CBEC Circular on 'recovery' – Why this 'Kolaveri'? – Jan 18, 2013

IN what could be termed as a New Year nightmare, the Board has come out with the highly controversial Circular No. **967/01/2013-CX dated: January 01, 2013. Thanks to TIOL for promptly reporting this Circular, as always.**

It is rather amazing if not amusing to note that the new wisdom related to recovery proceedings that has dawned on the Board is actually based on a short order passed by the Apex Court in the Krishna Sales Pvt Ltd's case, **(2002-TIOL-428-SC-CUS),** way back in 1993. Very interestingly…. this was a case of an appeal filed by the Department with the Apex Court against the order of the then prevailing CEGAT Bench in Delhi, ordering release of goods in a customs case. The Board is justifying the issuance of this Circular, based on the observation in Para 6 of this order of the Apex Court, which reads as under:

"As is well-known, mere filing of an Appeal does not operate as a Stay or suspension of the Order appealed against".

One would feel that the context in which this decision was rendered by the Apex Court, viz. release of goods in a customs case has been completely lost by the learned officers of the CBEC, while issuing this very important Circular. This is proven by the fact that, the decision rendered in the Krishna Sales Pvt Ltd's case, has been relied upon, in the next 20 odd years, in just one decision of the Calcutta High Court, viz. Rajiv Jain v. Commissioner of Customs, Port (Calcutta), which dealt with a similar customs case involving release of goods. Interestingly, in both these cases, the decisions went against the Revenue. Notwithstanding this, the Government has been able to take a simple statement of the Apex Court to form the basis for this obnoxious Circular.

In my view, the observation of the Apex Court that, the mere filing of an appeal does not operate as a stay or suspension of the order appealed against is in the nature of an obiter and this, by no means, can be construed as a precedent in matters related to recovery of amounts that are covered by pending appeals.

Be that as it may….it does seem that the Board is suffering from a serious bout of selective amnesia, inasmuch as, the decision of the Apex Court in the Kumar Cotton Mills case ***(2005-TIOL-42-SC-CESTAT)*** has completely missed the attention of the Board as rightly pointed out in the DDT of January 2, 2013. This decision, rendered after about 12 years since the decision in the case of Krishna Sales Pvt Ltd & in the context of the section 35C(2A) of the CEA, 1944 inserted on 11.05.2002 by the Finance Act, 2002, is extracted below –

"3. The provision has clearly been made for the purpose of curbing the dilatory tactics of those assessees who, having got an interim order in their favour, seek to continue the interim order by delaying the disposal of the proceedings. Thus, depriving the revenue not only of the benefit of the assessed value but also a decision on points which may have impact on other pending matters.

4. The Tribunal which was then known as Customs, Excise Gold (Control) Appellate Tribunal (CEGAT) came to the conclusion that the amendment did not affect stay orders which were passed prior to the date of coming into force of the amendment and also held that the amendment did not in any way curtail the powers of the Tribunal to grant stay exceeding six months.

6. The sub-section which was introduced in terrorem cannot be construed as punishing the assessees for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger bench matter, namely, IPCL v. Commissioner of Central Excise, Vadodara (supra) cannot be faulted. However we should not be understood as holding that any latitude is given to the Tribunal to extend

the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee."
I would invite the attention of the Netizens to Para 6 of this decision wherein the Apex Court has categorically stated that the assessees cannot be punished for matters which may be completely beyond their control. We need to keep in mind the fact that this decision having been rendered in the context of the powers of the Tribunals to grant stay of recovery of tax is much more relevant to recovery proceedings (than a decision rendered in the context of release of goods in a customs case). This decision has, of course, served as a land mark decision and has been relied upon in several decisions of the High Courts and in numerous Tribunal decisions.

Now… applying the ratio of the Apex Court's decision in the Kumar Cotton Mills case, it seems clear that, the new Circular which provides for the recovery amounts confirmed by the adjudicating Commissioner, pending the hearing of the stay petition filed by the assessee before the CESTAT for a period beyond 30 days from the date of filing of the appeal, is simply illegal. It is common knowledge that it is an impossible task for the CESTAT Benches, in 99 out of 100 cases, to hear stay petitions within 30 days of the filing of these stay petitions. As we know, vacancies to various Benches have not been filled by the Government, for reasons best known to it. Many Hon'ble Members are forced to shuttle between more than one Bench. In fact, one needs to have empathy for the Hon'ble Members of the CESTAT Benches, given the volume of the pending stay petitions staring at them. It is then not uncommon for stay petitions to come up for hearing before the CESTAT after several months and in some cases, years….

This Circular, in my view, is fit to be challenged before the Supreme Court under Article 32 and before the High Court under Article 226, should the Department go in for implementation of this Circular. I entirely agree with the DDT of January 3 that the High Courts are going to be flooded with writs, challenging the action taken by the Department on the basis of this Circular, adding to the burden of the High Courts.

This Circular seems to be an attempt to garner revenue to the Government, by hook or crook. For the hapless assessees, who have to live in a situation of adjudicating proceedings having become farcical, this Circular comes as a huge disappointment, especially at a time when the FM has been talking of transparency and dependability in respect of tax collection.

Before concluding….

It would have been good if the Board had chosen to inform the assessees of the reasons for taking a complete 'U' turn, vis-à-vis its own views contained in the earlier Circulars. Waking up one fine winter morning and taking a view that is contrary to its own views held for over 15 years is clearly unjustified, if not plainly ridiculous.

There could be a scramble before the CESTAT Benches, for hearing stay petitions, for sure. We could see scores of miscellaneous petitions being filed for early/out-of-the turn hearings, especially, in the case of decisions involving high levies. The fact that the CESTAT has decided, vide its Circular F.No.01(32)/R(Judl)/CESTAT/2012 dated 21-12-2012 to hear cases on a chronological basis would result in the CESTAT Benches, wherever they are working, not being able to hear new stay petitions without clearing the arrears, which by themselves, would take several months. I would then wonder as to how the CESTAT Benches, even assuming that they have no vacancies, would ever be able to hear stay petitions within 30 days, given the ever increasing volume of litigation in service tax matters.

The new system would also discriminate unfortunate appellants located in places like Karnataka, Andhra Pradesh and Kerala vis-à-vis their counterparts who are fortunate to have Benches that are fully operational. If this Circular were to be implemented, the CESTAT Benches would be pre-occupied mostly with stay

petitions. As things stand now…. the Benches are taking years to deliver final decisions, given the load on them. Perhaps, it would now take decades to get final decisions from the CESTAT Benches.

Forget issues related to the CESTAT….the fact remains that stay petitions filed even before the Appellate Commissioners take several months, if not years, to get heard.

That, recovery proceedings can be initiated immediately on decisions being rendered by the High Courts and Tribunals, even when the assessees are entitled to appeal to the Supreme Court, would undermine the authority of the Apex Court, apart from being unconstitutional.

Given the present status of the adjudication mechanism, the recovery proceedings under the new Circular could result in several assessees pulling down their shutters, unable to cough up the exorbitant demands of the Revenue. This is especially so, in the context of a brand new service tax law in operation, which neither the assessees nor the Department, not to talk of the Practitioners, are able to fully comprehend.

The only hope against this hopeless situation, vis-à-vis the assessees, lies with the Courts. I was relieved to know from TIOL that the AP High Court [**2013-TIOL-23-HC-AP-CX**] has given an interim stay against the recovery action taken by the Department, in a case involving a stay petition pending with the CESTAT, till such time the CESTAT disposes of the stay petition. It does seem that the High Courts are going to be swamped with writ petitions, courtesy this Circular. Consider the case of an order passed by an Additional Commissioner. It is 99.99% certain that the Appellate Commissioner will not grant a stay, given the quantum of cases pending before the Appellate Commissioners. Now, the only course open to the hapless assessee will be to approach the High Court, praying for a stay till such time the Appellate Commissioner hears the stay petition. Assuming that the Appellate Commissioner confirms the order of the Additional Commissioner, taking this logic forward, fully or partly, the assessee will again have to approach the High Court for a stay of recovery of tax, praying for a stay of recovery pending the hearing of the stay petition by the CESTAT. Now, it does seem that there could be multiple stay petitions before the High Court, in respect of the same matter. Surely, this is going to significantly increase the burden on the High Courts. As aforesaid, even the CESTAT Benches are going to be flooded with miscellaneous applications, praying for an expeditious hearing of the stay petitions.

More than anything else….why is the Government showing this 'kolaveri' vis-à-vis the assessees, when the indirect tax revenues have grown at over 16% during April-September 2012, despite a clear global slowdown.

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