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Stay Applications before CESTAT - End of an era...

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The Finance (No. 2) Act, 2014 was enacted on August 6, 2014. As usual, certain amendments in indirect taxes have been made. One of the amendments, which became 'talk of the town' is the new provision pertaining to **deposit pending appeal** in the Central Excise Act, 1944 and the Customs Act, 1962. The new section 35F of Central Excise Act (parallel provision has been made under Section 129E of Customs Act) has been substituted in place of earlier section. The Section 35F is reproduced hereunder:

“Section 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 percent of duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, 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 per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores: Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.....”

As per the new provision, Tribunal or the Commissioner (Appeals) shall entertain appeal only after the appellant has deposited 7.5% of the duty (in case only duty is in dispute), 7.5% of the duty (in case both duty and penalty is in dispute)



and 7.5% of the penalty (in cases only penalty is in dispute). This came as a major relief to the litigants.

The earlier Section 35F of the Act is also reproduced hereunder:

“Section 35F: Deposit, pending appeal, of duty demanded or penalty levied.

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 :

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing....”

As per the earlier provision, the appellant was required to deposit the full amount of duty demanded or the penalty levied pending the appeal. The proviso to Section 35F, however empowered the Tribunal or the Commissioner (Appeal) to dispense with such deposit. Due to this proviso, being in existence, the appellants invariably opted to file an application seeking two reliefs namely:-

- a. To waive the condition of pre-deposit; and
- b. To stay the recovery proceedings till appeal is disposed of.

With the substitution of new Section 35F, the deposit of 7.5% of duty / penalty has been made mandatory. The 'talk of the town' is as to whether the stay applications are still required to be filed or not. As far as pre-deposit is concerned, the position is clear that 7.5% of duty / penalty has to be deposited and there is no requirement of deposit of balance. The issue being talked about is “what about stay from recovery proceedings till the appeal is disposed of?”



It is, however felt that the position in that respect is also clear. In earlier Section 35F, it was mandatory for the appellant to deposit full amount of duty and penalty even if the appeal has been filed. As a result, the department could legally ask the appellants to comply with the said provisions and in the event of failure to do so, the recovery proceedings could so initiated. In order to restrain the department from initiating such proceedings, the stay was required and the Tribunal or the Commissioner (Appeal) was duly empowered to pass stay order.

Now, comparing present provisions of new Section 35F, there is no requirement to deposit full amount of duty / penalty. Nor any power has been given to the Tribunal or the Commissioner (Appeal) to pass orders staying recovery proceedings. Only 7.5% of the duty / penalty amount has to be deposited and there is no longer the provision to deposit full amount. In the absence of such a provision, the department cannot insist upon deposit of balance amount till the pendency of the appeal. It may be seen that in the Finance (No.2) Act, 2014, the first, second and third proviso in sub-section (2A) of Section 35C have also been omitted simultaneously. These provisions related to stay orders passed by Tribunal. The omission of these provisions is an offshoot of new Section 35F. Neither the stay from recovery proceedings is now required, nor the appellate authority has power to stay such proceedings. However, if the Department initiates the same, option of filing writ before the High Court is always open.

It can be said that the era of filing stay applications before CESTAT / Commissioner (Appeals) has come to an end.

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