CESTAT should start levying penalties on Adjudicating & Appellate authorities : 18-06-2014

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TIOL had recently reported that the number of cases pending disposal at the level of the CESTAT has crossed 1,00,000. A very quick analysis as to the reasons for this very disturbing development would point out to the undisputable fact that most of the Adjudicating authorities and Appellate Commissioners do not care to follow the binding precedents set by the Courts and Tribunals and instead, pass orders that are wholly aimed at protecting the interests of the Revenue making a mockery of the intention behind these quasi-judicial redressal systems. Sadly, one finds that most Appellate Commissioners have also caught on to this 'revenue oriented' approach, while passing orders. The inevitable result is the piling up of the cases before the CESTAT Benches.

One would wonder if even 2 out of 100 cases get a fair hearing at the adjudication level. In most cases, orders are mechanically passed without any application of mind whatsoever, confirming the allegations made in show cause notices. I had once mentioned, writing in TIOL, in an earlier occasion, that, the 'S to S' syndrome works in the Central Indirect Tax administration. Here, of course, the first 'S' refers to the all-powerful Superintendent and the second 'S' refers to the Hon'ble Supreme Court. The only two agencies who can bring finality to tax related issues are the Hon'ble Supreme Court and the Superintendents.

Be that as it may one finds that, while exercising their quasi-judicial functions as adjudicating officers, most Commissioners are not willing to consider the binding precedents in terms of the decisions of the Courts and the CESTAT. Even when the assessee/appellant brings the details of these binding precedents to the notice to the Adjudicating Commissioners, the case of the assessee/appellant is brushed aside with a generic comment that, the facts of the assessee/appellant are 'distinguishable on facts'. Sadly, this 'revenue orientation' approach would also seem to have gripped the Appellate Commissioners who seem very eager to reject the legitimate claims of the appellants on flimsy grounds, totally ignoring the impact of the binding precedents. In my view, the greater concern lies in the Appellate Commissioners rather than the Adjudicating Commissioners, not following the binding precedents. I have come across cases where some Appellate Commissioners have assumed themselves to be super-Adjudicating Officers and have traversed much beyond the adjudication orders.

Whether it is a case seeking levy of service tax or one involving claim of a refund of CENVAT credit, the story is the same. The assessee/appellant is left to face a very hostile and adversarial central indirect tax administration in matters of refund cases and the only forum where justice can be expected would seem to be the Hon'ble CESTAT. Even if by chance, the assessee is able to get some remedy before the Appellate Commissioners, the Department invariably goes in appeal to the CESTAT, even in cases where they do not seem to have a ghost's chance of winning the appeal. This explains the piling up of the appeals before the CESTAT and in most Benches it would seem that the time gap between the stay hearings and the final hearings could easily run to several years. This is a sad state of affairs to say the least and a significant portion of the blame would seem to lie with the Adjudicating and Appellate Commissioners.

I was pleased (at the cost of being called a sadistic) when I came across a recent decision of the Delhi CESTAT in *Hindustan Zinc Limited v. CCE, Jaipur* **2014-TIOL-855-CESTAT-DEL**, in which their Lordships have

taken a very serious view of the judicial impropriety committed by the Adjudicating Commissioner by not following the judicial precedents binding on him. I've reproduced the relevant para of this very important decision…

Quote

> *"11. In view of the above discussion, we hold that the impugned order is not only sustainable but is an absurd order passed without any application of mind. What we find more disturbing is that though the judgments of Tribunal and High Court with regard to eligibility of various insurance services for Cenvat Credit:-*
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> *(a) xxx; and*
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> *(b) xxx;*
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> *had been cited before the Commissioner (as mentioned in para 11 of the order-in-original), he has either ignored these judgments and not given any findings as to how these judgments are not applicable or has made observations contrary for the judgments of the Tribunal/High Court and has decided the question of eligibility of various insurance services for Cenvat credit on the basis of his own interpretation of Rule 2 (1) of Cenvat Credit Rules, 2004 observing that amendment to this rule w.e.f. 01.04.2011 is a retrospective amendment and the insurance services, in question, have no nexus with manufacture of final products. The conduct of the Learned Commissioner amounts to clear judicial indiscipline and irresponsible exercise of adjudication function. Such exercise of adjudication powers in blatant violation of Apex Court's judgment in case of Union of India Vs. Kamlakshi Finance Corporation Ltd., reported in* **2002-TIOL-484-SC-CX-LB** *requires to be censured as, if allowed to go unchecked, would lead to collapse of entire dispute resolution mechanism. Such adjudication orders burden not only the Assessee who has to incur avoidable expenses on challenging such order before the Courts/Tribunal, but also impose clearly avoidable costs for the Government, as the Tribunal's/Court's valuable time is also consumed in hearing appeals against such clearly erroneous and indisciplined orders, which should never have been passed.*
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> *12. In view of the above discussion, we set aside the impugned order and allow the appeal. We also impose costs of Rs.5,000/- on the Respondent which would be payable to appellant/assessee. The Registry is also directed to enclose a copy of this order to the Chairman, Central Board of Excise & Customs, for information and consideration."*

Unquote

This is a path breaking decision from the Principal bench of the CESTAT, dealing with a case, which is the rule, rather than the exception, in so far as adjudication proceedings are concerned. This decision lays down the principle that an Adjudicating Commissioner who deliberately disobeys the law can and should be punished by the higher judicial forum. One does hopes that this important legal principle is followed by the other Benches as well. Though this decision did not seemingly impose any personal penalty on the Commissioner, one does hope that the CESTAT Benches start imposing penalties on the defaulting Commissioners, which would go a long way in ensuring that the Commissioners follow the binding judicial precedents and pass fair and just orders. Needless to say, once the Commissioners start exercising their

quasi-judicial responsibilities in a fair and just manner, the need for assessees to go to the CESTAT would diminish, resulting in a reduction of burden on the CESTAT.

Before concluding….

A unique feature of the current adjudication and first appellate process is that they do not want to get into facts and in most cases are reluctant to decide on matters concerning limitation. The most common allegation against the assessee is one of suppression of facts with intent to evade tax and a typical SCN would allege – that but for the unearthing of the facts by the visiting audit or investigation team, the assessee would have continued to evade the law. One would wonder if this is the allegation levelled in 99 out of 100 cases, where is the justification for such a large team of super officers in the range and divisional offices of the Department? Why can't the Government scrap the system of filing periodical returns by the hapless assessees, as it would seem, nobody in the Department is going through these, for, if indeed the Departmental officers go through the returns they would have found out the facts much earlier obviating the need for invoking the extended period. The statutory provisions concerning limitation are substantive in nature and the failure of the adjudication and the lower appellate authority to shed light on the same but stick to the old adage 'to err on the side of Revenue' is a habit which has to be discarded at the earliest.

Secondly, failure to accept binding precedents of the Tribunals & Courts by the adjudicating and lower appellate authority should be treated as amounting to contempt of court and necessary proceedings should be initiated so as to put an end to the brushing aside of cases relied upon by the assessee/appellant on frivolous grounds. This would also indirectly reduce the number of appeals being filed by assessees.

The BJP has promised a 'non-adversarial' tax administration in its election manifesto and we sincerely hope that in the coming days they stand by it.