



Central Board of Indirect Taxes & Customs

Department of Revenue, Ministry of Finance, Government of India

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Circular No. 450/16/99-CX
dated 30/3/1999

F.No. 390/24/99-JC

Government of India
Ministry of Finance, Department of Revenue,
Central Board of Excise and Customs, New Delhi

Subject : Quasi judicial proceedings - Disposal of stay applications/dispensation of pre-deposit requests - Need for personal hearing - Reg.

The Board has been perturbed with the increasing pendency of appeals including stay petitions with commissioners (Appeals). Since as per Board's instructions issued in June, 1998 no coercive action for recovery of duty/penalty involved in the appeal is normally to be taken by field officers till the disposal of stay petitions by the Commissioners (Appeals), delay in disposal of such stay petitions comes in the way of recovery of Government's legitimate duties. It is, thus, very essential that - stay petitions against orders confirming certain duties and or imposing certain penalties are attended to and disposed of on a top priority basis.

2. On a careful analysis of the reasons for delay in disposal of stay petitions filed almost invariably by the appellants, it has come to the Board's notice that a practice appears to have developed in the field whereby the trade and industry has been trying to delay the disposal of the stay petitions by invariably insisting for a prior personal hearings and getting their postponement for various reasons. commissioners (Appeals) have generally expressed their helplessness in taking a quick view on the stay petitions without personal hearing as this action, they apprehend, may be challenged on grounds of denial of principles of natural justice.

3. In this regard, Board would like to draw your attention to the provisions made in the law in relation to appeals and Sec. 35-F of the Central Excise Act/ Sec-129E of Customs Act, which enjoins on the persons desirous of appealing to deposit with the proper officer the duty demanded or the penalty levied pending the appeal. It is only under the provisos to aforesaid Sections that the Commissioner (Appeals) has been given a discretion to dispense with the pre-deposit if he is of the opinion, in the facts and circumstances of a particular case, that such pre-deposit of duty/penalty may cause undue hardship. Such a dispensation of pre-deposit could be ordered subject to such conditions as the Commissioner (Appeals) may deem fit, so as to safeguard the interests of revenue.

4. Under Section 35A/128A which require a personal hearing to be given to appellant where requested, before an appeal is disposed off, there is no statutory condition in Section 35F/129E of elsewhere, requiring a personal hearing, if the party so desires, before exercising the powers under Section 35F/128A, on stay petitions/requests for waiver of pre-deposit conditionally or unconditionally.

5. The question whether, before passing such orders on the stay petitions/petitions for dispensation of pre-deposit, the commissioner (Appeals) has to allow invariably a personal hearing has been further examined and the various case laws on the subject also looked into. In this context, your attention is invited to the following case law:-

1. Supreme Court decision in CA No. 3597 of 1995 dated 25.3.96 in the case of UOI & others vs. M/s Jesus Sales Corporation Ltd. reported in 1996 (83) ELT 486 (SC).
2. Gujarat High Court decision in Special Civil Application No. 345 of 99 dt. 8/2/99 in the case of Saurashtra Cement Ltd. vs. UOI.
3. Gujarat High Court decision in Special Civil Application 10622 to 10624 etc. reported in 1998 (97) ELT 424 (Guj.) in the matter of DCW Ltd. vs. Commissioner (Appeals).

which appear to have examined this question of the need for giving a personal hearing in stay petition cases. The case decided by the Apex Court is most relevant. In the context of some of the analogous provisions for pre-deposit of penalty imposed under Sec. 4M of the Imports & Exports Control Act, 1947, under a proviso, the appellate authorities had been given a discretion to dispense with such deposits either unconditionally or subject to such conditions as he may impose where he is of the opinion that the deposit to be made will cause undue hardship to the appellant. The party had challenged the order passed by the appellate authority in a particular case ordering pre-deposit of 25% of the penalty imposed without giving the opportunity of a personal hearing, only by looking into the merits of the case and representation made. The Hon'ble Court while upholding the order of the appellate authority stressed that the statutory requirement was that before an appeal is entertained the amount of penalty has to be deposited by the appellant; ordering dispensation with such deposit shall amount to an exception to the said requirement of deposit. In this background, it held that it is difficult to hold that if the appellate authority had rejected the prayer of the appellant, but dispensed with the deposit un-conditionally or has dispensed with such deposit subject to some conditions without hearing the appellants on perusal of the petition filed on behalf of the appellant for the said purpose, the order itself is vitiated and liable to be quashed being violative of principles of natural justice.

6. Observations of the Hon'ble Court in Para 5 of the said judgement reproduced below, are also very relevant in this regard :

"But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded. This is all the more important in the context of taxation and revenue matters. When an authority has determined the tax liability or has imposed a penalty, then the requirement that before the appeal is heard such tax or penalty should be deposited, cannot be held to be unreasonable as already pointed out above. In the case of Shyam Kishore vs. Municipal Corporation of Delhi, it has been held by this Court that such requirement cannot be held to be harsh or violative of Article 14 of the Constitution, so as to declare the requirement of pre-deposit itself as unconstitutional. In this background, it can be said that the normal rule is that before filing an appeal or before the appeal is heard, the person concerned should deposit the amount which he has been directed to deposit as tax or penalty. Non deposit of such amount itself is an exception which has been incorporated in different statutes, including the one with which we are concerned....."

7. The Apex court has also observed that if affording personal hearing under all circumstances is insisted, " whenever statutory authorities are vested with the powers to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions.... The appellate authorities which are deemed to be quasi judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or the applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events, the quasi judicial authorities must hear the appellants or applicants as the case may by."

8 the Court also had occasion to observe that "when the appellate authority has been vested with discretion to dispense with such deposits, unconditionally or on conditions, then it has to apply its mind on that question line a quasi judicial authority, taking into consideration all the

facts & circumstances of the case, including undue hardship which has been pointed out on behalf of the appellants. whenever a statutory authority has to form an opinion on a question it does not mean that it has to be formed on a subjective or casual basis. That opinion must be formed objectively on relevant consideration. Same is the position in respect of exercise of discretion. The framers of the Act require such appellate authority to exercise its discretion in a reasonable and rational manner taking into consideration the relevant facts and circumstances of a particular appeal, while considering the question as to whether deposit of the amount of penalty be dispensed with unconditionally or subject to conditions."

9. The Board feels that the Hon"ble Apex Court's guidelines in the aforesaid judgement, briefly referred to above, should guide and form the basis of disposing all the requests for stay petitions and dispensation of statutory conditions of pre-deposit on behalf of appellants on grounds of hardship, in Central Excise & Customs cases. In fact, Hon"ble Gujarat High Court in disposing of a recent petition contesting the order passed on the stay requests without giving a personal hearing by Commissioner of Central Excise (Appeals) have referred to the aforesaid Supreme court judgement while upholding the non-grant of personal hearing. It only asked for a re-consideration by the Commissioner (Appeals), as the order passed did not appear to be speaking one. The following observations of the Hon"ble Gujarat High Court are very relevant :

"In view of the Law laid down by the Apex Court as well as this Court, it is open for the quasi judicial authorities exercising powers under Sec. 35F of the Central Excise Act to pass order or an application on merits without hearing the advocate for the parties concerned. It is equally open for the quasi judicial authorities to give opportunity if it thinks fit. Even when an application is disposed of, a speaking order must be passed. It is open for the quasi judicial authorities considering such dispensation of pre-deposit requests of pass reasoned order in an objective manner in the facts and circumstance as given in the representations/stay petitions without hearing advocates or the parties concerned."

10. From the above it is evident that though discretion is vested with the Appellate authority to give personal hearing in the facts and circumstances of the particular case, before disposing off stay petitions, but this should be more of an exception and not the normal rule. Commissioner (Appeals) of not commit any irregularity if they dispose off the petitions for dispensation of pre-deposits without hearing advocates or parties concerned. They must, however, in such cases pass a reasoned order in an objective manner considering the facts as given in representation/stay petition.

11. Board would also like to reiterate its earlier directions and instructions issued from file No. 201/4/98-CX.6, dated 2.6.98 to the effect that all such requests/petitions for dispensation of pre-deposits should be disposed of within one month of their filing, by passing speaking orders and communicating to the concerned parties/field formations.

Sd/-
(P. N. Malhotra)
Member, (AS/L & J)



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