

## **A CURSE IN DISGUISE - I**

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*"252. To expedite the process of disposal of appeals, amendments have been proposed in the Customs and Central Excise Acts with a view to freeing appellate authorities from hearing stay applications and to take up regular appeals for final disposal."*

### **- Budget Speech of the Hon'ble FM**

Section 35F of the Central Excise Act, 1944 (CEA) and its *pari-materia* provisions in the Customs Act and Finance Act, which prescribes the deposit of duty and penalty as a pre-requisite to entertain an appeal, has always been causing butterflies in the appellant's stomach. With the quasi- adjudication reduced to a mockery and every case being appealed against, such a mandate prescription at the threshold of litigation is a huge liability for the appellant. Further, today much of the time has been spent by the CESTAT in disposing of this pre-requirement, leading to a pendency status of over one-lakh cases. Time and again, it had been a sincere appeal by all concerned to dispense with the same and a prescription of a mandatory deposit like in that of the VAT laws. Ceding to the prayers, here comes the "blessing"!!! But the moot question is whether it is really one???

The new Section 35F of CEA prescribes a mandatory pre-deposit of 7.5% and 10%, as the case may be, of the duty demanded or penalty or both, before filing an appeal. True that this this bold and beautiful move would liberate the CESTAT from the shackles of "short matters" and would allow them to dispose off the regular matters. Ture that this proposition would reduce the cold shiver from the spine of the appellants substantially. True that this provision would bring ceratinity and uniformity discarding arbitrainess and inconsistency in pre-deposits.

### **All is well or all in the well???**

With this mandatory prescription of pre-deposit, now comes the STAY OF RECOVERY!!! Section 35F of CEA is a deposit to be made before filing an appeal. Though Section 35F of CEA does not automatically stay the recovery proceeding, time immemorial, once the pre-deposit as decided by the CESTAT is made, the stay of recovery is also granted. This is through the inherent power vested with the CESTAT under Rule 41 of the CESTAT (Procedure) Rules, 1982. For this, the appellants would make an application praying stay of recovery along with their application for waiver of pre-deposit. Now the moot question is that, with this mandatory prescription of pre- deposit in place, what is the status of the stay of revcovery? Will the Revenue department refrain from proceeding with recovery measures because the appeal has been filed with the prescribed pre-deposit? If the revenue brigade proceeds with recovery, that

too, in the last quarter of the fiscal year, when the Revenue is on an overdrive, what is the remedy available for the hapless assesses?

This mandatory pre-deposit prescribed in the statute is only to enable an appellant to pursue his appellate remedy. Otherwise, the appeal will not be entertained. But, how can it act against the Revenue from proceeding to recover the remaining demand?

If so, even after paying the prescribed pre-deposit, every appellant shall also file a petition for stay against recovery of the confirmed demands before the appellate authorities? If so, what are the guidelines to consider grant of such stay? Is the appellate authority expected to measure the "balance of convenience" and can further deposits be ordered while granting stay?

Though the Tribunal is having an inherent power under Rule 41 of the CESTAT (Procedures) Rules, will the Tribunal be pleased to exercise such discretion in every appeal filed before it? If stay petitions against recovery are filed in respect of all appeals, then is it not again back to square one, that the Tribunal would be once again wasting time in hearing the "short matters", this time instead of pre-deposit waiver but for stay of recovery!!!

Having addressed "stay of recovery" the under this new Section 35F of CEA, lets deal with some ground realities, which may cause irreparable injuries. Meet you in **Part II...**