TAX DUES RECOVERY: IMPLICATIONS OF DECISION IN GULF OIL(BOM HC) ON 8.2.2023

INTRODUCTION

1.In **Gulf Oil Lubricants India Ltd. Vs Joint Commissioner of State Tax** (Bombay High Court) **Writ Petition No. 3097 of 2022** Date of Judgement/Order : **08/02/2023** it has been ruled that **an statement of intent to file an appeal bars recovery of tax dues**.As a general proposition this has far reaching implications even if of persuasive nature ,since a decision on similar lines in income tax is only a matter of time.

1.1 In the said decision ,after losing the first appeal ,a WP was filed challenging the validity of statutory provisions, on the ground that though the statute provides an appeal to an Appellate Tribunal, but such Appellate Tribunal has not been constituted yet.

[Decision can be accessed at: https://taxguru.in/goods-and-service-tax/revenue-department-incorporate-measures-reduce-litigations-arisen-due-non-constitution-gst-tribunal.html]

THE RELEVANT LAW:

2.The relevant Sections are **109, and 112** of the Maharashtra Goods & Services Tax Act

s.109. Provides for, the Goods and Services Tax Tribunal constituted under the Central Goods and Services Tax Act shall be the Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority under this Act.

s.112.provides for appeal by Any person aggrieved by an order passed against him under section 107 or section 108 of this Act or the Central Goods and Services Tax Act.The person may appeal to the Appellate Tribunal against such order within three months from the date on which the order sought to be appealed against is communicated to the person preferring the appeal. Further provisions relate to enabling powers for revenue to file appeal,filing of cross objections .

THE DECISION AND A CONTENTIOUS CIRCULAR

3.What set the cat among the pigeons was (in my view a totally avoidable reference) by Assistant Government Pleader to Circular No. JC (HQ)-1/GST/2020/Appeal/ADM-8 dated 26 May 2020 **issued by the office of Commissioner of State Tax, Maharashtra State, giving clarification in respect of non-constitution of Appellate Tribunal.**

3.1 The Circular refers to various representations received since the Appellate Tribunal is not constituted and thereafter refers to the procedure to be adopted. The Circular states as under:-

" 4.3 Hence, as of now, the prescribed time limit to make application to appellate tribunal will be counted from the date on which President or the State President enters office. The appellate authority while passing order may mention in the preamble that appeal may be made to the appellate tribunal whenever it is constituted within three months from the President or the State President enters office. Accordingly, it is advised that the appellate authorities may dispose all pending appeals expeditiously without waiting for the constitution of the appellate tribunal.

5. Recovery of dues after disposal of appeal.

After disposal of pending appeal u/s 107, if any demand is confirmed or

appellate authority has created the additional demand then ***in such cases tax payer shall submit a declaration in Annexure-I before the jurisdictional tax officer stating that he is proposing to file an appeal*** *u/s 112(1) against the appeal order. If such declaration is not submitted within fifteen days from the communication of the said order, then it will be presumed that tax payer is not willing to file appeal against the order and recovery proceedings may be initiated as per the provisions of law.*

6. ***This Trade Circular is clarificatory in nature and cannot be made use of for interpretation of provisions of the law.***

Difficulty if any, in the implementation of this Circular may be brought to the notice of the office of the Commissioner of State Tax, Maharashtra."

(emphasis supplied)

3.2 An identical Circular extending the period of limitation to file an appeal to the GST tribunal, with some modifications, has been issued by the Central Authorities, it was noted in the decision.

4.In para 7-10 of its order the hon'ble Court ruled that

''It is stated in Clause 5 of the Circular as above that a declaration in Annexure-I has to be filed before the jurisdictional tax officer stating that an appeal is proposed to be filed. If such declaration is not filed, then it would be presumed that taxpayer is not willing to file an appeal and recovery proceedings would be initiated. ***Therefore, the sequitur is that if such a declaration is filed, recovery proceedings will not be initiated until the prescribed time limit as specified in Clause 4.3 of the Circular.*** *Therefore, as of today there is no prejudice to the Petitioners or any similarly situated taxpayers on the ground of the non-availability of the State GST Tribunal.*

8. Reverting to the present Petitions, the Petitioners have already filed such a declaration under Clause 4.3 of the Circular. If the Petitioners have not filed declarations, we permit the Petitioners to submit the same within 15 days fr om today. Since the Petitioners have raised various other challenges, ***such a***

declaration would be considered as without prejudice. As and when the contingency in the clause 4.3 of the Circular dated 26 May 2020 occurs, the petitioners can file an appeal or writ petition as the case may be*. In light of this position, we do not deem it necessary to keep these Petitions pending on the file of this court.*

9 Clarifying that the prescribed time limit has been extended asper Clause 4.3 and protective orders are incorporated in Clause 5 of the Circular, we dispose of the writ petitions.

10 ***Respondent State will consider two measures*** *to reduce the inflow of writ petitions in this Court due to non-constitution of the GST Tribunal.* ***First, to incorporate a stipulation*** *contained in Clause 4.3 and Clause 5 of the Trade Circular dated 26 May 2020* ***in the order passed by the First Appellate Authority.*** *This will put the tax payer to notice that the time limit for filing the appeal is extended and if a declaration is filed in terms of Annexure-I within the stipulated period, the protective measure would automatically come into force.* ***Second, if*** *recovery is being undertaken in terms of Clause 5 for failure to file a declaration within the time limit,* ***by way of indulgence****, to give 15 days period to make such a declaration.*

These two measures, according to us, will substantially reduce the litigation which has arisen due to the non-constitution of the GST Tribunal.''

[emphasis,added]

4.1 Learned AGP merely stated before Court that these suggestions will be placed before the State Commissioner of State Tax for taking necessary steps.

ANALYSIS:

5.The so called circular seems specious to say the least .The leverage to the Court was provided by its casualness which merely built upon the self goal.

Let us see first ,under what provision of law was this circular issued:

Maharashtra Goods and Services Tax Act, 2017 (Act 43 of 2017)

s.168. The Commissioner may, if he considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the State tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

5.1 This section empowers issue of Circular **only for uniformity in implementation.**

6.Readers may note that this is very different from a parallel provision in the Income Tax Act 1961.To wit,

> **119.** (1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities **as it may deem fit for the proper administration of this Act**, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :
>
> **Provided** that no such orders, instructions or directions shall be issued—
>
> (*a*) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(*b*) so as to interfere with the discretion of the[7] [***] [8][Commissioner (Appeals)] in the exercise of his appellate functions.

S.119 in IT is about administration. 168 of GST Act is merely about implementation.And yet ,circular in question , IMHO,has created an executive overreach and has entered almost into legislative domain.

6.1 More significantly ,the recovery embargo was not challenged at all,notwithstanding that the circular said:as noted by Court too: that

''6. This Trade Circular is clarificatory in nature and cannot be made use of for interpretation of provisions of the law."

Also further clarification power thereon lies with the Commissioner.

6.2 And yet,it was successfully made use of ,by the appellant and provisions of recovery in law were interpreted in its light and now stand modified by directions of the hon'ble Court.Withot any challenge by counsel of Revenue.Its ripple effect is likely in all fiscal laws involving multiple tiers of appeal.

7.An argument can be raised that why appellant is to be penalised if Tribunal IS NOT CONSTITUTED.But look at the remedy.Its robbing Peter to pay Paul.The one recourse is of course WP.Else the Tribunal may be constituted asap.But for revenue to interfere in legislative domain through extra –legislative means is astonishing. And see how it boomeranged.Their own circular now impedes them from recovery.

8.The Court interpretation too,most respectfully ,and with full deference,is disappointing.

1.Bare bones understanding is that a **mere''intent to appeal''shall** halt recovery.So even after losing the first appeal,no money is to be

paid.

2.''Intent'' is almost completely a part of criminal law.And that too substantive law.To transport intent into the procedural law of` a fiscal statute has far reaching implications.

3.Does statement of intent bind the assessee legally?Seems it does not.it only binds one side-REVENUE.A sort of prevarication results.

3.1 In addition ,an unintended consequence is that the rule becomes ''intent to file''then no recovery .The Court held(supra) that '' ***the sequitur is that if such a declaration is filed, recovery proceedings will not be initiated until the prescribed time limit as specified in Clause 4.3 of the Circular''.***

The time limit has reference to making of an application **to appellate tribunal** which will be counted from the date on which President or the State President enters office. The appellate authority while passing order may mention in the preamble that appeal may be made to the appellate tribunal whenever it is constituted within three months from the President or the State President enters office.

But there is no Tribunal.So till such time as there is Tribunal,no recovery can be initiated?Is that the consequence?

And see where is it flowing from?A circular ,which self admittedly is not to be taken as an aid in interpreting law(supra).But not only is it used as an aid but to lay down procedural law and is taken to its logical end by the hon'ble Court.

But isn't it an administrative casus omissus(if I may coin the phrase)being supplied by the Circular and turned into a judicial casus omissus by the Court?This too seems to be flowing.

If we look at recovery provisions of Maharashtra Goods and Services Tax Act, 2017,s 73-84,Chapter XV,such leeways are not provided for.So it has to be read as judge made law.Or a casus omissus supplied therein.

4.This is then ‘’judge made law’’-but Courts in India perceive themselves only in an interpretative role.’’Judge made law’’,sanctified in part of Europe and US is considered an anathema.So?...

5.The argument can be made that recovery is only stayed till appeal filing time which is 90 days per s 112(1)and further extendible by another 90 days per s 112(6).But the omnibus power given to Tribunal in s 111(1) which says that *‘’The Appellate Tribunal* ***shall not,*** *while disposing of any*
proceedings before it or an appeal before it, ***be bound by the procedure laid down in the Code of Civil Procedure, 1908****, but shall be guided by the*
principles of natural justice and subject to the other provisions of this Act
*and the rules made thereunder****, the Appellate Tribunal shall have power to regulate its own procedure.’’***
This ,arguably,gives power to admit appeal even beyond the period stipulated,so effectively ,once an statement of intent is provided ,recovery attempt can be overridden by reference to s 111(1).Improbable,maybe,but possible,yes.
Limitation Act 1963 generally does not apply to fiscal laws .So that too cannot help the cause of revenue. It is **applicable to a suit brought by the plaintiff** and is applicable to Court procedures.So on a hyper technicality ,the revenue seems remedy less.
6.The decision is a far cry from the sterling observations of three judge

bench of the hon'ble SC in case of Dunlop India[154 ITR 172] wherein Justice Reddy famously held that:

''Shri F. S. Nariman, learned counsel, however appeared for the respondent. We do not have the slightest doubt that the orders of the learned single judge as well as a Division Bench are wholly unsustainable and should never have been made. Even assuming that the company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient justification for granting the interim orders as was done by the High Court. There was no question of any balance of convenience being in favour of the respondent-company. The balance of convenience was certainly in favour of the Government of India. ***Governments are not run on mere bank guarantees.*** *We notice that very often some courts act as if furnishing a bank guarantee would meet the ends of justice. No governmental business or for that matter no business of any kind can be run on mere bank guarantees.* ***Liquid cash is necessary for the running of a Government as indeed any other enterprise.*** *We consider that where matters of* ***public revenue*** *are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest. We are very sorry to remark that these considerations have not been borne in mind by the High Court and an interim order of this magnitude had been granted for the mere asking. The appeal is allowed with costs.''*

Conclusion:

9.Nota bene. Governments are not run on mere bank guarantees.Let me attempt a tongue in cheek.A country cannot progress on sundry creditors in its balance sheet.The just tax is not even govt property.It is

public money.There are enough checks and balances in law for unjust recoveries.The appellant gets interest if it wins ultimately.But judicial process takes years.The country won't eat paper for breakfast till then.

10.If judicial success is overwhelmingly in favour of assessee we need to look at the laws and their implementation so that unsustainable demands without even a prima facie case are not raised.Let there be administrative checks and balances and legislative controls to address those issues.And to prevent overenthusiastic circulars.But to halt recovery for years in the name of justice even with interim remedies like WP in place is stretching it a bit too far.Lets be a little more even handed about this.

Anadi Varma