YOURS COERCIVELY

(G Natarajan, swamy associates)

"You are hereby directed to pay the duty and penalty confirmed vide OIO No. ____ (Order-in-Original), within 10 days from the date of receipt of this letter", read one of our clients' fax, which was a letter received recently from their Range Office. Having checked our files as to whether any such OIO has been received by us (as we have attended for a personal hearing for the client, sometime back), we enquired with the client, whether he has received any such order, for which the answer was in negative. Then we thought that this might have been the usual "cut and paste" error on the part of the department and the letter meant for some other assessee might have been wrongly addressed to this client. But, unfortunately it was not so! The next day, the OIO referred to in the letter, was promptly received our client. Who said, taxmen often work slowly? "Recovery of arrears" is one area, where the entire workforce of the department performs at its best! Even when the OIO was in transit, the vigilant Range Officer has taken steps to recover the arrears! This is not a stray case but a day to day affair, in the recent past after our beloved FM promised recovery of arrears as a source of revenue in his Budget speech last year!

Appellate remedy is a statutory right and not a bequest granted by the department. When an assessee disputes the liability cast on him, by way of challenging it in appeal, the said liability is only a disputed liability and not any "recoverable arrears" for the Government. We all know, that the CESTAT and other judicial forums are the real fulcrum of justice and not even a fraction of demands confirmed at lower levels, stand the legal, logical and judicious scrutiny by these forums. Be it Excise or Customs or Service Tax, the law requires deposit of duty and penalty amounts from the appellant while preferring an appeal. Such pre-deposit of duty and penalty are waived partly or fully by those appellate forums based on the merit strength, financial hardships of the appellant. Therefore in any appeal a petition seeking "waiver of pre-deposit" along with "stay of operations and recovery" is invariably filed by the appellants. It is a basic fact that these forums are already burdened with heavy work load and it takes considerable time for such petitions to be heard and disposed. But does the recovery hungry revenue understand the factual position? Unfortunately NO! Today a revenue officer with an OIO in his favour is an Adolph Hitler II against the hapless Jews! The Revenue Brigade just barges on the assessees like a hunger stricken cheetah encountering a beaten deer! With their coercive claws and menacing jaws, they threaten to detain the goods, seal the factory, auction the property and what not?

Even before the order confirming the demand is received by an assessee, he would receive a "request" from his Range Officer to pay up the confirmed demands, within a week! Even the CBEC is not far behind in whipping up this tendency.

In its Circular No. 80/88 Dated 18.11.1988, the Board has observed,

> "*The matter has been examined by the Board in consultation with the Law Ministry. The Law Ministry have, inter alia, opined that the Department is within its right to proceed with the recovery proceedings after waiting for decision on the stay application for a* ***reasonable period,*** *which would depend on the facts and circumstance of a particular case. The observations made by some*

> *High Courts and the CEGAT would not change the legal position that mere pendency of a stay application cannot be a legal bar to proceed with recovery proceedings, in the absence of a specific order against the same."*

What is the **reasonable** period? Reasonable for the officer or to the assessee, or to a layman? Will reasons such as vacancies in the CESTAT being not filled up for a long time, large number of appeals / stay petitions pending before the CESTAT, etc would be construed as "reasonable?" Nay! Never! Not for an axeman, sorry, taxman!

The Board goes on to say the following, in its Circular 23/90 CX 6 Dated 21.12.90;

> "*It was felt that the **correct legal position is** that unless the assessee obtains a stay the department is within its rights to recover the duty confirmed in an order. However, as a practical step and for administrative convenience, a period of 3 months (one month for filing appeal and stay application and two more months for obtaining orders on the stay application) can be granted before taking coercive steps to recover the dues. If an assessee is genuinely interested, he need not take matter leisurely and wait for full three months for filing the appeal and stay application; **he could easily file an appeal and obtain orders on a stay application from the appellant authorities within a period of 3 months from the date of communication of the order confirming demand against him.** It was, therefore, decided that assessee should not be granted time beyond 3 months before restoring to coercive measures to recover dues arising out of orders passed by original adjudicating authorities as well as the appellate authorities."*

This is the correct legal position, according to the CBEC. When the statute itself gives three months time for filing an appeal, the CBEC expects you to do so and also obtain a stay order within 3 months! In the above Circular, it appears that the CBEC states that one could "easily file an appeal and obtain stay within 3 months. We are at a loss to understand as to how the CBEC could comment that an appellant could obtain stay within 3 months that too easily! Firstly, the Hon'ble CESTAT has established highest standards, in disposing off these stay matters and stay is granted not as a matter of routine, but only when the assessee proves a *prima facie* case and not **easily!** Secondly, the ground reality is that it takes minimum 4 to 6 months to get your stay petition posted for hearing because of the volume in queue! The above clarification of CBEC, without knowing the ground realities, is nothing but juvenile!

A little bit of better sense prevailed in Circular No. 7/90 CX 6 Dated 02.02.1990, maybe, out of the rebuke from the Hon'ble High Court.

> "*However the Board felt that it was hardly fair and just to proceed with the recovery proceedings while application for stay of the impugned order or for waiver of the condition of pre-deposit was pending before the Appellate Authorities. The Board, therefore, in partial modification of its letter dated 18th November, 1988, has decided to accept the ratio of the judgments delivered by the Bombay High Court in Writ Petitions No. 3919/87, 422/88 and 518/88. Copies of the judgments are enclosed for circulation and guidance of the field formations.*

Collectors (Appeals) are separately being directed to dispose of stay applications expeditiously."

Alas! It lasted barely for two years and the Board had the following to say in its Circular No. 16/92 CX Dated 12.11.92.

"On the question of recovery of dues during pendency of stay petition/application, the matter was examined by the Board in the recent past and necessary instructions vide Cir. F. No. 208/107/90-CX.6, dated 21-12-1990 were issued in this regard. According to these instructions, the Central Excise Officers are to allow a period of three months from the date of decision for payment of the dues adjudged before resorting to coercive measures to recover such dues. However if a stay application of the assessee is rejected by the Appellate Authority even before the lapse of the time of three months, recovery proceedings should be initiated immediately. While coming to the said period of three months it was expected that the assessee should be in a position to file appeal within one month and the Appellate Authority to dispose of the same within another 2 months.

The issue has further been examined by the Board. The Board is of the view that it is not desirable to revise the above-mentioned instructions in the matter and provide for a blanket stay order for not taking coercive measures as pleaded by the Confederation of Indian Industries. If the assessee is diligent, as the things stand today, it would be possible to get orders on stay application well within a period of 3 months. In case of any individual hardships the case could be decided on a case to case basis."

So, dear brethren! Be diligent!

Now comes the Circular No. 788/21/2004 Dated 25.05.2004.

In the above Circular, a reprieve of six months from the date of filing of appeal / stay petition has been given. Wait! Don't get excited! This Circular is made applicable only for the first appeals and not for the second appeals (Appeals against the orders of the Commissioner Appeals)! Does it mean that the Commissioner – Appeals are far better in passing the orders than the regular Commissioners? Then why it is so? Who knows but the Almighty?

Often the judiciary has to express its displeasure towards this tendency and goes to the extent of passing strictures. To cite a few,

2004 (165) ELT 518.
2005 (185) ELT 335.
2005 (187) ELT 268.
2005 (190) ELT 399.
2006 (199) ELT 133.

But, who bothers? A stricture from the CESTAT is better than a bad ACR. The field officers usually go by the most prevalent paradox, "Err on the revenue side!" (Somebody please enlighten us, why at all one should "err" at the first place?). After all, they are only doing their bit to achieve their revenue targets. And so, the recovery castration goes on and on with innovative techniques getting better, day by day!

Before parting…

The Revenue babus and their clan often come under attack by authors like us, for several reasons. Poor drafting, delay in correcting mistakes and the list goes on. The idea is not to browbeat or brickbat these men in power to gain cheap popularity. Being from within, I very well know, it is easier said than done. I know the pulls and pressures and about the Damocles sword of disciplinary action, hanging upon all officers. It is not expected that the entire revenue machinery to be cleansed by these write ups, at once. This is only to highlight the systemic failures of the department, which in the longer run should correct itself, by a sensitized babudom. If anyone in the department "feels" that what is written above is correct, even if he does not follow it, I would really feel vindicated.

Sub: Response

The grievance of the author is understandable. If the assessee pays the amount immediately, where is the role for the consultant? The assessee has to be dragged to several stages of Appeal and until such time he should not listen to the words of the Range Officer.What prevents the asseessee or his consultant to write back that they will wait for the permissible period? If the Consultant is very much interested in the welfare of the master, why not the Govt. Servant towards the Govt?Assuming that the letter of the Range Officer is too premature, let me ask a simple question which may be honestly answered by the consultant. will the consultant advise the assessee to pay the dues once the time limit is over? Will he advise the assessee to pay the dues if the Department's case appears to be correct? He will not leave the assessee to settle down so easily. It is not the Range officer who acts as ADOLPH HITLER or CHEETAH. It is the person who renders ill advice to them for his survival.

Posted by **exciserajendran** Post Reply

Sub: Hitlors everywhere

Dear Author,

True reflection of ground reality! Of late, the pressure from the department to pay the confirmed demands is mounting beyond reasonable propositions. When the statute itself recognizes the right of appeal, how the department can proceed with such draconian coercive recovery measures, that too, when the appeal and stay petitions are pending for hearing. We also faced a similar situation and our fervent appeal to all higher ups, has not yielded any results. Everybody pointed to an officer above him. Beyond a particular level, we cannot represent and for the fear of seizure and detention, we have paid up the dues. You know, when we ultimately won the appeal and sought refund of this amount, we have been tossed up and down like a football.

When the reality is thus omnipresent, one learned staff from the department appears to have been totally ignorant of it. His remarks placed above seems to reflect only the Adolf Hitler in him. Further his suggestion that either the assessee or the advocate should write back to the Range officer is nothing but a laughing stock. When the front page of the order itself says about the appeal remedy and the time frame, why at all one should write back to the range about the permissible period? If the officers are so good and friendly why at all we go to consultants? Now a days we go to the consultants more to escape from the high handedness of the officers than for tax consultancy!

Posted by **critic** Post Reply

Sub: arrears recovery the usual M O

The article and the feedback posted are interesting. The avarice for revenue is too well-known to me and the author for we hail from the department. The kind of dramas enacted in shooting off letters asking assessees to pay the dues even during pendency of appeal (stay binds only.....and not me- the std refrain) and showing amounts as arrears before the ink in the order dries and finally after exhausting appellate remedies, rejecting refund of even pre-deposit under the pre-text of unjust enrichment are like 'Devdas' - tragedies made and remade. While the mighty among the trade can always parade legal troops at the wink of the Revenue, the poor not-so-well-off assessees are the favourite whipping boys of the dept. Neither is there any scientific classification of what constitutes arrears nor an idea about when an amount becomes arrears exist and every officer possesses interpretational independence unlimited. With absolutely no result of the antique provision like certificate action (imagine district collector having no other work but to collect excise arrears), the dept arms itself with provisional attachment even when proceedings are not concluded - names can be published even before being condemned- Does the Dept have any idea of PNJ? Only fair law can expect reasonable compliance. Such draconian provisions will remain deadletters - but they are sufficientto demolish the spine of an already battered assessee. Let the CBEC first formulate a rational policy for recovery of dues - within the policy framework - statutory and procedural requirements or compliances can be provided.
No policy + no judicial discipline + no serious effort even for getting govt revenue = arrears recovery. So much for public money!!!

Posted by **GOKULKISHORE** Post Reply

Sub: Recovery against confirmed demands

Sir,

Read the article by the learned advocate, his reactions against the Range Superintendent's letter which merely stated that the assessee has to pay the confirmed demand within ten days. Let us cooly analyse the situation.
1. A demand has been confirmed by an adjudicating authority.
2. The jurisdictional Range Superintendent has only written to the assessee that the confirmed demands may be paid within ten days.
3. If in the said letter it is written that on expiry of ten days coercive actions like the onces the author has mentioned in his article will be initiated, then the author's outburst is justified.
4. In any case if the assessee is not happy with the order then he can approach the appellate authorities as mentioned in the pre-amble itself.

We live in a democaratic world and each one has a right to critise however the criticism should be on some valid grounds

It is kindly requested that the matter may be given a cool thought - Thanks.

Saptharishi.

Posted by **saptharishi_iyer** Post Reply

Sub: Tax recovery in CBEC

dear natarajan, You have brought out the story very well.the stay and delaying the payments of dues was a delaying tactics till the clause on interest on delayed payments was brought into effect.Now even for provisional assessments the interst is applicable. of course, pro revenue orders confirming demands blindly are the rael problem of the day and in such cases ,the stay orders are very relevant.In practice, we find the CESTAT grant stay in second appeals as well without any discrimination.
however, the fact remains that the TAX RECOVERY CELL set up and procedures are not so vigourously pursued as in CBDT.Here the TAR and reports are for mere statistical purposes-even thogh there is Commr(TAR).No assessee bound to pay duty etc.would now resort to delaying payments due -no matter the role of consultants.It is no wonder that the settlement Commission is yet to have effective role for the purpose it was set up.What could be the amunt settled so far by the set up-after all.
Let us hope changes for the good of both law enforcing and abiding persons.

Posted by **unnikrish** Post Reply View Post Replies

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Hi Nuts,

The feedback tussle was as interesting as the article itself.The department staff needs to be enlightned of the following facts:

a)The consultants/ advocates not only give proper advise to their clients in such circumstances, but also give them copy of Board's circular pertaining to recovery of arrears with instructions to send the same to the department as and when approached by them for taking coersive measures. This way the department will also realise that the assessee is aware of his statutory right to appeal/ time for filing the same and also that he need not pay any duty or penalty demanded till he avails of his all his statutory rights.

b)Inspite of all this, if the department still continues with the recovery proceedings, the counsel is always there to rescue his client by getting interim stay.

Regards,

padi

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Padi

The article is well written one. I would suggest that the CEA, 1944 should be amended that Commissioner (Appeals) shall hear the appeals without pre-deposit of duty demanded and penalty imposed. This is because none of the Commissioner (Appeals) have got the guts to saty the demand and penalty theough the appellanr makes a plea for stay. Therefore only CESTAT should be authorized to exercise the powers under Section 35F of CEA, 1944.
Yours truely,

(R. RANGANATHAN.)
SENIOR AUDITOR,
O/o ADDL. DIRECTOR GENERAL (AUDIT)
CHENNAI ZONE.

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ranga_1952

Tax recovery in CBEC

Apropos the article by Mr.Natarajan, it would be pertinent to point out that the problem is the adament attitude of the Board and the Department Officials who always play it "safe" by confirming frivolous orders and initiating recovery proceedings prematurely. Other important reason which complicates matters is the massive work load and huge pendency before the CESTAT and Commissioner (Appeals). The rigorous Arrears Recovery routine prmoted by the FM has of late, become a real thorn in the flesh of the litigants as was correctly highlighted by the Advocate. Let the Department come out with practical solution to the problem without inflicting sense of fear on the assessees without setting arbitrary time-limits.

VICHAVICHA