande d 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 provision casued 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 or merits or on undue 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 a blessing may also be otherwise.

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 for the previous period. With this present provision, even in such cases, one has to deposit the mandatory pre-deposit, which would be absolutely against any logic, reasoning or the cardinal principles of law.

We all know that, today, the entire quasi-judiciary has become 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. Is also 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, many of the departmental adjudication happens with scant respect to the cardinal principles of adjudication, namely, principles of natural justice (PNJ). Many times, the adjudicator passes the order either without supply of all records, affording opportunities for cross examination, etc. There are also tins of orders passed *ex-parte.* In all such cases, today, the Tribunal remands the matter to the oadjudicating authority, at the threshold itself. Now with this current situation, the appellants would be required to deposit the mandatory pre-deposit even in such cases and have to wait for years for their fte line to be drawn.

Further, today the penalty is being used as 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 take the bleeding sick from ICU to mortuary.

Having addressed the most senible issues lets move on to the most sensitive issue in **Part III.**