

(2004) 05 GAU CK 0047

In the Gauhati High Court

Case No : WP (C) No's. 2921, 3075, 3076 and 3077 of 2004

Dharmpal Satyapal Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-05-2004

Acts Referred:

Central Excise Rules, 1944 — Rule 49, 8(1), 9
Central Excises and Salt Act, 1944 — Section 11, 11A, 35F, 9
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1
Constitution of India, 1950 — Article 14, 19(1), 226
Court Fees Act, 1870 — Section 6
Finance Act, 1982 — Section 51
Finance Act, 2003 — Section 154, 154(3)
Presidency Small Cause Courts Act, 1882 — Section 17

Citation : (2005) 192 ELT 122 : (2005) 2 GLR 520 : (2004) 2 GLT 1686

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : V. Sridharan and M. Bhuyan, for the Appellant; K.N. Choudhury, I. Choudhury, A. Baruah and R. Rubey and G.A., for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The first writ petition, being WP(C) No. 2921/2004 was heard at length during motion hearing. Although the learned counsel for the parties primarily argued on the prayer for interim relief, but on being pointed out that nothing might survive for final adjudication once the interim matter was decided either way, having regard to the nature of relief sought for in the writ petition, the learned counsel for the parties agreed for final disposal of the case. Thus the matter was taken up for final decision at the motion hearing itself.

2. The other three petitions being WP(C) Nos. 7075/2004, 7076/2004 and 7077/2004 were moved at a later date and the learned counsel for the parties submitted, rather agreed that the arguments made in the first petition would cover these cases and also agreed for final disposal at the motion stage itself

along with the first writ petition.

3. All the writ petitions raise common questions of law on similar set of facts with minor variations relating to the date of setting up of the Factories in Assam and Tripura, the dates of the impugned order passed by the authority of Central Excise and the amounts in question involved and thus are being decided and disposed of by this common judgment and order enumerating the facts in WP(C) No. 2921/2004. Any reference to the impugned orders, place of Factory and the amount in question involved in this case shall be treated to be a reference to the same in respect of the other three writ petitions also.

4. By this writ petition, the petitioners seek to challenge the legality and validity of the order dated 6.6.2003 passed by the Deputy Commissioner of Central Excise, Guwahati holding the petitioners to be liable to pay an amount of Rs. 27,62,44,664/- on account of different heads as indicated in the order itself and the order dated 31.3.2004 passed by the Commissioner of Central Excise (Appeals), Guwahati directing the petitioners to deposit the said amount u/s 35F of the Central Excise Act, 1944 as pre-condition for hearing the appeal filed by the petitioners against the said order dated 6.6.2003. The basic fact leading to the issuance of the impugned orders and filing of the present writ petition are indicated below as has been enumerated in the "synopsis and list of dates and events" in support of the writ petition.

8.7.1999 : Notification No. 32/1999 was issued granting exemption from excise duty to the products mentioned therein subject to fulfillment of conditions mentioned therein. The exemption was to the extent of excise duty paid in cash through the "Account Current" maintained statutorily under the Central Excise Rules by the petitioners.

17.11.2000 : The petitioners set up a factory in Guwahati. They are inter alia engaged in the manufacture of Pan masala containing tobacco since November 2000. They availed the benefit of the said Notification No. 32/1999 and become eligible for refund of the excise duty paid through their "Account Current". The total amount of such excise duty worked out to Rs. 2,16,10,577.43 for the period from 17.11.2000 to 28.2.2001 and refunds were also granted for this amount.

1.3.2001 : By Notification No. 6/2001, amendment was carried out to the Notification No. 32/1999 excluding the petitioners' goods.

6.3.2001 : Petitioners filed writ petition challenging the vires of the said notification.

11.4.2002 : Writ petition dismissed. Petitioners preferred writ appeal.

3.12.2002 : Writ appeal allowed, holding that it was impermissible to withdraw the benefit of Notification No. 32/1999 with effect from 1.3.2001 and that the earlier benefit should continue. By the judgment, it was provided that since the petitioner had been discharging the duty without the benefit of any exemption with effect from 1.3.2001, payments of duty made from the date of withdrawal of

the notification upto the date of judgment viz. from 1.3.2001 to 2.12.2002 would be available as credit to the petitioners to discharge duty payable on the goods cleared from 3.12.2002. It was further provided that the petitioners would also be entitled to receive refund of the duty so made from credit available to them in terms of Notification No. 32/1999 dated 8.7.1999.

...The Union of India preferred SLP (c) No. 4131-34/2003 against the judgment in writ appeal.

14.5.2003 : By the Finance Act, 2003, the benefit of Notification No. 32/1999 dated 8.7.1999, withdrawn from its inception viz. from 8.7.1999 to 28.2.2001 for Pan masala containing tobacco. This was sought to be achieved by issuing notification No. 6/2001 to have retrospective effect to amend Notification No. 32/1999 from its very inception viz. 8.7.1999. Section 154 of the Finance Act, 2003 retrospectively amended Notification No. 32/1999, withdrawing the benefit of exemption to Pan masala containing tobacco.

6.6.2003 : Impugned order issued by the Deputy Commissioner, Central Excise, Guwahati against the petitioners relying on Section 154 of the Finance Act, 2003 ordering refund and rejecting claim for refund as follows :

(i) Recovery of an amount of Rs. 2,16,10,577.43 refunded to the petitioners in terms of Notification No. 32/1999 during the period from 17.11.2000 to 28.2.2001.

(ii) Confirmed a demand of Rs. 25,46,34,087/- which had been paid prior to the judgment dated 3.12.2003 in the writ appeal and as was permitted by the Court to be adjusted for payment of duty for future clearances from 3.12.2002.

(iii) Rejected the refund claims of Rs. 85,31,17,836/- for the period from March 2001 to April 2003 which the petitioners were entitled to receive as per judgment in writ appeal since in the interregnum period duty had been paid without the benefit of the Notification No. 32/1999.

... : Thus the total amount that is required to be paid and recoverable from the petitioners stands at Rs. 27,62,44,664/- and interest as applicable on Rs. 25,46,34,087/- with the rider that in the event of petitioners' failure to pay the amount within 30 days from 14th May, 2003, the day on which the finance bill, 2003 received the ascent of the President, the interest @ 15% p.a. would be payable and recoverable from the date immediately after the expiry of the stipulated period till the date of payment on the entire amount of Rs. 27,62,44,664/- including the interest due on the defaulted amount of Rs. 25,46,34,087/-.

4.8.2003 : The petitioners preferred an appeal along with application for waiver of pre-deposit u/s 35F of the Central Excise Act, 1944 to the Commissioner of Central Excise (Appeals) Guwahati.

8.8.2003 : Letter No. 356/43/2003-TRU issued by the Central Board of Excise &

Customs addressed to Chief Commissioner of Customs & Central Excise, Shillong and Commissioner of Central Excise, Shillong/ Dibrugarh communicating purported decision to keep in abeyance the show cause notices and adjudication orders were recovery have been ordered.

25.8.2003 : Notification No. 69/2003 was issued by the Central Government restoring the partial benefit to Pan masala containing tobacco and chewing tobacco units set up and operating in North East, pursuant to Notification No. 32/1999.

12.1.2004 : Supreme Court passed order in the aforesaid SLP staying the operation of the judgment and order passed in writ appeal.

21.1.2004 : Notification No. 8/2004 issued by the Central Government granting exemption from excise duties in respect of manufacturing units set up in North East subject to the conditions mentioned in the notification.

31.3.2004 : Impugned order passed by the Commissioner of Central Excise (Appeals) on the stay application directing the petitioners to deposit the entire amount of Rs. 27,62,44,664/- within thirty days of receipt of the order. The petitioners received the same on 5.4.2004.

23.4.2004 : Notice of attachment of excisable goods u/s 11 of the Central Excise Act, 1944 issued by the Deputy Commissioner of Central Excise having jurisdiction over the factory of the petitioners detaining the quantities of Pan masala containing tobacco towards recovery of the amount of duty.

26.4.2004 : The instant writ petition preferred by the petitioners.

5. It is in the above backdrop that the petitioners have approached this Court invoking its writ jurisdiction challenging the legality and validity of the aforementioned impugned orders. The basic thrust of argument made by Mr. Sridharan was that on the face of it the appellate authority having admitted that no notice was issued to the petitioners giving an opportunity of hearing and it also having noticed that the purported suppression of the earlier notification dated 8.8.2003 by subsequent notifications could not be placed on records and thus the earlier notification dated 8.8.2003 by which the decision to keep in abeyance the show cause notices and/or recoveries was conveyed held the field, could not have ordered for depositing the mount in question within 30 days of receipt of the order by way of rejecting the stay application. Placing reliance on the decision of the Apex Court in J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, it was argued by Mr. Sridharan that amendment to Section 154 of the Finance Act, 2003 retrospectively will always be subject to Section 11A of the Central Excise Act, 1944 under which a notice is required to be issued on person chargeable with the duty. Referring to paragraph 31 of the judgment, he submitted that the provisions of Section 51 of the Finance Act, 1982 by which retrospective effect to the amendments of Rules 9 and 49 of Central Excise Rules, 1944 was brought about and which is pari

materia to the provisions of Section 154 of the Finance Act, 2003, such retrospective operation cannot override the express provisions of Section 11A and in the instant case the petitioners having not been issued with any notice before passing the impugned order dated 6.6.2003 and this position having been admitted by the appellate authority in its order dated 31.3.2004 and yet having ordered for depositing the entire amount in question, the impugned orders are not sustainable.

6. Referring to the decision of the Apex Court as reported in *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras*, he submitted that a stay order passed by the Apex Court will mean maintaining status quo from the date of passing of the order on 12.1.2004 and that by itself cannot bestow the respondents to undo the things already carried out pursuant to the judgment in the writ appeals. Referring to the decision of the High Court at Calcutta in *Bongaigaon Refinery and Petrochem. Ltd. Vs. Collr. of C. Ex. (A)*, Mr. Sridharan submitted that the discretionary power towards stay/dispensation of pre-deposit must be exercised in favour of the assessee in absence of goods reasons to the contrary and that "undue hardship" does not only confine to financial hardship but it also covers prima facie strong case or even an arguable case in appeal.

7. Mr. K.N. Choudhury, learned senior counsel appearing on behalf of the respondents on the other hand submitted that irrespective of any argument advanced on behalf of the petitioners the statutory requirement of depositing the amount in question as envisaged u/s 35F of the Central Excise Act, 1944 cannot be waived. He further submitted that the action on the part of the Deputy Commissioner towards issuance of the impugned order dated 6.6.2003 for recovery of the amount in question being in pursuance to the stay order granted by the Apex Court and in view of the retrospective amendment as has been brought by the Finance Act, 2003, there is nothing wrong in the action and that everything has been done as per contemplation of the provisions of Section 154 of the Finance Act, 2003. As regards the appellate order, he submitted that irrespective of any observation made by the said authority in respect of service of notice and supersession of the notification dated 8.8.2003, the said authority having recorded a prima facie satisfaction that the petitioner does not have a strong prima facie case on merit, more so, in view of the order of the Apex Court dated 12.1.2004, no amount of technicalities can come in aid of the petitioners and obliterate the statutory requirements of pre-depositing the amount in question towards entertaining and hearing the appeals. He also relied upon the aforesaid decision of the Apex Court in *JK Spinning (supra)*.

8. The whole controversy centers around the preconditions laid down in Section 35F of the aforesaid Act towards entertaining an appeal as per which the persons desirous of appealing against the decision in respect of the duty demanded, the amount so demanded is required to be deposited. However, as per proviso to Section 35F, the appellate authority may dispense with such deposits subject to

such condition as it may deem fit to impose so as to safeguard the interests of revenue upon forming an opinion that such deposit would cause undue hardship to the person. Section 35F reads as follows :

"35F. Deposit, pending appeal, or duty demanded or penalty levied. -

Where in any appeal under this chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied.

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that there an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing."

9. As per provisions of Section 35F of the Act, depositing of the amount demanded is the rule and dispensation thereof is the exception. Even if any exception is made, the appellate authority will have to form an opinion that such depositing of the amount would cause undue hardship to the person concerned. Even in case of such dispensation of depositing the amount, the appellate authority can only do so on imposition of condition so as to protect and safeguard the interests of revenue. It will be pertinent to mention here that during the course of hearing, learned counsel appearing for the petitioner was asked as to whether the petitioner was prepared to deposit at least 50% of the amount in question or even 25% of the amount to which the specific and emphatic reply was in the negative. On the other hand, learned counsel appearing for the respondents agreed for acceptance of 50% of the duty demanded and even 25% of the same as Bank Guarantee.

10. As noticed above, the entire argument on behalf of the petitioners is based on the two observations made by the appellate authority in the impugned order dated 31.3.2004. It is the case of the petitioners that the appellate authority having admitted that prior to passing of the impugned order dated 6.7.2003, no notice was given to the petitioner and that nothing could be brought on record to establish that the instructions issued by the CBEC by its letter dated 8.8.2003 has been withdrawn, it could not have and ought not to have ordered for depositing the entire amount as a pre-condition towards entertaining the appeal. It is in this context the aforesaid decision of the Apex Court in JK Cotton

Spinning (supra) was pressed into service. The decision of the Calcutta High Court in BRPL (supra) case was also pressed into service to negative the plea of the appellate authority that "financial hardship" was not pleaded on behalf of the petitioner. In this decision the High Court of Calcutta held that the expression "under hardship" would also cover a case where the appellant has a strong prima facie case and that it even covers a situation where there is an arguable case in the appeal. The High Court went on to say that in the former case, the appellate authority should dispense with the pre-deposit altogether and in the later case the appellate authority would have to safeguard the interests of the revenue.

11. In JK Cotton Spinning case (supra), the Apex Court upheld the retrospective amendment of Rules 9 and 49 of the Excise Rules by Section 51 of the Finance Act, 1982 which according to the learned counsel for the petitioner is a pari materia provision with that of Section 154 of the Finance Act, 2003. In the said case the Apex Court while upholding the judgment of the Delhi High Court held that the amended provisions of Rules 9 and 49 of the Excise Rules and retrospective effect thereof by Section 51 of the Finance Act, 1982 to be valid and constitutional. It also held that there was no question of the amended provisions of Rules 9 and 49 being arbitrary, unreasonable or violative of the provisions of Articles 14 and 19(1)(g) of the Constitution of India. While dealing with the apprehension of the party that the retrospective amendment would cause great hardship, if one has to pay duty with retrospective effect from 1944 in view of the amendment of 1982, the Apex Court while affirming the judgment of the Delhi High Court diluting such apprehension held that it would not be possible either to impose a penalty to confiscate goods for an act or omission which was not unlawful when such act was performed or omission made. It was in that context Section 11A of the Central Excises and Salt Act, 1944 was referred to while holding that Section 51 of the Act did not override the provisions of Section 11A.

12. The Deputy Commissioner while passing the impugned order dated 6.6.2003 elaborately dealt with the materials on record and the judgments of this Court and their effect. It also recorded as to how the petitioners have been discharging their duty liability by way of adjustments as was provided for by the Division Bench of this Court in writ appeals and have been claiming refund of the amount so adjusted in terms of the earlier notification dated 8.7.1999. It also noticed as to how the notification dated 8.7.1999 stood amended retrospectively in terms of Section 154 of the Finance Act, 2003 and the stipulations therein. There was no question of entertaining the refund claim after the retrospective amendment brought about by the Finance Act, 2003 for the period from March 2001 to April 2003 which stood at Rs. 85,31,17,836/-. The Deputy Commissioner also found that the petitioner cleared their finished goods without payment of appropriate duty since 2nd fortnight of November 2002 amounting to Rs. 25,46,34,087/- calculated upto 31st May, 2003 and kept informing the department from time to time by their various correspondences that in defiance of the judgment and order of this Court dated 3.12.2002 passed in the writ appeals, the duty payable on

clearance may be adjusted from the amount of pending refund which the department never exceeded to. Having regard to the provisions of Section 154(3) of the Finance Act, 2003, he observed that the said judgment and order dated 3.12.2002 is not enforceable and consequently the duty not paid by the petitioners during the period from 2nd fortnight of November, 2002 till 30th April, 2003 is liable to be recovered. It is on this basis recovery of the amount of Rs. 25,46,34,087/- has been ordered as duty not paid against the goods cleared during the aforesaid period along with interest payable.

13. In the impugned order dated 31.3.2004 although the appellate authority *prima facie* found fault with non-issuance of show cause notice to the petitioners before passing the order dated 6.6.2003 and it also recorded that the stand of the department that the earlier notification dated 8.8.2003 has already been superseded could not be substantiated, but dealing with the moot point that the Division Bench judgment of this Court dated 3.12.2002 quashing the notification dated 1.3.2001 is pending consideration before the Apex Court, it has referred to the stay order dated 12.1.2004 passed by the Apex Court staying operation of the said judgment and order dated 3.12.2002. It also noticed the observation of the Apex Court that if the Government had taken any decision independent of the judgment of this Court, the stay order would not come in the way thereof. Referring to the impugned order dated 6.6.2003 passed by the Deputy Commissioner in terms of Section 154 of the Finance Act, 2003, it found that the relief granted in writ appeal was no longer available to the petitioner in view of the stay order passed by the Apex Court. It is in this context the appellate authority has held that the petitioners does not have a strong *prima facie* case on merit. Accordingly the stay application has been rejected by the impugned order dated 31.3.2004 with a direction to the petitioners to deposit the entire amount before the appeal could be heard.

14. Whatever may the grounds of attack to the order dated 6.6.2003 passed by the Deputy Commissioner, the petitioner is bound to deposit the amount in question as contemplated u/s 35F of the aforesaid Act. The expression used therein is "shall". Thus the amount will have to be deposited first as a rule before an appeal is entertained. However, an exception has been provided towards depositing such amount in case of forming an opinion by the appellate authority that such pre-deposit would cause undue hardship. Even in that case also the appellate authority cannot dispense with the requirement altogether without protecting the interests of revenue, because the proviso to Section 35F providing an exception is not wholesome and can only be exercised on fulfillment of two pre-conditions viz. formation of an opinion of causing undue hardship and imposing such conditions towards dispensation of the pre-deposit so as to safeguard the interest of revenue. It is in this context, even if the arguments advanced by the learned counsel for the petitioner is accepted in toto, the submissions made by the learned counsel for the respondents expressing agreement for acceptance of 50% of the amount in question and even 25% of the same by way of Bank Guarantee will have to be understood and considered.

However, the concession shown by the respondents having not been accepted by the petitioners, there is no question of deliberating upon the same and the question will have to be answered either by way of favouring dispensation of the entire amount or by way of rejecting the claim of the petitioners.

15. It is one thing to say that the impugned order dated 6.6.2003 is bad in law because of non-issuance of notice to the petitioners before passing the order but it is altogether different to say that such non-issuance of notice resulted in prejudice to the petitioners. The main thrust of argument on behalf of the petitioners was that before passing the impugned order, they ought to have been issued with a notice and this aspect of the matter having been dealt with by the appellate authority prima facie in favour of the petitioners, the said authority ought to have formed opinion towards granting exemption from depositing the amount in question. The concept of natural justice has undergone a great deal of change in recent years. Over the years by a process of judicial interpretation two rules have been evolved as representing the principle of natural justice in judicial process, including therein quasi judicial and administrative process. What is known as "useless formality theory" received consideration of the Apex Court in the case of *M.C. Mehta Vs. Union of India (UOI) and Others*, The Apex Court while not expressing any opinion on the correctness or otherwise of the "useless formality theory" left the matter for decision in an appropriate case having found from admitted and indisputable fact of that case that grant of a writ will be in vain. The Apex Court in the case of *Canara Bank and Others Vs. Shri Debasis Das and Others*, while discussing in detail the concept, meaning, object, scope and applicability of "natural justice" held that, unless failure of justice is occasioned or that it would not be in public interest to dismiss a petition on the fact situation of a case, the Court may refuse to exercise the jurisdiction. It further held that legal formulations cannot be divorced from the fact situation of the case. Likewise in the case of *Escorts Farms Ltd., Previously known as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumaon Division, Nainital, U.P. and Others*, the Apex Court observed, reiterating the same position that rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits.

16. In the instant case the petitioners, to show that they have been prejudiced by the impugned action have placed no material. In the aforesaid case of *Canara Bank (supra)* the Apex Court also observed that though in all cases post decisional hearing cannot be a substitute for pre-decisional hearing, in a given case the position might be different. In the present case, the petitioners apart from attacking the impugned order dated 6.6.2003 more emboldened by the observation made by the appellate authority have not stated anything as to what material they could have placed before the Deputy Commissioner, had they been issued with a notice. The entire action on the part of the Deputy Commissioner was upon assessing the situation that had arisen pursuant to the judgment in writ appeals and the effect and retrospective operation of Section 154 of the

Finance Act, 2003 coupled with the stay order passed by the Apex Court. Undisputed facts for which there is no plausible explanation from the petitioners dilute the plea of non-issuance of notice to the petitioners. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. The Apex Court have also emphasised that not mere violation of natural justice but de-facto prejudice, other than non-issue of notice has to be proved. In the case of K.L. Tripathi Vs. State Bank of India and Others, the Apex Court quoting Wade's Administrative Law observed as follows :

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent...There such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth."

The Apex Court has consistently applied the principle of prejudice in several cases. In absence of any prejudice shown, the absence of a notice to show cause does not make any difference.

17. Coming to the 2nd aspect of the matter as has been dealt with the appellate authority in its order dated 31.3.2004, same will have to be viewed in reference to the notification No. 69/2003 dated 25.8.2003 by which the Central Government restored the partial benefits to Pan masala containing tobacco and chewing tobacco units set up and operating in North East pursuant to Notification No. 32/99 and the Notification No. 8/2004 dated 21.1.2004 by which the Central Government restored total benefits. Mr. K.N. Choudhury, learned senior counsel appearing on behalf of the respondents also produced the letter under F. No. 275/82/2003 - CX.8A dated 27/29.4.2004 issued by the Government of India, Ministry of Finance, Department of Revenue (Central Board of Excise & Customs) which has been issued in reference to letter dated 30.1.2004 which is much before the impugned order dated 31.3.2004 passed by the appellate authority clarifying the position that in view of the Notification dated 25.8.2003, the earlier Notification dated 8.8.2003 on which much emphasis was placed by the petitioner has become infructuous. The contents of the said letter dated 27/29.4.2004 are quoted below :

"F.No. 275/85/2003-CX.8A

Government of India Ministry of Finance Department of Revenue (Central Board of Excise & Customs) Legal Section New Delhi, the 27/29th April, 2004.

To

The Commissioner of Central Excise, Shillong.

Sub: Retrospective amendment of Notifications No. 32/99 and 33/99 both dated 8.7.1999 in the Budget 2003 - Reg.

Sir,

Kind attention is invited to your letter C.No.IV-16/3/TECH/2003 dated 30th January, 2004 addressed to the Joint Secretary (TRU) on the captioned subject.

2. The matter has been examined by the Board. The Board concurs with the view that the instructions contained in F.No. 356/43/2003-TRU dated 8.8.2003 is infructuous subsequent to the issue of the notification No. 69/2003 dated 25.8.2003.

3. In view of the above, necessary directions may be issued to the jurisdictional officers for initiating appropriate recovery proceedings from those units who are required to deposit the duty and interest claimed as refund from 8.7.1999 onwards till such time the exemption was withdrawn/restored subsequently.

4. Action taken may kindly be communicated in order to inform the Board.

Yours faithfully, (Lakhinder Singh) Joint Secretary (Legal)"

18. In reference to the aforesaid letter dated 27/29.4.2004, it was argued on behalf of the petitioners in reference to the decisions of the Apex Court in Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and Mahinder Singh Gill v. Chief Election Commissioner as reported in (1978) 1 SC 405 that the issue will have to be decided as it stood at the time of passing of the impugned orders towards judging their validity and must not be allowed to be supplemented by fresh reasons in the shape of an affidavit or otherwise. This argument is totally fallacious, firstly because, as noticed above the Notification dated 8.8.2003 will have to be judged in the context in which the same was issued and the two subsequent notifications referred to above. The appellate authority has also only observed that nothing could be produced to show supersession of the Notification dated 8.8.2003. It did not make any reference to the Notifications dated 25.8.2003 and 30.1.2004. The above quoted letter dated 27/29.4.2004 has only clarified the position without adding anything more. This court while deciding the important issue involved in this case cannot be oblivious of such a situation and take a rigid and mechanical approach to the matter. There is another aspect of the matter. Can the authorities of the respondents, by issuing the letter dated 8.8.2003 supersede the statutory provisions. In my considered opinion, such instruction cannot supersede the statutory provisions. It is now well settled that when there is conflict between law and equity, the former shall prevail. Further more, the legal right of the petitioners, if any, pursuant to the issuance of the instructions dated 8.8.2003 having been lost in view of the aforesaid subsequent two notifications, the ground of attach on this score in respect of the impugned order dated 31.3.2004 is not available to the petitioners. In the case of Laxminarayan R. Bhattar v. State of Laxminarayan R. Bhattad and Others Vs. State of Maharashtra and Another, the Apex Court held that the directions or instructions issued cannot supersede the statutory provisions contained either in the main enactment or the statutory regulations.

19. The appellate authority in its impugned order dated 31.3.2004 arrived at a finding that the petitioners do not have any strong prima facie case on merit more so in view of the order of the Apex Court dated 12.1.2004 and upon arriving at such a finding rejected the stay application holding that the pre-deposit cannot be waived. According to the learned counsel for the petitioners the effect of the stay order dated 12.1.2004 only means that the judgment passed in writ appeals would not be operative from the date of passing of the stay order and it does not mean that the same has been wiped out from existence. It is in this context the decision of the Apex Court in *M/s Shree Chamundi* (supra) has been referred to. It was argued that the action taken pursuant to the judgment in writ appeals could not have been wiped out merely because the Apex Court has stayed the said judgment by its order dated 12.1.2004. When there is no dispute relating to the proposition on the effect of stay order in the context of wiping out altogether of the order in question and the existence of the order till it is set aside, in the instant case the impugned orders will have to be judged in the context in which the same have been passed. The impugned order dated 6.6.2003 has been passed taking recourse to Section 154 of the Finance Act, 2003 upon discussion and evaluation of the materials on record including the earlier judgments and orders of this Court in the writ petitions and the writ appeals. The appellate authority has taken note of the stay order passed by the Apex Court and after arriving at the aforesaid finding that the petitioners do not have any prima facie case on merit passed the impugned order dated 31.3.2004 which cannot be said to be illegal and arbitrary. Both the orders have been passed on the given and admitted fact situation.

20. As noticed above, the requirement of Section 35F of the Act towards entertaining an appeal is to deposit the amount in question, subject however, formation of an opinion of undue hardship in which eventuality also interests of revenue is to be protected. The Apex Court in the case of *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, deprecating the practice of granting interim orders in revenue matters observes as follows : -

"Now coming to the facts of the present case, the respondent, Dunlop India Limited is a manufacturer of tyres, tubes and various other rubber products. By a notification dated April 6, 1984 issued by the Government of India, Ministry of Finance (Department of Revenue) in exercise of the powers conferred by Rule 8(1) of the Central Excise Rules, 1944, tyres, falling under item 16 of the First Schedule to the Central Excise and Salt Act, 1944, were exempt from a certain percentage of excise duty to the extent that the manufacturers had not availed themselves of the exemption granted under certain other earlier notifications. The department was of the view that the company was not entitled to the exemption as it had cleared the goods earlier without paying central excise duty, but on furnishing bank guarantees under various interim orders of courts. The company claimed the benefit of the exemption to the tune of Rs. 6.05 crore and filed a writ petition in the Calcutta High Court and sought an interim order

restraining the central excise authorities from the levy and collection of excise duty. The learned Single Judge took the view that a prima facie case had been made out in favour of the company and by an interim order allowed the benefit of the exemption to the tune of Rs. Two crore ninety three lakh and eight five thousand for which amount the company was directed to furnish a bank guarantee, that is to say the goods were directed to be released on the bank guarantee being furnished. An appeal was preferred by the Assistant Collector of Central Excise under Clause 10 of the Letters Patent and a Division bench of the Calcutta High Court confirmed the order of the learned Single Judge, but made a slight modification in that the Collector of Central Excise was given the liberty to encash 30% of the bank guarantee. The Assistant Collector of Central Excise has preferred this appeal by special leave. By our interim order dated 15th November, 1984, we vacated the orders granted by the learned Single Judge as well as by the Division Bench. We gave two weeks" time to the respondent company to file a counter. No counter has, however, been filed. Shri F.S. Nairman, learned counsel, however appeared for the respondent. We do not have the slightest doubt that the orders of the learned Single Judge as well as Division Bench are wholly unsustainable and should never have been made."

21. Similarly in the case of Mahanadi Coalfields Ltd. v. Orient Paper and Industries Ltd. the Apex Court held as follows :

"While the purpose of an interlocutory order is to preserve in status quo the rights of the parties during the pendency of the litigation, the court is also required to put into the scales the need to protect the interest of the respondent before it if the writ petitions ultimately fail and uncertainty as to their results is resolved in such respondent's favour. If the dispensation ordered by the High Court prevails, the respondent before it, even in the event of its success, would be faced with a fait accompli and it would well nigh be impossible for that respondent to gather the dues from the innumerable purchases of coal. The interim orders passed by the High Court do not protect his interests adequately if the final result goes in his favour. Accordingly, the order under appeal is set aside."

22. In the same vein the Apex Court in the case of Union Territory of Pondicherry and Others Vs. P.V. Suresh and Others, as follows :

"Before parting with the case, we feel constrained to reiterate our unhappiness about the interim injunction order made in the Mahe writ petitions. Passing of interim orders is not and cannot be a matter of course - nor a matter of charity. In the matters touching public revenue the courts ought to be made cautious. For better or worse, the courts have come to acquire a veto over the public exchequer. This power should be exercised with good amount of self-restraint and with a sense of responsibility. The power is coupled with accountability - accountability to the Constitution, to the laws of the land and above all to ourselves. The court must apply its mind to the facts of the case and must also envisage the implications and consequences of the order it proposes to make."

23. I may also gainfully refer to the decision of the Apex Court under similar circumstances as reported in (2001) 124 STC 285 (State of Haryana v. Maruti Udyog Ltd.). Referring to Section 39 of Haryana General Sales Tax Act, 1973 under which also as in the instant case the assessee is required to deposit the tax assessed towards entertaining an appeal, held that the object of Section 39 of the Act is to ensure the deposit of amount claimed from an assessee in case of an appeal filed against the tax demanded. It exclusively quoted with approval the considerations made by the Full Bench of the Punjab and Haryana High Court in Emerald International Ltd. (2001) 122 STC 382 and held that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. In the instant case also it is the case of the petitioners that there is a prima facie case in their favour in view of the first two findings recorded by the appellate authority. The Full Bench of the High Court inter alia observed :

"The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India in rarest of the rare cases in the given facts and circumstances, can grant stay and waive the condition of pre-deposit of tax and the existing alternative remedy in such circumstances would be no ground to refuse interference."

24. In the above case of Maruti Udyog Ltd. (supra) the Apex Court noticed that the Division Bench of the High Court even failed to mention the circumstances which justified the passing of the order for allowing the writ petition with direction to the Tribunal for disposal of the appeal on furnishing of the Bank Guarantee by the company. It held that merely because the Tribunal had insisted upon the payment of the amount in terms of proviso to Sub-section (5) of Section 39 of the Act, should not have annoyed the Court while granting the relief in exercise of its powers under Article 226 of the Constitution. In that case the impugned order was held to be contrary to settled principles of law. The observations made by the Apex Court towards setting aside the judgment of the Division Bench of the High Court are worth quoting:

"7. ...

There cannot be any dispute that right of appeal is the creature of the statute and has to be exercised within the limits and according to the procedure provided by law. It is filed for invoking the powers of a superior court to redress the error of court below, if any. No right of appeal can be conferred except by express words. An appeal, for its maintainability, must have a clear authority of law. Sub-section (5) of Section 39 of the Act vests a discretion in the appellate authority to entertain the appeal if it is filed within sixty days and the amount of tax assessed along with penalty and interest, if any, recoverable from the persons has been paid. The aforesaid restrictions subject to the proviso conferring discretion upon the appellate authority to dispense with the deposit of the amount only on proof of the fact that the appellant was unable to pay the amount. Before deciding the appeal, the appellate authority affords an

opportunity to the party concerned to either pay the amount or make out a case for the stay in terms of proviso to Sub-section (5) of Section 39 of the Act. Once the conditions specified under Sub-section (5) of Section 39 are complied with, the appeal is born for being disposed of on merits after hearing both the sides.

8. Interpreting the word "entertain" in relation to the filing of an appeal, as is also the mandate of Sub-section (5) of Section 39 of the Act this Court in *S. Sanyal Vs. Gian Chand*, observed:

"To begin with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word "entertained" in this context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available? The dictionary meaning of the word "entertain" was brought to our notice by the parties, and both sides agreed that it means either "to deal with or admit to consideration" stage can the appeal be said to be entertained for the purpose of the application of the proviso? Is it "entertained" when it is filed or is it "entertain" when it is admitted and the date is fixed for hearing or is it finally "entertained" when it is heard and disposed of? Numerous cases exist in the law reports in which the word "entertained" or similar cognate expressions have been brought to our notice and we shall deal with them in due course. For interpreted by the courts. Some of them from the Allahabad High Court itself have been the present we must say that if the Legislature intended that the word "file" or "receive" was to be used, there was no difficulty in using those words. In some of the statutes which were brought to our notice such..., under Order 41, Rule 1 of the CPC it is stated that a memorandum shall not be filed or presented unless it is accompanied, etc. In Section 17 of the Small Causes Courts Act, the expression is "at the time of presenting the application". In Section 6 of the Court-fees Act, the words are "file" or "shall be received". It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State. It has used the word "entertain" and it must be accepted that it has used is advisedly. This word has come in for examination in some of the cases of the Allahabad High Court and we shall now refer to them. In our opinion, these cases have taken a correct view of the word "entertain" which according to dictionary also means "admit to consideration". It would therefore appear that the direction to the court in the proviso to Section 9 is that the court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the court for the first time. In the decision on which the Assistant Commissioner relied, the learned Chief Justice (Desai, C.J.) holds that the word "accompanied by" showed that something tangible had to accompany the memorandum of appeal. If the memorandum of appeal had to be accompanied by satisfactory proof, it had to be in the shape of something

tangible, because no intangible thing can accompany a document like the memorandum of appeal. In our opinion, making "an appeal" the equivalent of the memorandum of appeal is not sound. Even under Order 41 of the Code of Civil Procedure, the expressions "appeal" and "memorandum of appeal" are used to denote two distinct things. In Warton's Law Lexicon, the word "appeal" is defined as the judicial examination of the decision by the higher court of the decision of an inferior court. The appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited. For purposes of limitation and for purposes of the rules of the Court it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax.

9. The object of Sub-section (5) of Section 39 of the Act is to ensure the deposit of amount claimed from an assessee in case of an appeal filed against the tax demand. However, power is given to the Appellate Tribunal to relieve him from the rigour of above restriction under the circumstances spelt out in the proviso of the aforesaid section. Sub-section (5) regulates the exercise of right of appeal conferred upon an assessee u/s 39 of the Act, the object being to keep in balance the right of the aggrieved person and the right of the State to speedy recovery of tax.

11. The act has been enacted and the right of appeal provided with a dual purpose of protecting the interests of the assessee and also to safeguard the interests of the revenue. The provision appears to have been made to explore further sources for raising Revenue of the State. This Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, observed that "No Government business or for that matter no business of any kind can be run on mere bank guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required."

12. In the instant case the prayer was made to grant stay on the ground that "the petitioner has not collected any additional tax from the customers and is unable to deposit the amount of additional demand created by patently illegal order". The respondent company nowhere mentioned to or referred to its inability to pay the amount on account of its alleged financial difficulties or incapacity to make the requisite payment. The legality of the additional demand created could not be made the basis for insisting to entertain the appeal without prior payment, as that would have required the determination on the merits of the appeal. Relying upon the Full Bench judgment of the jurisdictional court in Emerald International Ltd.'s case (2001) 122 STC 382: (1997) P&H 113 the Tribunal was competent in passing the order (annexure-p8) which was impugned

in the High Court. The Division Bench of the High Court was not justified in ignoring the Full Bench judgment and the judgment of another Bench of co-ordinate jurisdiction while allowing the writ petition of the company. The Division Bench even failed to mention the circumstances which justified the passing of the order for allowing the writ petition with direction to the Tribunal for disposal of the appeal on furnishing of the bank guarantee by the company. Merely because the Tribunal had insisted upon the payment of the amount in terms of proviso to Sub-section (5) of Section 39 of the Act, should not have annoyed the court while granting the relief in exercise of its powers under Article 226 of the Constitution. The impugned order being contrary to settled principles of law cannot be sustained and is accordingly set aside."

25. In the case of *Vijay Power Generators Ltd. v. Commissioner of Sales Tax* as reported in (2000) 120 STC 337 a Division Bench of Delhi High Court under similar circumstances, while refusing to interfere with the order passed by the Commissioner of Sales Tax towards depositing the amount in question, held that the right of appeal is a creation of statute but in exercise of such right, there is no inherent or constitutional right to file an appeal. Referring to the decisions of the Apex Court in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, and *State of Bombay Vs. Supreme General Films Exchange Ltd.*, held that legislature can, while granting right of appeal, lay down a condition for deposit of tax as it is creation of statute and that there is nothing wrong if under same statute, a right of appeal is given and then some restrictions put over it. It further observed that such right is neither an absolute right nor an ingredient of natural justice and that it must be conferred by statute and can be exercised only as permitted by statute. Referring to many fiscal statutes like Central Excise and Salt Act, Customs Act, Sales Tax of various States and many other similar statutes which mandate deposit of disputed amount as a condition precedent for entertaining appeal, it held that such deposits merely regulates exercise of right of appeal. As regards the merit of the case, the Court observed that any expression finally on merits would not be desirable and proper. Noting that the prescribed authority is conferred with discretion to dispense with pre-deposit conditionally or in full or in part the Court observed that such discretion is governed by the Maxim "*discretio est discernere per legem quid sit justum*" (discretion consists in knowing what is just in law). It further observed that the discretion in general is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution, to discern between falsity and truth, between shadow and substance, between equity and colourable glosses and pretences and not to do according to the will and private affections and ill will. It has to be done according to the rules of reasons and justice, not according to private opinion. It has to be done according to law and not humour. It is not arbitrary, vague and fanciful but legal and regular.

26. In the instant case the appellate authority applied its sound discretion in the matter towards passing the impugned order dated 31.3.2004. The object of

Section 35F is to ensure protection of revenue. The appellate authority has also recorded its prima facie satisfaction that the petitioners do not have any prima facie case on merit. The findings arrived at by the appellate authority cannot be said to be perverse or based on no material/evidence. The appellate authority has gone through the impugned order dated 6.6.2003 in which the factual aspect of the matter as well as the legal position pursuant to the amendment brought by the Finance Act, 2003 have been elaborately discussed. Same is the case in respect of other such orders involved in the other three writ petitions. The petitioners have not been able to bring any material whatsoever to persuade this Court to take different view than the one, which has been taken by the authorities, or that the said decisions are extraneous and are based on no materials. Even if two views are possible, the writ court in exercise of its power of judicial review under Article 226 of the Constitution of India cannot take one view of the matter in preference to the other view. The appellate authority has applied its sound discretion having regard to the attending circumstances including the stay order dated 12.1.2004 passed by the Apex Court. I do not find any infirmity with the impugned orders so as to interfere in exercise of power if judicial review under Article 226 of the Constitution of India.

27. In view of the above discussions and findings I need not deal with the submission made by Mr. K.N. Choudhury, learned senior counsel appearing for the respondents that the provisions of Section 51 of the Finance Act, 1982 are not in pari materia with that of the provisions of Section 154(3) of the Finance Act, 2003, in view of inclusion of the expression "omitted to be done" in Section 154 which expression is missing in Section 51, although the same may have a bearing on the issue on merit. Mr. M. Bhuyan, learned counsel appearing for the petitioners upon instructions submitted that although a challenge has been put to Section 154 of the Finance Act, 2003, the petitioners would not like to pursue the same in these proceedings. However, liberty was prayed for to make challenge to the same independent of these proceedings. Liberty is granted making it clear that the same will have no bearing so far as the impugned orders in the present proceedings are concerned. No opinion is also expressed as to whether the decision in JK Cotton & Spinning Ltd case (supra) will have any bearing to such a challenge.

28. For the foregoing reasons and discussions I do not find any merit in the writ petitions and the same are dismissed. However there shall be no order as to costs.

29. Writ petitions stand dismissed.