Revenue Boards - Math of kindness may overlook seniority! - CBIC preparing for 'Cannon' shot!

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TAX Administration in any tax jurisdiction sits in the nucleus of a fiscal regime! It constitutes the centrality of the character of a tax system - Whether it would be hawkish or dovish! Its integrated trait determines the degree of fairness, alertness, efficaciousness and pugnaciousness in implementation of fiscal policies. I am told that while filling up the creamy layer of posts in the Revenue Boards - CBDT and CBIC, the PMO and the Ministry of Finance tend to allocate due weightage to the enumerated mosaic of parameters! A few Members have recently been appointed by the ACC in both the Boards. They were cautiously and also pensively curated to pit their wits against fiendishly mounting fiscal quagmire during the Corona times! A surgical analysis of some appointments done in the past may reveal that some of them were done, probably grudgingly, and also based on the principle of hub-and-spoke alliance theory!

However, things are going to be different henceforth! A couple of posts are going to fall vacant in the next few months - for instance, the CBIC Chairman would retire by November-end. And the ACC may not like to pursue the stereotyped historical pathway! The dice is going to be cast in favour of all such 'swashbucklers' who have left behind a tangibly-measurable legacy of performance and not merely held important and sensitive posts of Principal Chief Commissioners or DGs! The ACC has finally chiselled its 'gauge theory' which tends to elbow out tyre kickers and aspirants of gilded 'cage'! In kilter with the Prime Minister's avowed slogan - Min Government, Max Governance, maximum score is likely to be 'awarded' to the one who has not treated his previous postings as a golden era of 'dukedom' and has literally sweated out to show results on the electronic screen!

A concrete view has been taken that the Member posts in the Revenue Boards are not a gift for those who have honed their skills in demonstrating exquisite nonchalance or extraordinary skills to limp to the finish line (retirement)! The future chairmen and Members are going to be judged on the basis of their lean contribution to the crimson ink (red tape)! A new era is going to be rolled out where the fatal obsession or the hubris of seniority may be allowed to fade in the rear-view! Supplanting the math of kindness towards overlapped weightage to seniority is going to be a new calculus favouring statistics-based performance - certainly not *papier mÃ¢chÃ©*ncluding the fairness in dealing with the taxpayers! If such an HR policy is implemented with a 'deletionist zeal' against the hoary tissue of threadbare clichÃ©s, it would mean 'brain death' for the culture of seniority demanding higher scores and may ruffle many feathers. But, let's now forget that unusual odds or pugnacious opposition have seldom deterred PMO from experimenting with radicalised policies!

How does the quality of staffing Boards impact the working of the tax administration, can be exemplified by the avoidable controversy over the limitation period. Let me go straight to the *suo moto* order of the Apex Court dt 23/09/2021

on discounting the limitation period for pending appeals, applications and proceedings before judicial and quasi-judicial authorities. As per this order, while computing the period of limitation, the period from March 15, 2020 to October 2, 2021 shall be excluded. First, the circumstances were certainly not too chastening or compelling for the GST Policy Wing (Circular No 157) to pick up a periscope and make a distinction between types of cases where the Apex Court order will apply and not apply! Why? It would certainly trigger more litigation where the taxpayers and legal professionals have taken a view that the Apex Court order applies to all types of cases and ought to be honoured by all courts including quasi-judicial authorities. To avoid such litigation, the onus always rested with the Revenue not to needle the taxpayers to knock on the door of courts! Secondly, a tax case should always be duked out on the ground of merit rather than technical tentacles like limitation!

Interestingly, when the GST Wing decided to do so in the July month, of course on the basis of its fine-grained understanding of the Apex Court order, what prevented the other arms of the Board from doing the same for the Customs, Central Excise and also the legacy cases of Service Tax? If the ideas factory went awhir in one wing of the Board, why to play coy for the other wings? Such an interpretation should have been shared with other sections too! Aha! Working in silos with gay abandon! The GST Circular has created a barmy scenario where a large number of field officials and also taxpayers tend to believe that such an order of the Apex Court does not apply to Customs or other taxes, perhaps and that is why the CBIC is as silent as the grave on this issue! Why did the Board leave a *carte blanche* for the field officials to interpret the Supreme Court order at their own whims? Even as the Board dossed around and failed to examine the merit of issuing such an Instruction, the Supreme Court has given its final verdict - end of limitation order from **October 3, 2021** (See 2021-TIOL-246-SC-MISC-LB). One can now expect the opening of a floodgate of unseemly legal wrangles from here when the limitation period is going to be counted for survival of an appeal or refund application!

Let me now revisit the hair-splitting and 'eucalyptus tree'-uprooting Apex Court decision in the case of Canon India (*2021-TIOL-123-SC-CUS-LB*). I had sieved through the chilling repercussions of the Apex Court in this Column (See COB(WEB) - 757) in the month of April, 2021. The SC had virtually passed the death sentence for the Directorate of Revenue Intelligence(DRI) which was found 'missing' in the esoteric club of 'Proper Officers' as per Sec 28(4) of the Customs Act, 1962. A delight for the doomsday prepper! One instant implication of such an order was that the CBIC quickly decided to put all SCNs issued prior to the SC order in the 'Call Book' and all fresh SCNs were ordered to be issued by proper officers of port of import. After some time, based on the views of the Ministry of Law, a Review Petition was filed - quite predictably! The filing of such a petition is not known to many, particularly the counsel and the CBIC field officials! The petition was obviously heard and also ordered to be listed but even if it is listed tomorrow, the Larger Bench order will continue to be binding unless the same is stayed! Meanwhile, the High Courts and the CESTAT Benches have no freedom to 'politely' treat DRI cases - more than a dozen already tossed out so far! Secondly, the adjudicators for DRI cases have nothing to chew over - Worse, many getting subjected to the Cushing's syndrome! The Board needs to keep them oiled for the future assignments!

Let me now hazard a guess what could be there in the Review Petition and why has the Government decided against poleaxing the Apex Court order by resorting to an Ordinance? First, as I had reported in my Column that when the Mangali Impex case (2016-TIOL-173-SC-CUS) was pending before the Apex Court on the same issue, it should have been logically clubbed with the Canon India case! I am sure that the Revenue's counsel must have pointed it out but it was perhaps mistakenly overlooked - a mistake apparent on record! Secondly, when the Apex Court had, in the Sayed Ali case (2011-TIOL-20-SC-CUS), pointed out the infirmities in the provisions, and the Legislature had passed an

amendment in Sec 28(11) w.e.f April 8, 2011, there might have been some suspected cluttering of provisions but the Apex Court could not have discounted the INTENT of the Legislature to approve such an amendment notifying DRI as 'Proper Officer'! If that is so, the golden principle of interpretation of a tax statute should have been allowed and the Apex Court should have, perhaps in its harshest pivot, ruled against past cases but a leeway should have been given for the future issuance of SCNs. Though there is indeed a dearth of precedence for the Review Petitions to succeed but the fact that the petition is going to be listed for hearing, the Apex Court does see some merit in the case - a plain but intelligible guess!

Why did the Government decide against Ordinance? Did it amount to a swirl towards the edge of precipice? One of the plausible reasons could be that the Modi Government has finally taken a firm stand to keep miles away from retrospective amendment *a la* Vodafone case! Had the Government gone for an ordinance, it would not have been taken kindly by the judiciary and also the taxpayers' community. Judiciary has, of late, taken a sternly dim view against fiscal brinkmanship where the Executive has too often been found to be putting its good decisions under scalpel. Secondly, since the Ministry of Law did underline some mistakes apparent on record, it had the faith in the Bench to take note of the same and peer into the merit of the Review Petition. Can both, the Review Petition and the Ordinance, survive together? NO, as long as the Review Petition is pending, it does not provide any wiggle-room for the Ordinance route? It is always wise for the Government to wait for the verdict and if it goes against the Revenue, the Government may issue an Ordinance for the limited purpose of empowering DRI to issue SCNs but only prospectively, perhaps! If the ambit of the Ordinance is stuffed with the elasticity to tarry on even the past cases, it would amount to shooting in its own foot! And I am quite sanguine about a realistic resolution of this sticky problem and the DRI would soon be out of the rabbit-hole!