2013 eGLR_HC 10005121

Before the Hon'ble MR AKIL KURESHI, JUSTICE the Hon'ble MS. SONIA GOKANI, JUSTICE

GUJARAT STATE FERTILIZER CO LTD....PETITIONER Vs. UNION OF INDIA THRO SECRETARY AND 4....RESPONDENT

SPECIAL CIVIL APPLICATION No: 1124 of 2013 , Decided On: 11/03/2013

K.S.NANAVATI, KUNAL NANAVATI, NANAVATI ASSOCIATES, KAMAL TRIVEDI, BIJAL CHATRAPATI, SINGHI & GUPTA, A.P.NANAVATI, UDAY JOSHI, TRIVEDI & GUPTA, S.N.THAKKAR, DHAVAL SHAH, HARDIK P. MODH, NIKHIL S. KARIEL, D.K.TRIVEDI, P.S. CHAMPANERI, R.J.OZA, Y.N.RAVANI, M.S.MANISHA, MANISH L. SHAH, GAURANG H.BHATT, V.D.NANAVATI

MR.AKIL KURESHI

1. In this group of petitions, the petitioners have challenged various recovery notices issued by the Customs and Central Excise Department on the basis of the revised guidelines issued by the Central Board of Excise and Customs (CBEC for short) dated 1.1.2013. The petitioners have challenged such circular dated 1.1.13 as also the individual demand notices issued by the respondents. For the purpose of this judgment, basic facts may be noted from Special Civil Application No.1124 of 2013.

Petitioner is a company registered under the Companies Act. The petitioner is engaged in the business of manufacturing of fertilizers and other products. For manufacture of such products, the petitioner purchases inputs without payment of duty. Once the manufacturing process is over, the petitioner would be in a position to ascertain the quantity of input used for manufacture of products which are exempt from payment of duty and which are not. There is ongoing dispute between the petitioner and the Department with respect to Cenvat credit availed by the petitioner in the process. The Department contends that such credit was availed by the petitioner in breach of Cenvat Credit Rules. It is the case of the petitioner that such disputes started way back in the year 1998 and went up the Supreme Court and in the case of Commr. of C.Ex., Vadodara v. Gujarat State Fertilizers & Chem. Ltd., reported in 2008 (229) ELT 9 (SC) , the issue was settled in favour of the petitioner-assessee. Despite such decision, the Department raised fresh demands against the petitioner on the very same grounds relying on a later decision in the case of Gujarat Narmada Vally Co. Ltd. reported in 2009 (240) ELT 661 (SC). Ultimately, the Assessing Officer passed the order in original dated 26.11.2010 confirming the duty demand. The petitioner s appeal came to be rejected by the Tribunal, against which the petitioner has preferred Tax Appeal No.793 of 2012 which is pending before this Court along with stay application, in which the High Court has issued notice to the respondents.

At that stage, the respondents issued the impugned notice dated 17.1.13 to the petitioner and conveyed as under :

With reference to order No.A/1273/WZB/AHD/2012 dated 13.08.2012/29.08.2012 passed by CESTAT, Ahmedabad read with OIO No.22-29/DEMAND/COMMR-1/2010 DATED 26.11.2010 for demand of duty amounting to Rs.34,36,60,312/- which includes duty Rs.343660312/- interest on Rs.31362988/- under section 11AB interest on Rs.312297324/- under section 11AA The CESTAT has upheld the OIO passed by the Commissioner confirming the above mentioned demand.

Now a notice is, hereby given to you under section 11 of Central Excise Act, 1944 read with CBEC Circular No.967/01/2013-CX dated 01.01.2013 (Serial No.11) to pay the duty amount along with interest in Government exchequer within seven days from the receipt of this notice, failing which will initiate action against you under section-11 of Central Excise Act, 1944, such as attachment and sale of your excisable goods to recover the govt. dues.

It is this notice which the petitioner has challenged in this petition along with the CBEC Circular dated 1.1.2013. From the perusal of the notice, it emerges that recovery of the Departmental dues is initiated on the strength of the CBEC circular dated 1.1.2013.

In all the petitions recoveries are founded on the CBEC circular dated 1.1.13. The impugned circular dated 1.1.13 reads as under:

Subject Recovery of confirmed demand during pendency of stay application

-regarding I am directed to bring your attention to the following circulars issued from time to time on the above issue and to state that it has been decided to rescind these circulars with immediate effect.

Sr. No. Date Circular no and File number of CX-6 18-11-88 and 208/31/88 2-3-90 and 208/107/89 21-12-90 and 209/107/89 12-11-92 and 208/59/92 3-8-94 47/47/94 and 208/33/94 2-6-98 396/29/98 and 201/04/98 25-2-2004 788/21/2004 and 208/41/2003

2) Henceforth, recovery proceedings shall be initiated against a confirmed demand in terms of the following order -

Sr. No. Appellate Authority Situation Directions regarding recovery NIL No appeal filed against a confirmatory order in original against which appeal lies with Commissioner(Appeals) Recovery to be initiated after expiry of statutory period of 60 days for filing appeal Commissioner (Appeals) Appeal filed without stay application against a confirmatory order in original Recovery to be initiated after such an appeal has been filed, without waiting for the statutory 60 days period to be exhausted.

Commissioner (Appeals) Appeal filed with a stay application against an order in original Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any specified, whichever is earlier.

NIL No appeal filed against an Order in Original issued by the Commissioner.

Recovery to be initiated after expiry of statutory period of 90 days for filing appeal from the date of communication of order.

CESTAT Appeal filed without stay application against an Order in Original issued by the Commissioner.

Recovery to be initiated on filing of such an appeal, without waiting for the statutory 90 days period to be exhausted.

CESTAT Appeal filed with a stay application against an Order in Original issued by the Commissioner Recovery to be initiated 30 days after the filing of appeal. If no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any, whichever is earlier.

NIL No appeal filed against an Order in Appeal issued by a Commissioner (Appeals) confirming the demand for the first time Recovery to be initiated after expiry of statutory period of 90 days for filing appeal from the date of communication of order.

CESTAT Appeal filed without stay application against an Order in Appeal confirming the demand for the first time Recovery to be initiated on filing of such an appeal in the CESTAT, without waiting for the statutory 90 days period to be exhausted.

CESTAT Appeal filed with a stay application against an Order in Appeal confirming the demand for the first time Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any, whichever is earlier.

CESTAT All the cases where Commissioner (Appeals) confirms demand in the Order in Original Recovery to be initiated immediately on this issue of Order in Appeal.

High Court or Supreme Court Tribunal or High Court confirms the demand.

Recovery to be initiated immediately on the issue of order by the Tribunal or the High Court, if no stay is in operation.

3) It may be noted that a confirmed demand remains an order in operation till it is stayed. Mere preferment of appeal itself does not operate as a stay. Hon ble Supreme Court in case of Collector of Customs, Bombay Vs. Krishna Sales(P) Ltd. [1994 (73)E.L.T. 519(SC)] has observed that As is well known, mere filing of an Appeal does not operate as a stay or suspension of the Order appealed against . Accordingly, the above directions are hereby issued for initiating recovery of the confirmed demands.

4) Instructions in CBEC s Excise Manual of Supplementary instructions on the above subject or any other circular, instruction or letter contrary to this circular stand amended accordingly.

A perusal of the impugned circular would disclose that in supersession of various previous circulars, the CBEC laid down fresh guidelines for initiation of recovery proceedings against confirmed demand of the departmental dues against the assessee. Para 1 of the circular, specifically rescinds as many as 7 previous circulars of the Board on the issue. Para 4 of the impugned circular further provides that instructions contained in Excise Manual of Supplementary instructions on the subject or any other circular, instruction or letter contrary to the said circular would stand amended accordingly. The revised guidelines contained in the said circular envisage initiation of recovery proceedings in different situations at different points of time. We would advert to these different eventualities at a later stage. At this stage, we may notice that in addition to questioning the very powers of the Board to issue such guidelines, the petitioners have alternatively also questioned the instructions contained in clauses 3, 6, 9, 10 and 11 of para 2 of the circular. These clauses essentially put a burden on the assessee to obtain a stay order from higher forum and envisage initiation of recovery proceedings either after expiry of the period provided in such guidelines or forthwith, as the case may be. Central contention of the petitioners is that an assessee can beyond filing an appeal with stay application and pursuing such appeal without any laxity, has no control when such appeal or stay application may be heard by the Departmental Appellate Authority, the Tribunal or the Court and to insist that in the meantime the demand which has not yet achieved finality be recovered would be grossly unjust.

Appearing for the petitioners, leading the challenge, learned senior counsel Shri K.S.Nanavati, raised following contentions:

That the CBEC did not have power to issue such guidelines. That section 37B of the Central Excise Act, 1944, did not vest such powers in the Board. He also argued that no such powers can be traced in rule 31 of the Central Excise Rules, 2002.

With respect to various situations provided in the impugned circular, the counsel attacked those contained in clauses 3, 6, 9, 10 and 11 of para 2. It was contended that the demand which is not yet finalized cannot be recovered. When appeal is pending along with stay application, to permit the Departmental Authorities to proceed with recovery proceedings would be wholly unjust, arbitrary and therefore violative of Article 14 of the Constitution.

It was next contended that set-up of appellate Commissioner as well as the Tribunal is maintained and provided by the Government. In numerous cases, appeals and stay applications are not heard by such fora for non-availability of members. In such a situation, an assessee would be rendered defenceless if on one hand his appeal or stay application is not heard and on the other hand, the Department continues with the recovery proceedings.

It was contended that vesting any such power in the Departmental authorities to recover the dues when the appellate forum is seized of the appeal proceedings would amount to interfering with the exercise of judicial discretion of such appellate authority. Drawing our attention to the relevant statutory provisions in the Central Excise Act, 1944 and the Customs Act, 1962, the counsel would contend that the appellate authority and the Tribunal exercise discretionary powers of waiving pre-deposit, if grounds are so made out. Once the recovery is effected, question of waiver of pre-deposit becomes redundant. When, therefore, once the appellate authority is seized of the appeal along with the request for waiver of pre-deposit, the Departmental authorities cannot recover such dues.

7. Adopting such contentions of the counsel, learned advocate Shri P.M.Dave, further contended that earlier instructions of the CBEC took into consideration various aspects of the matter and provided a balanced formula for recovery after permitting the assessee to avail remedy of appeals. Such procedure stood the test of time. It was, therefore, not necessary to make drastic changes in such procedure. He contended that once appeal is filed by an assessee against any order confirming the duty demand, such duty would cease to be a confirmed demand and any recovery thereof would not be permissible.

7.1 In support of his contentions, counsel relied on the following decisions :

(i) In the case of Mark Auto Industries Ltd. Union of India, 1998 (102) ELT 542 (Del.) wherein a Division Bench of the Delhi High Court observed as under :

6. It is pointed out by the learned counsel for the petitioner that at the end of Para 2, the affidavit does not set out the decision of the respondent in the matter of recovery pending hearing on the application for stay and pre-deposit before Commissioner (Appeals) where the quantum involved is above 5 lacs of rupees. We see no reason why a different standard can be adopted in those cases. The policy decision taken by the respondents not to effect recovery till date of decision on application for stay cum pre-deposit under Section 35F of Central Excise & Salt Act or Section 129E of Customs Act should be applicable to such cases also.

The said decision, however, was rendered in the backdrop of the then prevailing instructions which distinguished between appeals involving quantum of more than Rs.5 lacs and less than Rs.5 lacs. Such decision, in our opinion, therefore would not have any bearing on the present controversy.

In the case of Charak Pharmaceuticals v. Union of India, 2004 (163) ELT 300 (Kar.) wherein a Division Bench of the Karnataka High Court stated thus:

2. We have heard learned counsel for the appellant and the learned counsel for the respondents and in our judgment, it is not permissible for the Assistant Commissioner to commence the recovery proceedings even while the stay application filed by the appellant is pending before respondent No.2 and is not disposed of. The appellate authority cannot decline to consider the stay application and thereby permitting respondent No.3 to proceed with the enforcement of the order of adjudication. It is, therefore, necessary to direct that the respondent No.3 shall not proceed with the recovery in pursuance of the adjudication order as long as respondent No.2 has not disposed of the stay application.

In the case of Thermo Plastic Industries v. Union of India, 1991 (51) ELT 629 (Bom.) wherein learned Single Judge of the Bombay High Court while examining the validity of recovery proceedings initiated pending appeal and stay application, on facts of the case, proceeded to grant waiver of pre-deposit finding that the case was fit for such consideration. This decision, therefore, was rendered in the special facts of the case.

In the case of Vidhya Ply & Board Pvt. Ltd. v. Union of India, 1992 (61) ELT 231 (All.) wherein a Division Bench of the Allahabad High Court held and observed as under:

4. Now section 35F of the Act under certain circumstances makes it mandatory on the person desirous of appealing against a decision or order under the Act to deposit with the adjudicating authority the duty demanded or penalty levied by the decision appealed against. Under the proviso the appellate authority is conferred with the discretion to dispense with such deposit on such condition as it may deem fit to impose, where the appellate authority is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such a person. Thus a statutory obligation is cast on the appellate authority where its powers under the proviso are invoked by the person appealing to it, to make such order as it may think fit as regards the payment of duty or penalty which is the subject matter of appeal before it. The inaction on the part of the appellate authority to pass an appropriate order on the application under the proviso, filed before it and in the meanwhile permitting the recovery of disputed dues would amount to a refusal to exercise the discretion when called upon and would frustrate the very purpose and object with which the powers were conferred on the appellate authority to dispense the making of deposit of the disputed dues in an appropriate case. To put it differently, the inaction on the part of the appellate authority in such a situation would not only defeat the spirit of proviso bu twill also result in deprivation of as valuable right to which an appellant is entitled under the proviso to section 35F aforesaid. This certainly cannot be permitted to happen. (underline supplied by us).

In the case of Acquaguard Plastics & Polymers Pvt. Ltd. v. Union of India, 2000 (121) ELT 29 (Guj) wherein a Division Bench of this Court in the peculiar facts of the case, gave certain directions in which it was observed as under:

3. Learned advocate Mr.Dave appearing for the petitioner has, seriously criticized the approach of the respondent authority in employing coercive recovery proceedings even when the stay application pending appeal was yet not heard and that this Court in many such cases has stayed the coercive measures until the stay application is decided. It was, therefore, stated that the petitioner would like to move the appropriate authority for release of the goods attached on payment of duties. In view of the peculiar facts and the fact that the goods are required to be used for irrigation and allied programmes in drought affected areas, the authority concerned shall decide such application within a period of one week from the date of receipt of the application.

It can thus be seen that the Court gave certain directions in peculiar facts of the case.

(vi) Validity of the circular came up for consideration before the Bombay High Court in the case of Larsen & Toubro Ltd v. Union of India, 2013 (280) ELT 481. Para 13 of the said judgment reads as under:

13. The decision of the Supreme Court and the situation which led to the decisions of the Delhi High Court and of this Court take due notice of the fact that the delay in the disposal of an appeal by an assessee or for that matter the delay in the disposal of a stay application may take place for reasons which lie outside the control of the assessee. Where the failure of the Appellate Authority

to dispose of the appeal or the application for stay arises without any default on the part of the assessee, and without the assessee having resorted to any dilatory tactics, there would , in our view, be no reason or justification to penalize the assessee by recovering the demand in the meantime. Undoubtedly, where the assessee has been responsible for the delay in the disposal of the stay application, such an assessee cannot be heard to complain if the Revenue were to initiate steps for recovery. But the vice of the circular of the Board dated 1 January 2013 is that it mandates that steps for recovery must be initiated thirty days after the filing of the appeal if no stay is granted. Counsel appearing on behalf of the Revenue submits that the Board has directed that a period of thirty days should be allowed to lapse after the filing of the appeal allowing the assessee time to move the Appellate Authority for the disposal of the stay application. The reason why the submission cannot be accepted is because, in a situation where the Commissioner (Appeals) or as the case may be, the CESTAT are unable to decide the application for stay within a period of thirty days of the filing of the appeal, it would be completely arbitrary to take recourse to coercive proceedings for the recovery of the demand until the application for stay is disposed of. Administrative reasons including the lack of adequate infrastructure, the unavailability of the officer concerned before whom the stay application has been filed, the absence of a Bench before the CESTAT for the decision of an application for stay or the sheer volume of work are some of the causes due to which applications for stay remain pending. In such a situation, where an assessee has done everything within his control by moving an application for stay and which remains pending because of the inability of the Commissioner (Appeals) or the CESTAT to dispose of the application within thirty days, it would, to our mind, be a travesty of justice if recovery proceedings are allowed to be initiated in the meantime. The protection of the revenue has to be necessarily balanced with fairness to the assessee. That was why, even though a specific statutory provision came to be introduced by Parliament in Section 35C(2A) to the effect that an order of stay would stand vacated where the appeal before the Tribunal was not disposed within 180 days, the Supreme Court held that this would not apply to a situation where the appeal had remained pending for reasons not attributable to the assessee.

8. On the other hand, learned counsel Shri RJ Oza and Shri YN Ravani for the Department opposed the petitions raising following contentions :

The order passed by the competent departmental authority or the court becomes immediately executable unless stayed by higher forum. Reliance in this respect was placed on a decision of the Supreme Court in the case of Collector of Customs v. Krishna Sales (P) Ltd., 1994 (73) ELT 519 (SC).

The said decision was, however, rendered in the background of the facts that the assessee had succeeded before the appellate Tribunal on certain issue whether the machinery imported was Bevel Gear Generator or Bevel Gear Planer. Despite such success, the decision of the Tribunal was not implemented on the ground that the Customs Authorities had decided to go in appeal against the decision of the Tribunal. It was in this background, the Supreme Court had observed that if the authorities were of the opinion that goods were not to be released pending the appeal, the course open 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, and without obtaining such order, they cannot refuse to

implement the order under appeal. On this background, it was observed that mere filing of appeal does not operate as a stay or suspension of the order appealed against.

Once a duty is confirmed by the adjudicating authority, appeal would be competent only if the entire amount with penalty and interest is deposited with the Revenue. Only if the appellate forum waives pre-deposit, the appeal can be pursued without satisfying such demand. It was contended that what is required for waiver of pre-deposit is undue hardship which has been explained by the Supreme Court in various decisions including in the case of Benera Valves Ltd v. Commissioner of Central Excise, 2006 (204) ELT 513 (SC).

Drawing our attention to various provisions contained in Central Excise and Customs Act, it was contended that there is clear manifestation of legislative intent that even pending appeal proceedings, Revenue cannot be precluded from carrying out recovery of duty.

It was also contended that the procedure provided in the impugned circular dated 1.1.13 is reasonable and balances between safeguarding the interest of the assessees permitting them reasonable time to prefer appeals and obtain stay from appellate forum and at the same time safeguards the interest of the Revenue. It was contended that the revised guidelines were issued to prevent revenue pilferage where in some cases, the assessees would be in the guise of availing appellate remedy transfer immovable and movable properties making recovery of the Government dues impossible.

9. In support of such contentions, counsel relied on the following decisions :

(i) In the case of Omega Cables Ltd v. Deputy Commissioner, Chennai-II, 2008 (11) STR 100 (Mad.) wherein learned Single Judge of the Madras High Court refused to stay recovery on the ground that against the order confirming the duty, no stay was operating.
(ii) In the case of Areva T & D India Ltd. v. Asstt. Commr. Of C.Ex., Chennai, 2011 (271) ELT 21 (Mad.) wherein also learned Single Judge of the Madras High Court recorded that when the stay application was listed before the Tribunal, the Department was ready to contest the case, but the counsel for the petitioner sought long adjournment. It was on this background that stay against recovery pending appeal was turned down.
(iii) In the case of J & J Plast v. Union of India, 2010 (258) ELT 341 (Guj.) wherein request of the petitioner therein to stay recovery on the strength of the circular of the Board was turned down observing that it was not possible to read a sentence of the circular out of context.

(iv) Decision in the case of State of A.P. v. McDowell & Co. (1996) 3 SCC 709 was cited to canvass that the guidelines contained in the impugned circular are not arbitrary. We may, however, notice that the observations made by the Supreme Court in the said case were in the background of challenge to the vires of the statutory provisions. It was in this background examined as to what

extent the ground of arbitrariness can be the basis for striking down a statutory provision as being violation of Article 14 of the Constitution. In the present case, however, we are not concerned with the vires of any statute.

(v) Decision in the case of Khoday Distilleries Ltd v. State of Karnataka, (1996) 10 SCC 304 was pressed in service for the same purpose. Here also, we notice that the decision was rendered by the Supreme Court in the background of challenge to a statutory rule as being violative of Article l4 of the Constitution on the ground of arbitrariness.

10. We may record that in the context of challenge to the circular, the petitioners have, in addition to joining the Departmental authorities, also joined CBEC. In number of matters, CBEC was duly served, but there was no representation on behalf of the Board. We have, looking to the fact that number of petitions have cropped up only on the issue of recoveries initiated on the basis of the impugned circular, heard the learned counsel for the parties for final disposal of the petition at this stage itself.

11. We may first deal with the challenge to the very power of the CBEC to issue the circular. Section 37B of the Central Excise Act, 1944 pertains to instructions to the Central Excise Officers and reads as under:

37-B.

Instructions to Central Excise Officers The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board :

Provided that no such orders, instructions or directions shall be issued

a) so as to require any Central Excise Officer 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 Commissioner of Central Excise (Appeals) in the exercise of his appellate functions.

Likewise, section 151A of the Customs Act, 1962 pertains to instructions to the officers of Customs and reads as under:

151A.

Instructions to officers of customs -- The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon or for the implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or procedure for import or export of goods issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all the 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 such officer or customs 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 Collector of Customs (Appeals) in the exercise of his appellate functions.

Insofar as section 151A of the Customs Act is concerned, it is worded widely and includes power of the Board to issue instructions, orders and directions for the purpose of uniformity in classification of goods or with respect to levy of duty thereon or for the implementation of any other provisions of the Act or any other law for the time being in force insofar as they relate to any prohibition, restriction or procedure for import or exports of goods. The power of the Board, therefore, to issue any orders, instructions, or directions for the implementation of the provisions of the Act if the Board considers it necessary and expedient to do so cannot be questioned. Recovery of customs duty with or without interest and penalty would certainly arise out of the provisions made in the Customs Act, 1962 and the Rules made thereunder. For example, section 142 of the Customs Act pertains to recovery of sums to the Government. The Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules 1995 provides for the procedure for such recoveries. In that view of the matter, power of the Board to issue such instructions for recovery of customs duty would flow from section 151A of the Customs Act, 1962.

12. Section 37B of the Central Excise Act, 1944, however, is not so widely worded. It empowers the Board, if it considers necessary and expedient to do so for the purpose of uniformity in classification of excisable goods or with respect to levy of duty of excise on such goods, to issue orders, instructions and directions to the Central Excise Officers as deemed fit. The powers of the Board, therefore, can be exercised for the purpose of uniformity in classification of goods or with respect to levy of duty of excise on such goods. When read in conjunction, both the elements touching the powers of the Board would have a bearing on the question of classification of the goods or with the levy of duty of excise on such goods. It is highly questionable whether recovery of excise duty along with interest and penalty can form part of matter of any instructions the Board may issue in exercise of powers under section 37B of the Central Excise Act. Had this been the only source of power, we would have examined the question further and given finality to the issue at our stage. We, however, notice that rule 31 of the Central Excise Rules, 2002 also has a significant bearing on the question of power of the Board. The said rule reads as under:

31. Power to issue supplementary instructions (1) The Board or the Chief Commissioner or the Commissioner, may issue written instructions providing for any incidental or supplemental matters, consistent with the provisions of the Act and these rules.

13. Section 37 of the Central Excise Act, 1944 is a rule making power of the Government. Sub-section (1) of section 37 provides that the Central Government may make rules to carry into effect the purposes of the Act. Sub-section (2) of section 37 provides that in particular and without prejudice to the generality of the foregoing power such rules may provide for various issues contained in clauses (i) to (xxviii) of the said sub-section. Clause (xx) which is relevant for our purpose reads as under:

(xx) authorise the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) or Commissioners of Central Excise appointed for the purpose of Act to provide, by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section;

In exercise of such rule making powers, the Central Excise Rules 2002 has been framed. Rule 31 thereof empowers the Board to issue written instructions providing for any incidental or supplementary matters consistent with the provisions of the Act and the Rules. Thus, under rule 31 of the Central Excise Rules, 2002, the Board has sufficiently wide powers for issuing instructions which may provide for any incidental or supplementary matters, only limiting condition being that such instruction must be consistent with the provisions of the Act and the Central Excise Rules, 2002. Issuing guidelines for the purpose of uniformity in recovery procedure would certainly fall within incidental or supplementary matters. In that view of the matter, we cannot accept the contention of the petitioners that the Board lacked power to issue the instructions in question.

14. This brings us to the validity of different instructions contained in the impugned circular. In this context, we may recall that the petitioners did not take any objection with respect to the conditions contained in clauses 1, 2, 4, 5, 7 and 8. They however, opposed the legality of the instructions contained in clauses 3, 6, 9, 10 and 11 of para 2 of the said circular.

15. Various instructions contained in said para 2 can be broadly clubbed in three different segments. The first category of cases would be where no appeal has been preferred against the order in original till the expiry of the period of limitation prescribed or where such appeal has been preferred, but no stay application has been filed. These cases would be covered under clauses 1, 2, 4, 5, 7 and

8. The second category of cases would be where an appeal is envisaged before the appellate Commissioner or the Tribunal, such appeal is filed within the period of limitation along with stay application, but no decision is rendered on such stay application. These cases would be covered under clauses 3, 6, 9 and 10 of the impugned circular. The third category of cases calling under clause 11 would be where the Tribunal has rendered its decision and further appeal would be available either before the High Court or the Supreme Court or where the High Court has rendered its decision.

16. We may examine the validity of the circular in the background of different situations noted above. Insofar as the first category of cases is concerned, there is hardly any debate possible. In cases where despite availability of appellate remedy, if the assessee does not file appeal within the period of limitation prescribed or if any such appeal is filed but is not accompanied by any application for stay, it is provided that in such a situation, recovery would be initiated either at the end of the statutory period of limitation or without waiting for such period if no stay is sought. Obviously, an assesee who either does not prefer an appeal or who though prefers an appeal, does not ask for stay from the appellate authority can hardly avoid recovery of the confirmed demand.

17. The real question is with respect to the reasonableness of the guidelines contained in clauses 3, 6, 9 and 10 of the circular. We may take detailed note of these provisions.

18. Clause 3 pertains to a situation where the adjudicating authority has confirmed certain duty demand first appeal is available and filed along with stay application before the Commissioner (Appeals). The guidelines provide that in such a case, recovery shall be initiated after 30 days of the filing of the appeal, if no stay is granted or after disposal of the stay application whichever is earlier. It is this clause whichever is earlier which causes serious concern. Likewise, clause 6 governs a situation where an appeal lies before the Tribunal against an order in original issued by the Commissioner. Such appeal is filed along with stay application. Here also, it is provided that recovery should be initiated after 30 days of filing of the appeal, if no stay is granted or after disposal of the stay petition, whichever is earlier. Clause 9 covers a situation where a second appeal against an order of the appellate Commissioner confirming the demand for the first time is

filed. In essence, therefore, the appeal before the Tribunal is a second appeal. Insofar as the assessee is concerned, it happens to be a first challenge to the appellate order which would have reversed the order of the adjudicating authority. In such a situation also, it is provided that recovery would be initiated after 30 days of filing of appeal or disposal of the stay application whichever is earlier. Clause 10 pertains to a second appeal before the Tribunal at the instance of the assessee which appeal is directed against the order of the appellate Commissioner confirming the order of the adjudicating authority. In such a situation, it is provided that recovery should be initiated immediately on issue of the order by the appellate authority.

19. We may club clauses 3, 6 and 9 for common consideration and treat clause 10 separately. In these clauses, two things are common. Firstly, the appeal that the assessee files either before the Commissioner or the Tribunal is the first appeal at the hands of the assessee though, in essence, it may be a second appeal before the Tribunal. Second commonality is that the circular itself recognizes that in such a situation, recovery should not be initiated till filing of appeal (of course subject to the outer limit of the limitation prescribed) and for a further period of 30 days enabling the assessee to obtain stay from the appellate forum. The question is, should recovery be initiated in all cases if within 30 days of the period so prescribed, the assessee fails to obtain stay from the appellate forum? We must recognize that there can be large number of reasons why even after the assessee prefers an appeal within the period of limitation along with stay application, it is not possible to dispose of such application within 30 days of filing. Such reasons may be attributable to the assessee or the Department or may be completely independent reasons. Of course, if it is found that the assessee has delayed the disposal of stay application, and has sought unreasonable adjournments leading to the appellate forum not being able to decide the application for stay, it would be open for the Revenue, in an appropriate case, to seek recovery of the confirmed demand even pending appeal and stay application. However, surely, if the non-disposal of the stay application has nothing to do with the conduct of the assessee, Revenue cannot contend that recovery must be permitted in such a situation also. Accepting any such contention of the Revenue would lead to drastic and sometimes absurd situation. For example, before the appellate forum, if the Revenue is unable to present full facts and is therefore compelled to seek adjournments repeatedly and thereby making it impossible for the appellant forum to dispose of the stay application of the assessee, could the Revenue contend that it can take advantage of its own wrong and go ahead with the recovery of demand though the appellate forum is seized of the appeal and stay application? Surely, the answer has to be in the negative.

20. We may also presently address the various reasons which may be completely beyond the control of the assessee as well as the Revenue which may lead to non-disposal of the stay application. In fact, in majority of the cases which have arisen in these petitions, such reasons can be traced. It is not unknown that because of paucity of time either the appellate Commissioners or the Tribunal are unable to dispose of stay applications within a short time. To expect such appellate forum to invariably to do so within 30 days of filing of such proceedings would, under the prevailing conditions, be quite impossible. Before us, large number of cases have come in the present group for recovery where the petitioners have preferred their appeals either before the appellate authority or the Tribunal. Such appeals are filed within the period of limitation. Such appeals are accompanied by stay applications. Such stay applications have not been taken up for hearing by the Commissioner or the Tribunal simply because of want of time. In some cases, the Commissioner has granted date of first hearing after several months of the filing of the appeal and the stay applications. On many such dates, either due to non-availability of the Commissioner or non-

availability of time with the Commissioner, such applications could not be heard. Similar situation obtains before the Tribunal also. In large number of cases, the Tribunal simply could not grant first date of hearing within 30 days of filing of the appeal with the stay application. We are informed that ordinarily, the Tribunal fixes the date of hearing of stay application which normally would not be within 30 days of filing. If the assessee has some urgency, he would have to move an application for taking up stay application on early basis. Such application when granted the Tribunal would advance date of hearing of the stay application. In number of cases, quite apart from the non-availability of time with the Tribunal due to heavy pressure of work, we are informed that the Tribunal was not fully functional as only one member was posted. In certain cases, due to personal reasons of the concerned member, the appeals were ordered to be posted before some other Bench. Since no second Bench would be available, necessarily, such appeals would have to be transferred to some other bench of the Tribunal outside the State.

21. We do not mean to list exhaustively all the reasons which would be simply beyond the control of the assessee due to which despite the best efforts, stay application filed along appeal well within the period of limitation would not be disposed of within 30 days of filing. In all such cases, if the Revenue were to be permitted to continue with coercive recovery, in our opinion, the same would lead to grossly unjust situation and would not be conducive to the interest of justice.

22. Section 35 of the Central Excise Act pertains to appeals to the Commissioner (Appeals). It permits any person aggrieved by an order passed by the adjudicating authority to prefer appeal to the appellate commissioner within 60 days from the date of communication of such decision to him. Section 35B of the Central Excise Act, 1944 pertains to appeal to the appellate Tribunal. Sub-section (1) thereof essentially enables a person aggrieved by an order of the Commissioner of Central Excise or the appellate Commissioner to prefer appeal before the Tribunal.

23. Section 35F of the Central Excise Act, 1944 pertains to pre-deposit pending an appeal of duty demanded or penalty levied. It provides, inter alia, that where any appeal is filed against the decision or a order which relates to any duty demanded in respect of goods which are not under the control of the Central Excise authorities or penalty levied under the Central Excise Act, the person desirous of appealing against such a decision pending appeal shall deposit with the adjudicating authority the duty demanded or the penalty levied. Proviso to section 35F of the Act provides that the Commissioner (Appeals) or the Tribunal is of the opinion that deposit of duty or penalty would cause undue hardship to such a person, may dispense with such deposit subject to such conditions as may be deemed fit so as to safeguard the interest of the Revenue. Further proviso to section 35F provides that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit, the Commissioner (Appeals) shall where it is possible to do so, decide such application within 30 days from the date of its filing. Similar provisions have also been made under the Customs Act, 1962 pertaining to pre-deposit pending appeal either before the Commissioner (Appeals) or the Tribunal and its waiver at the discretion of the appellate forum on the ground of undue hardship. Provisions of Section 129E of the Customs Act, 1962 are peri materia with the provisions of section 35F of the Central Excise Act, 1944.

24. From the above provisions, it can be seen that pending appeal either before the Commissioner (Appeals) or the Tribunal, ordinarily an assessee would have to deposit the entire amount of duty demand or even penalty. The appellate forum, however, would have discretion to waive such pre-deposit either partially or fully. Such waiver would be passed on consideration of undue hardship to the assessee, as interpreted by various judicial pronouncements. Significantly, dispensation of pre-deposit may be subject to such conditions as the appellate forum may impose so as to safeguard the interest of the Revenue.

25. While issuing guidelines by the impugned circular, the Board has superceded the previous circulars on the issue. Such guidelines being issued from time to time and now holding the field by virtue of the impugned circular provide uniformity and predictability as also in most cases permit reasonable time to the assessee to avail of the remedy of appeal. These guidelines, therefore, supply to a large degree uniformity and predictability in recoveries of confirmed demands. In absence of such guidelines, different recovery authorities may adopt different yardstick and standards. While judging the guidelines in the backdrop of these considerations, we cannot lose sight of two important aspects. Firstly, that as section 35F of the Central Excise Act, 1944 or section 129E of the Customs Act, 1962 provide for partial or complete waiver of pre-deposit requirement which is within the sole domain of the discretionary jurisdiction of the appellate forum, be it Commissioner (Appeals) or the Tribunal. It is that authority alone which, on the basis of relevant consideration of undue hardship to the assessee and with a view to safeguard the interest of the Revenue may either refuse totally or grant fully or partially waiver of pre-deposit. Once, therefore, an appeal is presented before such a forum, within the period of limitation prescribed along with stay application, even the CBEC circular recognizes that reasonable time should be allowed to the assessee to pursue such stay application. In that background, once the CBEC recognizes such leverage to an assessee, to abandon the course mid-way and to insist that irrespective of the reasons why such application could not be concluded, recovery must be commenced 30 days after filing of such an application and be completed cannot be countenanced. In our opinion, such procedure would be wholly unreasonable and arbitrary for the following reasons:

That the CBEC itself having recognized that an assessee should be provided with reasonable opportunity to question an adverse decision before going ahead with the recovery thereof cannot thereafter put an unreasonable condition that the entire onus would be on the assessee to obtain stay from the higher forum or the Tribunal within 30 days from the filing of the application.

The instruction completely ignores the possibility that such application may not be heard and disposed of within such short time permitted for variety of reasons which may not be attributable to the assessee.

The instruction ignores a situation where the stay application may not be heard due to the reasons entirely attributable to the Revenue. In such a situation to permit recovery would be allowing the Revenue to take advantage of its own wrong.

The instruction also fails to recognize the hard realities. As already noted, in majority of the cases which have traveled before this Court in this group of petitions, the reasons for non-disposal of stay applications, before the appellate Commissioner or the Tribunal are that the appellate forum was either not available or because of heavy workload was unable to take up hearing of such application within 30 days.

26. In our opinion, therefore, condition Nos.3, 6 and 9, if read rigidly, fail to clear the test of reasonableness and thus fall foul to Article 14 of the Constitution. We, therefore, prefer to read down such conditions and recognize that there would be situations where for no fault of the assessee a stay application filed before the appellate forum may not be disposed of within 30 days of its filing. In such a situation, the said conditions would not require the recovery officer to initiate recovery proceedings. However, if after filing of stay application, it is found that the assessee is prolonging the hearing thereof or for some such similar reasons attributable to the assessee stay application is lingering, surely it would be open for the Revenue to proceed with the recovery irrespective of pendency of appeal and the stay application. In this context we are unable to uphold the contention of Shri Nanavati that once appeal and stay application are filed, any attempt on part of the authorities to recover the duty would be encroachment on the power of the appellate body. Mere filing of the proceedings cannot be equated with stay and if such proceedings are not pursued by the assessee with seriousness, he cannot claim immunity from recovery. In the conclusion, condition Nos.3, 6 and 9 are read down as to requiring the recovery officer to initiate recovery proceedings pending appeal and stay application only when it is found that the application remained pending beyond 30 days for the reasons of delay which can be attributed to the assessee. This would have to be necessarily judged by the Revenue authorities before initiating the proceedings. While doing so, if the authorities required any details from the assessee, such as the date of filing of the appeal and the stay application, the stage at which such proceedings are pending and the reasons for non-disposal of such proceedings, the assessees in their own interest would be duty bound to supply the same.

27. Condition No.10, however, stands on a different footing. It envisages a second appeal before the Tribunal at the hands of the assessee. Such a situation would arise when a demand is confirmed by the adjudicating authority and the assessee s appeal is also rejected by the appellate Commissioner. Having lost at two stages, and when the assessee is in second appeal before the Tribunal, CBEC circular distinguishes such a case from other similar appeals before the Tribunal covered under condition Nos.3, 6 and 9. We also do not find that such distinction is not reasonable. Therefore, the requirement that in such a case the Revenue must wait for the full period of limitation to see whether the assessee files the appeal with stay application, is not provided, in such a situation, we do not think it is drastically incorrect or improper. However, to provide that recovery should commence immediately after the order is passed by the appellate Commissioner, in our view, would not be permissible. We say so for the following reasons:

Appeal in such a situation is before the Tribunal. We cannot shut our eyes to the hard realities that the Tribunal as a machinery, may not always be available to an assessee to knock at the doors of justice at a shortest possible notice. It was brought to the notice that against the sanctioned strength of four members of the Tribunal, the Tribunal has never functioned at its full strength. Barring a short period, when three members were posted, the Tribunal has mostly functioned with two

members and at times with only one member. We are informed that in the recent past, only one member was appointed and the Division Bench of the Tribunal was therefore not functional. An assessee who requires an urgent consideration of appeal and stay application in such a situation would be rendered without any protection whatsoever. In a given situation, if one of the members of the functional Bench for his personal reasons is unable to hear the appeal of a particular assessee, the entire proceedings would have to be transferred outside the State. Such being the vagaries of the tribunalization of justice, we cannot equate such Tribunals with the functioning of a court of law. For example, it would be unimaginable that a litigant would be left without hearing for any period of time in the High Court. If extraordinary urgency is shown, a litigant can knock at the doors of justice at midnight. If a particular judge or a Bench is not available, the pre-decided guidelines issued by the Chief Justice from time to time always provide an alternative forum of hearing before another Judge or Bench. If a particular Judge cannot take up a matter, it is also decided who else in his substitution will take up such a petition. In that view of the matter, to provide that as soon as the order is passed by the Commissioner confirming the duty demand made by the adjudicating authority, the order should be executed without any leverage would give rise to large number of cases which would travel to the High Court at such an interim stage. We are not inclined to accept a situation where such unnecessary litigation would arise.

28. Culmination of the discussion in the preceding paragraph would be that condition No.10 insofar as it provides for immediate recovery as soon as the order is passed in appeal also needs to be read down as to permitting reasonable time to the assessee to seek protection from the appellate forum. This period of reasonable time must be judged in the facts of each case and cannot be equated with full period of limitation.

29. Condition No.11, however, stands on a different footing. It covers a case where decision is rendered by the Tribunal or the High Court and further appeal is available either before the High Court or the Supreme Court. In such a situation, the circular envisages immediate recovery if no stay is in operation. We are inclined to uphold this condition for the following reasons:

Situation covered in condition No.11 would arise only once either the Tribunal in first or second appeal or the High Court in second or third appeal has decided against the assessee. The order of the Tribunal would be appealable either before the High Court or the Supreme Court depending on the subject matter of the issue under appeal. Such appeal would be available only on a substantial question of law, the Tribunal being the final fact finding authority. If the High Court has already decided such an appeal, there would be no further statutory appeal before the Supreme Court, but only special leave petition under Article 136 of the Constitution which also would be an extraordinary remedy. In such a situation, to expect the Revenue to stay its hands off either for the full period of limitation and then after watching the outcome of the stay application, in our opinion, would be an unreasonable expectation. Such appeals would be filed before the High Court which, as we noticed, would be able to grant immediate hearing if there is urgency. Additionally, such appeal is available only on limited grounds, once all questions of facts are thrashed out at the level of the Tribunal. The period of limitation prescribed for filing such appeal is 180 days. The Central Excise Act or the Customs Act nowhere envisages that for the entire period of full 180 days of limitation, even at the stage of third appellate stage, the Revenue must stay its hand off. We, therefore, uphold condition No.11 without any modification.

30. Before adverting to individual cases, we may touch on a few peripheral aspects. First, despite our observations and conclusions with respect to condition Nos.3, 6, 9 and 10 noted above, we cannot lose sight of the fact that protecting interest of the Revenue is also of equal importance. It would, therefore, be highly desirable that the appellate Commissioner and the Tribunal bestow their utmost consideration to the application for pre-deposit waiver and dispose of them as quickly as possible. While considering the question of waiver of pre-deposit, it is within the jurisdiction of the appellate forum to impose such conditions as deemed fit to safeguard the interest of the Revenue. While, therefore, granting any stay or waiving fully or partly any pre-deposit, it is open and in fact incumbent upon such appellate authority to take into account the Revenue s concern that some condition be imposed on the assessee so that the demand if confirmed in future, recovery does not become illusory. Such consideration can also weigh with the appellate forum at an ad-interim stage. In other words, even pending the final disposal of the stay application, it would be within the jurisdiction of the appellate forum to impose some condition on the assessee to safeguard the interest of the Revenue. This, in our opinion, would take care of the anxiety of the Revenue that under the protection of the appellate authorities, ultimately, when the duty demand is confirmed, by virtue of the developments during the pendency of such proceedings, actual recovery becomes impossible. We may remind the appellate fora of the observations made by the Division Bench of this Court in the case of D.C.W.Limited v. Commissioner (Appeals), 1997 (2) GLR 913.

16. Having regard to the all these circumstances, we find that the appellate authorities are required to be directed that whenever such applications for stay and/or waiver of condition of predeposit are made, they shall hear expeditiously and pass appropriate orders expeditiously and preferably within a month and if it is not possible to pass final orders on such applications, it can pass appropriate ad-interim orders subject to such conditions as may be necessary at that stage so as to see that interest of both the sides are taken care and the litigant does not carry a feeling that his request did not receive timely attention by the judicial forum.

17. If the authorities fail to discharge their statutory functions, the High Court will be unnecessarily burdened with the hearing of the cases which are required to be heard by the statutory authorities constituted under the relevant Statutes, and the Legislative intention may be frustrated.

18. We, therefore, direct that the appellate authorities shall pass appropriate orders on the stay applications expeditiously and preferably within four weeks of such application.

19. If the Appellate Authority does not decide the stay applications the parties have to rush to the High Court; and the High Court may have to pass orders in such cases and give directions to hear stay application and may stay the recovery till the stay applications are decided. It would, therefore, be in the interest of every one as well as in the interest of judicial administration that this kind of unnecessary litigation and multiplicity of litigation is avoided.

31. We may notice that recovery is carried out by the authorities under the Customs (Attachment of property of Defaulters for Recovery of Government Dues) Rules, 1995 (hereinafter referred to as the said Rules of 1995). Rule 3 envisages issuance of certificate by the competent authority where the Government dues are not paid by any defaulter. Rule 4 provides for issuance of notice calling upon the said defaulter to pay up the amount within seven days from the date of service of the notice. The rules envisage coercive recovery through attachment and sale of the property of the defaulter. In particular 9(i) provides that where a notice has been served on a defaulter under rule 4, the defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the written permission of the Proper Officer. A situation may arise where an assessee during the period of limitation for filing appeal after a duty demand has been confirmed, may be found to be siphoning away its movable and immovable properties even before filing of appeal. Question in such a situation would arise, whether by virtue of the provisions contained in circular date 1.1.2013, the Revenue would be defenceless and would be able to take steps only once the entire period of limitation is over or the Recovery Officer can initiate recovery and travel upto the stage of rule 4 for service of notice of demand and then take recourse to rule 9 prohibiting any transfer of property thereafter. We are not faced with such a situation and would therefore not like to make any conclusive observations in this regard leaving it open to be judged in a case if and when same comes up before us.

32. Lastly, we may notice that sub-section (2-A) of section 35-C provides as under:

(2-A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

Provided that where an order of stay is made in any proceedings relating to an appeal filed under sub-section (1) of section 35-B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.

Sub-section (2A) of section 35C thus requires the Tribunal, as far as it is possible, to hear and decide every appeal within three years. Proviso thereto requires the Tribunal to dispose of the appeal within 180 days wherever any order of stay is granted in the proceedings. Further proviso provides that if such appeal is not disposed of within the specified period, stay order shall on the expiry of the said period stand vacated. In the circular dated 26.5.2010, CBEC in this context provided that :

4. A harmonious reading of the statutory provision and judicial pronouncements in the matter would mean that while the Tribunals are expected to dispose of cases as stipulated in the above section,

nothing prevents them from granting stay beyond six months. However, the extension of stay has to be applied for by the party. Thus, the outcome of the above interpretation would be that, wherever stay period is over and the final decision has not been pronounced, the Department may by a simple letter ask the party to pay and the party would be at liberty to go back to the Tribunal for seeking extension of stay. Coercive measures, without giving an opportunity to the party to seek further extension of stay should be avoided. This is not to say that applications filed for extension should not be contested. Also, in a case where the Commissionerate feels aggrieved by an order of the Tribunal granting stay indefinitely till disposal of appeal, the said Tribunal order could be challenged before the jurisdictional High Court, citing the amended provisions.

None of the clauses of circular dated 1.1.2013 cover such a situation where having granted stay, the Tribunal could not dispose of the appeal within the period of 180 days and therefore, stay would be vacated. This circular is also not part of the specifically rescinded circulars mentioned in para 1 of the impugned circular. In our view, it would also not be covered under the description of any other circular, instruction or letter contrary to the said circular. In that view of the matter, the said circular dated 26.5.2010 would continue to operate in the limited field occupied by the said circular irrespective of the fresh guidelines dated 1.1.2013. We needed to clarify this aspect because under the mistaken belief that the circular dated 1.1.2013 would cover such a situation also, in some of the cases before us recovery proceedings have been initiated upon stay previously granted by the Tribunal having lapsed after 180 days period though applications filed by the assessees for extension of stay were pending before the Tribunal.

33. Before addressing individual petitions, we may touch upon one more aspect. We wonder why in the present day of advanced technology, the Department should be groping for latest information and current status of assessees further appeal proceedings. Surely, with proper inter-departmental cooperation and computerization and utilization of such technology, the Department should be in a position to track every appeal before the appellate Commissioner or the Tribunal and the precise stage at which such proceedings are pending, including the reason for such pendency. This, of course, is an issue which the Department needs to address itself internally and we leave it to them.

34. We may now advert to individual cases.

In Special Civil Application No.1124 of 2013, as we have noticed, the petition is filed by the Gujarat State Fertilizer Co. Ltd. Tax Appeal is pending before the High Court. In the stay application, notice is also issued. Previously, the entire issue was decided in favour of the petitioner right upto the stage of the Supreme Court. Subsequently, depending on a later decision of the Supreme Court where certain observations were made, the entire issue is reopened by the Revenue. Considering such special facts, we are inclined to stay the further recovery till the High Court disposes of the stay application. Under the circumstances, the impugned notice for recovery is quashed.

In Special Civil Application No.977 of 2013, following details arise:

Date/(s) of impugned notice of recovery: 16.1.2013 Date/(s) of order/(s)-in-original : 14.10.2010 First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: One of the members of the Tribunal recused himself.

Applying the above principles, the impugned recovery notice is quashed.

(3) In Special Civil Application No.1024 of 2013, following details arise:

Date/(s) of impugned notice of recovery: 16.1.2013 Date/(s) of order/(s)-in-original : 16.2.2012 First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal Appeal filed within limitation and accompanied by stay application:

Yes.
5. Status of such appeal and stay application : Pending
6. If pending, the reasons why: One of the members of the Tribunal recused himself.
Applying the above principles, the impugned recovery notice is quashed.

(4) In Special Civil Application No.1236 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: January 2013.

2. Date/(s) of order/(s)-in-original : July 2010 and March 2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Stay application is not heard though the petitioner has never prayed for any adjournment.

Applying the above principles, the impugned recovery notices are quashed.

(5) In Special Civil Application No.1273 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 21.1.2013

2. Date/(s) of order/(s)-in-original : January 2010 to September 2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: No hearing has been granted by the Commissioner (Appeals). The petitioner, however, has not prayed for any adjournment.

Applying the above principles, the impugned recovery notice is quashed.

(6) In Special Civil Application No.1390 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 17.1.13 and 29.1.13.

2. Date/(s) of order/(s)-in-original : (i) 1.9.2010, (ii) 5.4.2011,

(iii) 16.2.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4. Appeal files within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: No hearing has been granted by the Commissioner though the petitioner has not prayed for time.

Applying the above principles, the impugned recovery notices are quashed.

(7) In Special Civil Application No.1511 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 8.1.13 and 21.1.13.

2. Date/(s) of order/(s)-in-original : 28.11.2008.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal The Tribunal had already granted stay on condition to deposit 50% of the amount. Such condition was also fulfilled by the petitioner. However, since the Tribunal could not dispose of the appeal within six months as envisaged in section 35C(2A) of the Central Excise Act, 1944, the stay would stand vacated. The Department is therefore proceeding with the recovery. It is pointed out that the petitioner has

already filed an application for extension of stay before the Tribunal which is not yet heard for no fault of the petitioner.

Applying the above principles, the impugned recovery notices are quashed.

(8) In Special Civil Application No.1580 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 30.1.2013

2. Date/(s) of order/(s)-in-original :15.6.2012, 27.4.2011, 14.12.2011.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4 Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: No hearing has been granted by the Commissioner (Appeals) though the petitioner has not prayed for time.

Applying the above principles, the impugned recovery notice is quashed.

(9) In Special Civil Application No.1609 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 08.02.2013

2. Date/(s) of order/(s)-in-original : 30.8.2012 and 25.4.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal.

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Non-availability of the Division Bench of the Tribunal.

Applying the above principles, the impugned recovery notice is quashed.

(10) In Special Civil Application No.1644 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 22.1.2013.

2. Date/(s) of order/(s)-in-original : 29.8.2011.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Notice of hearing not yet received by the petitioner.

Applying the above principles, the impugned recovery notice is quashed.

(11) In Special Civil Application No.1732 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 7.2.2013

2. Date/(s) of order/(s)-in-original : 1.10.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal.

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: The Tribunal was not available on the date of hearing of the appeal.

Applying the above principles, the impugned recovery notice is quashed.

(12) In Special Civil Application No.1816 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: January 2013 and February 2013.

2. Date/(s) of order/(s)-in-original : In 22 matters ranging from 31.3.2009 to 23.11.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals) & Central Government.

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Either pending or heard the application for stay, but no final order is passed.

6. If pending, the reasons why: Commissioner (Appeals) has not passed final order though no adjournment was sought by the petitioner.

Applying the above principles, the impugned recovery notices are quashed.

(13) In Special Civil Application Nos.1818 and 1978 of 2013, following details arise:

Both these petitions involve various demands confirmed by the adjudicating authorities. Issue however, is common. In all such proceedings, appeals along with stay applications are pending before the appellate fora. Final decision on such application are not available. There is nothing to suggest that the petitioners had delayed such proceedings. We are informed that in one of the proceedings, the petitioners had not attended on one occasion, but a fresh hearing is now fixed. In all other proceedings, the petitioners had been attending regularly.

Under the circumstances, aplying the above principles, the impugned recovery notices in both these petitions are quashed.

(14) In Special Civil Application No.2096 of 2013, following details arise:

In this petition, recovery notices have been issued on 13.2.2013. Appeals against the orders passed by the adjudicating authorities are pending before the Commissioner (Appeals). Such appeals have been filed with application for stay within the period of limitation prescribed. Majority of such proceedings are pending without any hearing by the Commissioner (Appeals). In three of the cases, hearing has been concluded in February 2013, but no final order has been passed and at that stage, the respondents have issued the impugned notices for recovery.

For the above reasons, applying principles laid down hereinabove, the impugned recovery notice is quashed.

(15) In Special Civil Application No.2098 of 2013, following details arise:

In this petition, recovery notices have been issued on 13.2.2013. Appeals against the orders passed by the adjudicating authorities are pending before the Commissioner (Appeals). Such appeals have

been filed with application for stay within the period of limitation prescribed. Majority of such proceedings are pending without any hearing by the Commissioner (Appeals). In two of the cases, hearing has been concluded in February 2013, but no final order has been passed and at that stage, the respondents have issued the impugned notices for recovery.

For the above reasons, applying principles laid down hereinabove, the impugned recovery notices are quashed.

(16) In Special Civil Application No.2148 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 19.2.2013

2. Date/(s) of order/(s)-in-original : 27.3.2012

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Non-availability of the Division Bench of the Tribunal.

Applying the above principles, the impugned recovery notices are quashed.

(17) In Special Civil Application No.2213 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 17.1.2013 and 7.2.2013

2. Date/(s) of order/(s)-in-original : 3.2.2012

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals)

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Not yet decided by the Commissioner.

Applying the above principles, the impugned recovery notices are quashed.

In Special Civil Application No.2236 of 2013, following details arise:

In this petition, the petitioner has challenged the recovery notice dated 6.2.2013, which refers to several separate orders confirming the duty demands. Some of these proceedings are pending before the Commissioner (Appeals) while some are pending before the Tribunal. It was pointed out that in the proceedings before the Commissioner (Appeals), though the appeals were filed within time along with stay applications, no decision is yet available on such proceedings. Out of the four proceedings pending before the Tribunal, in three cases, the Tribunal also granted stay on suitable conditions. However, since the Tribunal could not dispose of the appeals within six months, the stay is deemed to have expired. The petitioner has also preferred application for extension of such stay. In the fourth case, the Tribunal has not yet disposed of the stay application. It is stated that in all cases, the petitioner has not delayed the proceedings and has not prayed for any adjournments.

Therefore, applying the above principles, the impugned recovery notice is quashed.

(19) In Special Civil Application No.2268 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 22.2.2013

2. Date/(s) of order/(s)-in-original : 29.3.2012

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals)

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Decided OIA dated 27.12.2012 without insisting any further pre-deposit.

Against the order of the Commissioner (Appeals), appeal was preferred before the Tribunal along with stay application within limitation prescribed and hearing of the stay application was fixed on 7.3.3013, despite which notice for recovery was issued on 22.2.2013. It was pointed out that during the pendency of the appeal proceedings before the Tribunal, no pre-deposit was insisted.

Considering the above, the impugned recovery notice is quashed.

(20) In Special Civil Application No.2316 of 2013, following details arise:

In this case, the petitioner has challenged the demand notice dated 20.2.2013. The petitioner filed appeal along with stay application before the Tribunal against the order of the Commissioner (Appeals). Hearing of such application was fixed on 5.2.2013. Due to non-availability of the Bench, hearing could not take place. At that stage, the recovery notice was issued.

Applying the above principles, the impugned recovery notice is quashed.

(21) In Special Civil Application No.2422, 2424 and 2434 of 2013, following details arise:

The petitioner has challenged the action of recoveries initiated by the respondents. Against different orders passed by the Additional Commissioner of Service Tax, the petitioner has preferred appeals before the Commissioner (Appeals) within the period of limitation along with stay application. Such proceedings were fixed for hearing on 22.2.2013. At that stage, the respondents attached the bank account of the petitioner and also withdrew unilaterally an amount of Rs.54,88,000/-. We notice that the petitioner has not prayed for any time before the appellate authority on the date of hearing. It is stated that the petitioner s representative had made his submissions. It appears that stay application along with appeal could not be disposed of immediately. We are seriously concerned

with the manner in which the respondents not only attached the bank account of the petitioner but unilaterally recovered a hefty sum from such account.

Under the circumstances, following the ratio laid down hereinabove, recovery proceedings are quashed and the amount of Rs.54,88,000/- withdrawn from the Bank account shall be returned to the petitioner by the respondents.

(22) In Special Civil Application No.2423 of 2013, following details arise:

Facts in this petition are slightly different from the rest. The petitioner has challenged the recovery notice dated 16.1.2013. The order in original was passed on 31.1.2011 confirming demand of recovery of amount of Rs.13,82,211/- with interest . Against such order, the petitioner preferred appeal before the Commissioner (Appeals). The appeal was dismissed on 20.12.11. Against such order, the petitioner preferred further appeal before the Tribunal. The Tribunal, however, transferred such appeal on 28.8.12 to the revisional authority holding that appeal was not maintainable.

It can thus be seen that the petitioner had preferred appeal before a wrong forum. Thereupon the appeal had to be transferred to the revisional authority. This also was done as far back in August 2012. The petitioner cannot expect the respondents to wait indefinitely for recovering the amount arising out of the order in original which is also upheld by the appellate authority. However, since no such recovery has been so far, we grant one month s time to the petitioner to persuade the revisional authority. It is clarified that if no stay is granted latest by 15th April 2013, it would be open for the respondents to proceed further with the recovery in connection with the impugned notice. The petition is disposed of accordingly.

(23) In Special Civil Application No.2461 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 4.2.2013

2. Date/(s) of order/(s)-in-original : 30.9.11.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals)

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Stay application was listed on 20.2.2013. The Commissioner (Appeals) was not present. Thereafter, stay application was listed for hearing on 26.2.2013 and the application was heard and reserved for orders.

Applying the above principles, the impugned recovery notice is quashed.

(24) In Special Civil Application No.2473 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 20.2.2013

2. Date/(s) of order/(s)-in-original : 22.8.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal.

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: No-availability of Division Bench of the Tribunal.

Applying the above principles, the impugned recovery notice is quashed.

In Special Civil Application No.2475 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 15.2.2013

2. Date/(s) of order/(s)-in-original : 6.3.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Though hearing has been concluded on 13.12.2012, no order has been passed in the matter.

Applying the above principles, the impugned recovery notice is quashed.

(26) In Special Civil Application No.2478 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 12.2.2013.

2. Date/(s) of order/(s)-in-original : 3.1.2012 and 14.5.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Decided vide OIA No.169/2012(AHD-III)SKS/Commr/(A)/AHD/dated 31.10.12 and OIA No.205/2012(Ahd-II) SKS/Commr.(A)Ahd. Dated 31.12.12.

6. Give details of further proceedings(Second Appeal/Revision/Writ, etc.) : (i) Appeal and stay application against OIA No.169/2012 (AHD-III)SKS/Commr/(A)/AHD/ dated 31.10.12 (issued on 9.11.2012) filed on 28.12.2012, (ii) Appeal and stay application have been filed within limitation and (iii) No date of hearing has been given for the stay application.

Applying the above principles, the impugned recovery notice is quashed.

In Special Civil Application No.2531 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 16.1.2013 and 14.2.2013.

2. Date/(s) of order/(s)-in-original : 20.7.2011.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Hearing attended on 26.02.2012 and order awaited.

Applying the above principles, the impugned recovery notice is quashed.

(28) In Special Civil Application Nos.2541 to 2547 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 26.2.2013

2. Date/(s) of order/(s)-in-original : 26.9.2012

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal.

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeals and stay applications : Pending

6. If pending, the reasons why: Due to non-availability of Bench at the Tribunal.

Applying the above principles, the impugned recovery notices are quashed in all these petitions.

(29) In Special Civil Application No.2576 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 18.2.2013

2. Date/(s) of order/(s)-in-original : 6.1.2012

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Commissioner (Appeals).

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: No further date of hearing has been granted in the stay application and the appeal.

Applying the above principles, the impugned recovery notice is quashed.

(30) In Special Civil Application No.2603 of 2013, following details arise:

1. Date/(s) of impugned notice of recovery: 22.1.2013 and 15.2.2013.

2. Date/(s) of order/(s)-in-original : 6.6.2012.

3. First Appeal, whether before (Commissioner (Appeals)/Tribunal: Tribunal.

4. Appeal filed within limitation and accompanied by stay application: Yes.

5. Status of such appeal and stay application : Pending

6. If pending, the reasons why: Before the Tribunal, hearing was fixed on 27.1.13 where the advocate for the petitioner prayed for adjournment. Hearing was thereafter fixed on 7.2.2013, but the Bench was not available. Now the date of hearing fixed is 20.3.2013.

Applying the above principles, the impugned recovery notice is quashed.

35. The respondents shall circulate copies of this judgment to all the Chief Commissioners of the State for proper and uniform implementation of the decision. All the petitions are disposed of in above terms.

Petition desposed off.