

## **MISCELLANEOUS APPLICATIONS**

Every person aggrieved against any Order issued by lower adjudication authority can use the Appellable remedy. The Appellable remedy available in Excise & Service Tax matters are well defined under Section 35 of the Central Excise Act, 1944 and under Section 85 & 86 of Finance Act, 1994 respectively.

Appeals before Commissioner (Appeals) is routine practice for assessee keeping in mind that this is nothing but the quasi-judicial proceedings. Therefore, every Appeal filed before the Commissioner (A) is either filed with or without Stay Application as per requirement of case matter, but certainly if preferred to file the Stay Application then it is treated as part & parcel of the said Appeal. In fact, Commissioner (A) sometimes conducted the hearing of Stay Application along with main Appeal. It means independent treatment did not give to the Stay Application.

One of the reasons behind this may be that there is no prescribed fee for the Commissioner (A) for Appeals as well as Stay Applications like Tribunals.

Whereas, in Tribunals not only Stay Applications but Condonation of Delay Applications, Early Hearing Applications, Rectification of Mistake Applications are treated as 'Miscellaneous Applications' for which prescribed fees are to be paid separately other than Appeals prescribed fees.

Why the word 'Miscellaneous' is used for these various applications?

May be these are 'short' of a nature and having limited issue to be heard and decide.

Let us see the individual function of each application of the 'Miscellaneous category'.

**Stay Application**: To be filed with limited object of Stay operation of Order against which appellant prefers to file an Appeal. In light of Section 35F of CEA, 1944 this stay application deserves more attention, because whether the Appellant is required to pre-deposit the amount for admittance of Appeal or not will be decided by Stay Application. Therefore, Stay Applications are decided on merits as well as on facts of the case considering the financial capacity of the Appellant. Tribunals keep the Stay Application hearings in the 'short matter' list. It can be said that many times Stay Application hearing and pronouncement of order against it just indicates the merits of the case either in favor of Appellant or Respondent. Pre-deposit is a discretionary power in the hands of adjudicating authority. Unfortunately, very little time is provided and the applicant is prevented from many convincing argument although it indicates the merits. Sometimes, he is obliged to block huge amounts for unproductive work and has to wait

indefinitely long for final outcome. Therefore, it cause undue hardship also. Therefore in the humble opinion of author 'the Stay Applications must be awarded, the status of main Appeal'.

**Condonation of Delay Application:** Every Person who failed to file an Appeal within prescribed period can file the Appeal alongwith Condonation of Delay Application. The reasonable grounds mentioned in the said application will decide whether Stay Application and Appeal is acceptable to Tribunals for admission or not. Naturally, Condonation of Delay Application is more on facts and less on merits of the case. Therefore the status of the said application listed in 'short matter' by Tribunals is found correct. At the same time classification of this application in 'Miscellaneous' is nothing wrong because it is not applicable to all those who are filing the Appeals before Tribunal within prescribed period mentioned in the Act and the Rules made there under.

**Early Hearing Application:** There must be solitary grounds either of matter is of recurring nature or high revenue is involved and blocked by any reason from either side i.e. either assessee or department or the protective SCNs issued for further period and still continued in the present situation or recovery proceedings named as 'Coercive actions' initiated by department saying that 180 days is the time limit of Stay granted by CESTAT and now it is vacated. In all these situations the only method available is filing the EARLY Hearing Application to request the CESTAT to take up the matter early than its regular course. Sometimes, it gets difficult to convince the judges about the seriousness of EARLY Hearing prayer since it is branded as 'short matter' as per normal practice. But sometimes without arguing also based on only application the Tribunal accepted the request of early hearing and directed to listed the matter for Final Hearing at earliest or directed the fixed date of such final hearing. Overall, the solitary grounds framed in various decided early hearing applications are common but somewhat different situation in the interest of justice like when SSI unit whose money of say Rs. 3 lacs are involved which is very small amount in the eyes of Tribunal but for assessee this is huge, but unfortunately applications get rejected. Therefore, more than accepted grounds commonly used the Tribunal should be more liberal to the appellant's who are tiny trots.

**Rectification of Mistake Application:** Whenever assessee feels that there is/are apparent mistake(s) made by the Tribunal while passing the Order in Appeal or the plea raised in the Appeal and discussed are not reflected in the Orders, which is required to bring to the notice of Hon'ble Court, he can prefer to file the ROM Application within the prescribed period as per the Act and the rules made there under. This has supported by Hon'ble Apex Court in the case of CCE Vs. Bharat Bijlee limited [2006(198) ELT 489 (S.C.)] held 'failure to take into consideration the material evidence which is present on record, would amount to mistake apparent on face of records and Tribunal has jurisdiction to correct such a mistake in exercise of its powers under Section 35C (2)'. Normally, if possible the same bench who passed earlier order hear the ROM Application otherwise

other competent bench hear the matter. ROM Application is nothing but a Review Application and therefore limited issue to be decided for consideration. The Appeal filed and the Order passed by the Tribunal is reviewed as per the pleas mentioned by Applicant at the same time opportunity to rebut of the same is given to the Respondent. Therefore, ROM application by any stretch of imagination cannot be treated as 'Short matter' but still it is treated as 'Short matter'.

There must be other applications submitted either by Appellant or Respondent which are also categorized in 'Miscellaneous Applications'.

**Author personally feels** that at least Stay Application and the ROM Application which are submitted to discuss the legal merits as well as facts involved in the case may be heard without limitation of time and status of 'short matter' awarded by the courts, so that applicant does not restrict his argument on limited issue. Whether the Revenue interests are protected or not? This should not be the end criteria while deciding the Stay Application. Whether the merits of the case tilts in favor of applicant or not? I think is a justified reason to decide the application as upheld by almost all High Courts, but this is possible only if the case with facts and merits both discussed at the time of Stay Application hearing at sufficient length.

'Disposing of the ROM Application by cryptic remark that there is no mistake apparent on record and the order under subject is very much legal'. I think this is a casual statement because ROM is a outcome of earlier order and applicant bonafide believe that there is apparent mistakes while passing the earlier order and therefore the court also to honor the justice and the order pronounced by them, should not restricted the applicant and himself only to see that which are the mistakes made them but should treat is as 'Re-open' the case.

In fact, the case law cited in the 'Rectification of Mistake Application', CCE Vs. Bharat Bijlee limited [2006(198) ELT 489 (S.C.)] questions was whether non-standard motors could be construed to be different product and consequently different values for standard motors and non-standard motors. It was on record supported by documentary evidences that for non-standard motors, tailor made as per buyer's requirement the treatment was given differently compared with standard motors. In the first adverse order against Bharat Bijlee, Tribunal did not consider this evidence on records resulting into adverse order. ROM was filed and Tribunal accepted that 'There was a factual mistake apparent on the face of the record, and therefore, the order passed earlier required to be rectified', and accordingly rectified the order. The departmental Appeal in Supreme Court arguing that 'Tribunal can rectify its earlier order in exercise of jurisdiction under Section 35C (c) only if there was a mistake apparent on the face of the records, which is not there in present case'.

However, Apex Court rejected departmental argument holding correctness of Tribunal's Decision and departmental appeal dismissed.

Well, author must say here that the list of miscellaneous applications should be reduced to some extent and at least Stay and ROM Applications should deserve the justification without any bounds or limitation framed on time or space or restrictions of issues.

**With due respect** to our judges and judiciary system, author is not interested in criticizing but prefers to point out the lacunae in his personal thinking.

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