

Mandatory pre-deposit in indirect taxes – a case of mixed feelings : 10-07-2014



By S Sivakumar, LL.B, FCA, FCS, MBA, Advocate

IN what could be termed as an unexpected development, the concept of a compulsory pre-deposit of a part of the duty/service tax confirmed in adjudication proceedings for appeals to be admitted by the Appellate Commissioners and the CESTAT, has been introduced in the Budget. Read the proposed amendment to Section 35F of the Central Excise Act, 1944, which reads as under:

35F. The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal,-

- (i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise;
- (ii) against the decision or order referred to in clause (a) of sub-section (1) of Section 35B, unless the appellant has deposited seven and a half percent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;
- (iii) against the decision of order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten percent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

Provided that the required to be deposited under this section shall not exceed rupees ten crores;

Provided further that the provisions of this section shall not reply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 20114.

Explanation :- For the purposes of this section” duty demanded “ shall include.-

- (i) amount determined under section 11D
- (ii) amount of erroneous cenvat credit taken
- (iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.

A reading of the above provisions which are made applicable to service tax matters also by virtue to Section 83 of the Finance Act, 1994 makes it clear that, for an appeal to be filed before the Appellate Commissioners, 7.5% of the (duty/service tax confirmed plus penalty) in respect of adjudication orders passed by officers of a rank less than the Commissioners, has to be deposited as a pre-requisite, before the admission of the appeal. In the case of the second appeal before the

CESTAT, 10% of the duty/service tax confirmed by the Appellate Commissioner would have to be pre-deposited. It seems that the deposit made at the time of the filing of the appeal before the Appellate Commissioner, can be adjusted against the pre-deposit to be made, vis-à-vis the appeal filed before the CESTAT. In respect of adjudication orders passed by the Commissioners, under Section 35B(1)(b) of the Central Excise Act, 1944, the pre-deposit would be 10% of the (duty/service tax confirmed + penalty).

The proposed new Section is silent on the pre-deposit on the interest. There are two ways to look at this development...Given the fact that, pre-deposit is now becoming mandatory, the burden on the Appellate Commissioners and the CESTAT would come down drastically, as there would be no more need for hearings related to disposal of pre-deposit applications. The CESTAT would now be able to directly handle final hearings and dispose of the cases much more expeditiously.

Another way to look at this development would be that, appellants would be aggrieved to some extent as they would now need to pay 10% pre-deposit in respect of penalty also. It is common knowledge that, the Adjudicating and Appellate Commissioners are habituated to levy penalties of 100% to 200% of the duty/service tax confirmed and to this extent, the quantum of the pre-deposit vis-à-vis the duty/service tax confirmed would actually work out to a significant percentage of such duty/tax.

The proposed Section says that the pre-deposit requirement would not apply to cases pending before the Appellate Authorities prior to the commencement of the Finance (No.2) Act, 2014 and hence, assessee should ensure that they file their appeals along with the stay petitions in respect of adjudication orders already issued.

Another interesting development is that, the requirement of pre-deposit is applicable also to amount of erroneous cenvat credit availed. I am surprised to note that the Explanation does not talk of the pre-deposit being made applicable for erroneous availment and utilized. It would then seem that exporters would get affected to a large extent, in terms of denial of cenvat credit in adjudication and first appellate proceedings, as they would now need to deposit the requisite pre-deposit. It would be very unjust for exporters to be asked to make a pre-deposit of the requisite percentage of the cenvat credit availed by them and not utilized by them, as the entire refund amount would be lying with the Central Government, in any case.

We do have a similar provision in the VAT law. In the case of Karnataka, a mandatory pre-deposit of 30% of the (tax confirmed + interest + penalty) would have to be deposited in cash, before an appeal is admitted by the First Appellate Authority, apart from being asked to provide a bank guarantee for the balance 70%.