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Dear Professional Colleague,

CBEC Gift – If Stay application is pending, pay up confirmed demands

CBEC has issued its first Central Excise Circular No. 967/01/2013 - CX, dated January 01, 2013 on eve of New Year 2013, for recovery of confirmed demands during pendency of Stay applications. The Circular has rescinded seven previous circulars on the subject matter. The said Circular has brought about a significant shift in the timing of recovery of confirmed demands, where the stay applications are not disposed off by the appellate authorities, within a period of 30 days of filing thereof.

The Board has noticed a Supreme Court judgement delivered in case of Krishna Sales (P) Ltd 2002-TIOL-428-SC-CUS wherein the Court observed that *"As is well known, mere filing of an Appeal does not operate as a stay or suspension of the Order appealed against"*.

As per this Circular, if a stay application is filed before the Commissioner (Appeals) and CESTAT and if there is no stay within 30 days, recovery action has to be initiated. In case of stay applications before the High Courts and Supreme Court, even this 30 days' time is not available. Recovery has to be initiated immediately after the orders if there is no stay. A moot question arises → who will come forward to rescue Trade/ Commerce when:

- The Board is aware that CESTAT Bench sitting only intermittently in Bangalore, Chennai & Kolkata and given the pendency of matters before the Appellate Commissioner, it will be very difficult to obtain stay within a period of 30 days after filing of stay petition.
- This Circular is contrary to the provisions of the proviso to Section 35F of the Central Excise Act, in so far as it indirectly imposes a time line of 30 days for disposal of stay petitions by the Tribunal. Hence the same is ex-facie amenable to challenge, being in excess of the statutory provisions.
- The Circular issued by the Board lacks foresight, proper understanding of the real situation - draconian Circular

Members are requested to give their suggestions on said Circular for onward submission to CBEC. Your suggestions may reach us latest by Monday, 7th January 2013 by email.

You may download the Circular from the following link:

<http://www.cbec.gov.in/excise/cx-circulars/cx-circ13/967-2013cx.htm>

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The Horror Begins - CBEC's New Year Bomb-If Stay Application is Pending, Pay up Confirmed Amounts

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WE never imagined our Tax horror-scope would be a reality in less than 24 hours. (Please see yesterday's DDT) CBEC has issued its first Central Excise Circular on arrears recovery during pendency of Stay applications. The circular has rescinded seven previous circulars on the subject matter. Suddenly, the Board has noticed a Supreme Court judgement delivered in 1993 in case of Krishna Sales (P) Ltd 2002-TIOL-428-SC-CUS wherein the Court observed that "As is well known, mere filing of an Appeal does not operate as a stay or suspension of the Order appealed against". So, the Board has come to a conclusion that their predecessor Chairmen/Members did not know how to read Court Judgements and had issued some useless Circulars, which are now rescinded. Now, a fresh circular on how to deal with demands against which stay applications are pending before the Appellate forums, is issued.

According to the latest Circular, if a stay application is filed before the Commissioner (Appeals) and CESTAT and if there is no stay within 30 days, recovery action has to be initiated. In case of stay applications before High Courts and Supreme Court, even this 30 days time is not available. Recovery has to be initiated immediately after the orders if there is no stay.

Perhaps the Board is not aware that there was no Bench sitting in Bangalore and Chennai CESTAT for the last several months and even now, the Bench is functional only for half of the month. How can they expect the CESTAT to dispose of all the stay petitions within 30 days? There are many places where the Commissioner (Appeals) posts are lying vacant. How can they expect the assessee to get stay within 30 days? Perhaps the Board is under the impression that stay orders are just like a ready-to-eat dish which the assessee should go, pick up and come back. All that the assessee can do is only file a Stay Petition and wait for the hearing notice.

The Circular issued by the Board lacks foresight, proper understanding of the real situation and shows utter lack of respect for established procedure and the judicial system in the

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country. This Circular will no doubt create lot of work for the High Courts, as many Writ Petitions will be filed against this atrocious Circular. Perhaps the High Courts should award costs on the Board for issuing such mindless directions without understanding how not to apply the Supreme Court decision of 1993 to the present situation.

When the Board has shown extreme obedience to the Supreme Court order in case of Krishna Sales (P) Ltd , why do they have total disregard to this observation of the Hon'ble Supreme Court in Kumar Cotton Mills case, which is more recent compared to the 1993 order? (2005-TIOL-42-SC-CESTAT). Is it because it just does not suit you? How can they have only selective respect for the Supreme Court judgements? Their Lordships in Kumar Cotton Mills observed that:

The sub-section which was introduced in terrorem cannot be construed as punishing the assesseees for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified.

Certainly, this is not the way to treat the goose that lays golden eggs for the department. They don't fill the Commissioner (Appeals) post, they don't post Members in Tribunal and they want to punish the assesseees for the fault of babus! Is it the job of the assesseees to fill the vacancies in CESTAT, post the Commissioner (Appeals)?

The situation in case of appeals filed in High Court / Supreme Court is worse. The orders passed by the lower authorities will be implemented immediately if there is no stay in operation. Does the Board expect the High Courts and Supreme Court to dispose of the Stay applications immediately, as directed by the Hon'ble CBEC? Are they aware of the level of pendency in these courts?

Before causing damage to the industry and embarrassment to itself, the Board should immediately do proper introspection and withdraw this draconian Circular.

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CBEC Circular No. 967/01/2013-CX, Dated: January 01 2013

Krishna Sales was against Revenue - First Hang; then Wait for Appellate Order

THE celebrated Krishna Sales case, which the Board relies on to justify the above draconian circular, was actually against the Revenue. In that case, the Customs Authorities refused to release the goods in spite of the importer winning in the Tribunal on the ground that the Department has appealed against the decision of the Tribunal. In such a circumstance, the Supreme Court observed, "If the authorities are of the opinion that the goods ought not to be released pending the Appeal, the straight-forward course for them is to obtain an Order of Stay or other appropriate direction from the Tribunal or the Supreme Court, as the case may be. Without obtaining such an Order, they cannot refuse to implement the Order under Appeal. As is well-known, mere filing of an Appeal does not operate as a Stay or suspension of the Order appealed against."

The Board wants to use these adverse comments against it to harass the assessee now.

Suppose somebody is given the sentence of hanging by a High Court and he appeals to the Supreme Court. Will the Government hang him before the Supreme Court can grant a stay?

Or if somebody who is in jail is acquitted by a High Court, will the Government continue to keep him in jail because the Government has gone in appeal?

You may say revenue cases cannot be compared to imprisonment and death sentence. No, they cannot be compared - this is even worse. If you kill a man (legally after a death sentence), you kill an individual and may be you inflict misery on his near ones, but if you kill an industry, you kill a society and you leave marks of your fiscal cruelty for years. That is exactly what is going to happen if the Board is serious about the Circular.

What is going to happen? For Show Cause Notices where the demand is less than Rs. 50 lakhs, Assistant/Deputy Commissioners, Jt/Addl Commissioners will routinely confirm the

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demands even if the law, Board Circulars and Supreme Court judgements are in favour of the assessee. The assessee files a stay petition before the Commissioner (Appeals) who will order pre-deposit of the entire duty. If you cannot pay this, he will dismiss the appeal. Before you can say CESTAT, the officers of the Department will swarm your place with attachment orders threatening to sell your properties. If you pay 50 lakhs, you are doomed. If you don't pay 50 lakhs, you are still doomed.

If the demand is for more than Rs.50 lakhs, it can be anything running into hundreds of crores, the Commissioners also confirm the demands, because they are afraid to drop demands running into Crores. The demands can be atrocious, illegal and outright perverse - but a Commissioner's order is to be obeyed. You can never get a stay from CESTAT within 30 days and the department wants its illegitimate money.

These are not hypothetical situations. Do you remember Customs issued notices to DTA suppliers of SEZ units demanding export duty for goods supplied to SEZs and Excise issued notices to the same assessee denying CENVAT credit on the same clearances? Even now, some notices are being issued. The procedure is simple. Audit raises an objection, department issues a notice, notice is confirmed, appellate authorities are not functioning and you are forced to pay up huge amounts.

You can certainly enforce your demands and protect revenue - if you can make your adjudicators write fair, reasonable or at least legally valid orders.

These measures don't seem to be to collect revenue - they are meant to harass the trade and maybe ultimately get them to close down business. You can't do more harm to Revenue than this.

There seems to be a strong message for future. You must manage your case appropriately at the very first stage of adjudication.

DDT's HORRORSCOPE was not for humour - the horror is here and now - Happy New Year!

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PS: In a recent judgement delivered a few days ago, the AP High Court directed the Revenue not to initiate or pursue any coercive steps against the petitioner (or others who owe dues to the petitioner) under Section 87 of the Finance Act, 1994 or any other appropriate provision, till disposal of the petitioner's applications for condonation of delay and for grant of interim relief in the appeal preferred by the petitioner to the Tribunal on 26-9-2012.
(2013-TIOL-09-HC-AP-ST)