

Pre (datary) Deposits

(S. Jai Kumar, Advocate, Swamy Associates)

"ADDRESSING the Chief Commissioners and DGs of Customs and Central Excise in Delhi yesterday, Finance Minister Pranab Mukherjee expressed concern over avoidable litigation with taxpayers which has been continuously growing over the years. He said that this is not a healthy trend and requires introspection especially about routine filing of appeals. He asked the CBEC officers to make an honest endeavour to address the problems faced by their stakeholders in the quickest possible time."

Pre-deposit! This statutory pre requirement for preferring any appeal would make the litigant assesses feel the sting of a swarm of bees, under their belly.

As we know, Sec 35F of the Central Excise Act mandates pre-deposit of the entire disputed liability including interest and penalty (*pari materia* provisions available in customs and service tax) when they prefer an appeal either before the Commissioner (Appeals) or before the CESTAT, as the case maybe. Hence, while filing the appeal, a petition for waiver of this pre – deposit is filed and the appellants (through their counsels) argue their blood and sweat to either get a waiver of pre – deposit or

reduce the quantum, which is given based on the pleadings on *prima facie* or financial hardships. But trust me, many a time, getting a waiver of pre – deposit is as good as arguing the entire case or at times, even tougher!

I had always been against Pre - deposits, though much of my bounty is made out of it! Many times in the past, I have launched scathing attacks against this pre - deposit predicament. ([Ref : Malice in Blunderland](#)). Amongst other “undue hardships” it can cause, this pre deposit menace is also a potential multiplier of litigation within litigation, especially “avoidable ligations”, that concerns our beloved FM!

One of our client had an excise issue. A show cause notice was issued and religiously got confirmed by an order in original in December 2008. Now jus the sequence of the events...

29.12.08 Date or Order in Original confirming the demand and imposing penalty.

09.06.09 Tribunal hears the Stay Petition and orders pre deposit of entire duty.

Jul-09 Writ Petition filed in Nagpur HC against the pre deposit ordered.

07.08.09 Admission hearing before Nagpur HC. Got adjourned.

21.08.09 Admission hearing before Nagpur HC.

04.09.09 Final hearing before Nagpur HC.

07.09.09 WP dismissed by HC, refusing to interfere with the interim order of the CESTAT.

07.10.09 Appearance before the CESTAT seeking time to pre – deposit.

29.01.10 Compliance before the CESTAT. Offer to furnish bank guarantee instead of cash payment of PD. Tribunal refuses and grants time to pay.

Feb-10 WP filed in Nagpur bench of the HC, against this rejection of offer of Bank Guarantee by CESTAT.

26.03.10 Admission hearing in HC, Nagpur.

09.04.10 Admission hearing in HC, Nagpur.

12.04.10 Reporting Compliance before CESTAT seeking further time.

16.04.10 Final hearing before Nagpur HC. Nagpur HC dismisses WP and Rs.5,44,70.146 paid as Pre deposit.

31.12.10 Early hearing petition comes up for hearing in Tribunal and early hearing granted on 24.03.11.

24.03.11 Final hearing comes up before CESTAT, Mumbai. Hearing adjourned to 12.05.11.

12.05.11 Final hearing comes up before CESTAT, Mumbai

.Tribunal adjourns the hearing to 07.07.11,

07.07.11 Final hearing comes up before CESTAT, Mumbai

Appeal Allowed.

The above sequence of events are 100% unadulterated facts. This is not a one – off case but one of the casualties of this pre deposit menace! This narration is not to comment on the merits of the case but only to give a visibility about the multiplicity of litigations, especially AVOIDABLE LITIGATIONS, this pre deposit menace could create! Lets also not forget the time, money and energy spent !!!

I feel, before appealing to his cadres and ranks, our FM should take the first initiative by abolishing this pre-deposit predicament or otherwise with these sort of litigations within litigation, his concern on “avoidable litigation” would only further deepen!!!

Before Parting...

Sec 35F of CEA reads 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 demanded or the penalty levied***"

In a recent decision **{2011(265) ELT 3}** the Apex Court has held that the word "OR" cannot be substituted by the word "AND". If so, would it suffice that the appellant deposit **either the duty demanded OR the penalty levied** so as to comply with the requirement under Sec 35F?