

DEED, IN NEED, INDEED - III

THE LOST NTT

(By S. Jaikumar, Advocate, Swamy Associates)

NTT, which had a hype and charisma of a blockbuster, has remained an unborn fetus, and stares the peril of being aborted before birth, is lying in some unwanted bin of the North Block. No one has any clue, as to what is the status of this Act, which, to me, is the best thing that could happen to one and all including to the tax itself, after CESTAT.

As per Section 35G of the Central Excise Act, an appeal lies to the High Court from every order passed by the CESTAT, except an order, among other things, relating to classification (rate of duty) or valuation.

As per Section 35L, an appeal shall lie to the Supreme Court from an order passed by CESTAT among other things, relating to classification (rate of duty) or valuation. Thus, if Valuation or Classification is one of the issues among many other issues, the appeal from an order of the CESTAT lies to the Supreme Court and the High Court is barred from appellate jurisdiction. Similar provisions are applicable for Customs and Service Tax.

Here I need to confess that, after a decade of practice in all Courts of law, even today, on any appeal after CESTAT,

I immediately search the books as to where lies the appeal, whether in the High Court or in the Supreme Court! Not only me, this is the status for 99 out 100 consultants in the country and the rest 1 percent should be out of practice!!!

Another controversial issue is whether the remedy against an interim order of the CESTAT is in an appeal as envisaged above or under the writ jurisdiction of the High Court? For example, if CESTAT orders a pre deposit and passes a stay order, and if one is aggrieved by such interim order, Then whether he has to appeal as per Section 35G/35L of the Act, to High Court or Supreme Court, as the case maybe or whether he can approach the High Court by way of writ of mandamus?

After a study of a spate of various judgements rendered on this issue, namely,

- **Bongaigaon & Refinery Petrochem Limited VS CCE – 1994 (69) ELT 193 (Cal)**
- **UOI Vs Classic Credit Limited 2009 (236) ELT 12 (Del)**
- **Bhasir Oil Mills Vs UOI – 1990 (47) ELT 305 (Bom)**
- **Shahnaz Ayurvedics Vs CCE – 2004 (173) ELT 337(All)**
- **Assotech Realty (P) Limited VS State of UP – 2007 (7) STR 129 (All)**

it can be safely concluded that, generally the orders of the Tribunal in matters of pre deposit are interim in nature and are often passed on the basis of *prima facie* view of the matter, in exercise of discretion. More often, it would be difficult to frame a substantial question of law, in such interim orders of the Tribunal. As the existence of a substantial question of law is a must to pursue the appellate remedy against the orders of the Tribunal, in High Courts and as the existence of an alternative remedy is not an absolute bar over the writ jurisdiction of the High Courts, the High Courts can still exercise their writ jurisdiction, where there is an error of jurisdiction, violation of the principles of natural justice, challenge to a legal provision, etc. A wrong exercise of such discretion by the Tribunal would be a jurisdictional error and as a result, it can be safely concluded that the writ petitions against orders of pre deposit passed by the Tribunals are maintainable.

But the Apex Court in a FEMA case - RAJ KUMAR SHIVHARE Vs ASSTT. DIRECTOR, DIRECTORATE OF ENFORCEMENT – 2010 (253) ELT 3 (SC), has toppled the above and has held otherwise!

Leave alone, the difficulties faced by the assesseees to approach the High Court or the Apex Court, and wait for years, nay decades, to get a decision, as the Central Excise, Customs and Service Tax are taxes to be levied

uniformly all over the country and since, almost every decision of the Tribunal, has pan-India implications, is it not better that there is only one Appellate Authority and let it be the NATIONAL TAX TRIBUNAL?

Reference is drawn to the judgement of the Karnataka High Court in the case **CCE, Mangalore vs Mangalore Refineries and Petrochemicals Ltd – 2011 (270) ELT 49 (Kar)**, wherein the Hon'ble High Court had elaborated the reason behind the bifurcation of jurisdiction between the High Courts and Supreme Court, by observing:

"The intention behind this bifurcation of jurisdiction between the Apex Court and the High Court seems to be that more often than not, any decision on these aspects not only affects the interest of the manufacturers who are parties thereto, but also to the manufacturers of those products throughout the country. In a country governed by Parliamentary legislation because of the territorial bifurcation in forming states and because of the divergent opinion, which is possible, the excise duty payable would vary from place to place. In order to bring uniformity in the levy of excise duty throughout the country and consequently to see that the country's finance is not affected, the Parliament has vested the jurisdiction to decide the disputes with the Apex Court. Therefore, we see a duty policy underlining this

bifurcation of the jurisdiction between the Apex Court and the High Courts."

Now tell me, do you need any more reason to form NTT ???

Before Parting...

CESTAT was formed under the reign of the present FM but during his earlier tenure in 1982. Will it not be a poetic justice that NTT is also formed under the helm of our beloved FM???