

**(2009) 08 AHC CK 0274**

**Allahabad High Court**

**Case No:** Civil Miscellaneous Writ Petition No's. 1717 and 1441 (Tax) of 2004

D.S.M. Sugar

APPELLANT

Vs

Commissioner (Appeals) of  
Central Excise

RESPONDENT

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**Date of Decision:** Aug. 18, 2009

**Acts Referred:**

- Central Excises and Salt Act, 1944 - Section 35F

**Citation:** (2011) 22 SLJ 356 : (2011) 22 STR 356

**Hon'ble Judges:** Shashi Kant Gupta, J; R.K. Agrawal, J

**Bench:** Division Bench

**Final Decision:** Allowed

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### **Judgement**

Shashi Kant Gupta, J.

Since similar questions are involved in these aforementioned writ petitions, they are, with the consent of the parties, being taken up together and disposed of by a common judgment and order.

2. Civil Misc. Writ Petition No. 1717 (Tax) of 2004 has been filed, inter alia, for the following relief's;

(a) issue a writ of certiorari quashing the order dated 27-9-04 read with order dated 19-8-04 passed by the Commissioner (Appeals), Central Excise, Meerut-II;

(b) issue a writ of mandamus directing the Respondent No. 1 to restore the appeal to its original number and further to decide the stay-cum-waiver application afresh after granting a personal hearing to the Petitioners;

(c) issue a writ of mandamus directing the Respondents to lift the order of attachment forthwith.

3. The connected writ petition No. 1441 (Tax) of 2004 has been filed, inter alia, for the following relief's;

(i) issue a writ order of certiorari quashing the order dated 14-9-2004 (Annexure A-7 to the writ petition) issued by the Superintendent (Appeals) Customs, and Central Excise, Meerut-II;

(ii) issue a writ of mandamus directing the Respondent No. 1 to decide the stay cum waiver application afresh after granting a personal hearing to the Petitioners after giving a notice of hearing in advance to the Petitioners and Petitioner's counsel.

4. Brief facts as enumerated in the writ petitions are as follows;

The Petitioners are engaged in the manufacture of sugar and molasses and were availing the facility of MODVAT credit on inputs and capital goods. Petitioners were served with seven show cause notices from 28-4-1995 till 4-11-1996 alleging that they had wrongly availed MODVAT credit to the tune of Rs. 1,09,54,582.42 and were required to show cause as to why the said amount be not recovered from them. On 31-12-2003 Additional Commissioner adjudicated all the seven show cause notices and disallowed MODVAT credit to the tune of Rs. 66,07,214.00 and imposed an equal amount of penalty. Aggrieved by the adjudication order, the Petitioner filed an appeal along with stay-cum-waiver application before the Commissioner (Appeals), Meerut-II on 17-5-04.

5. The date of hearing on stay-cum-waiver application was fixed on 17-8-04 vide notice dated 5-8-04. On 12-8-04, the communication of hearing was received by the Petitioner. Thereafter, on 16-8-04 the counsel of the Petitioner by letter dated 16-8-04 sought an adjournment of hearing fixed on 17-8-04. The Commissioner (Appeals) decided the stay-cum-waiver application ex-party without considering the adjournment application on 19-8-04.

6. On receipt of the order passed by the Commissioner (Appeals) on the stay-cum-waiver application, the Petitioner immediately filed an application on 6-9-04 for modification of the order apprising the Commissioner (Appeals) that he had filed an application dated 16-8-04 which was received in his office on 16-8-04 itself and therefore requested the Respondent No. 1 to pass afresh order on the stay-cum-waiver application after granting him proper opportunity of hearing. Respondent No. 2 by letter dated 14-9-04 informed the Petitioner that there is no provision of law under which the Commissioner (Appeals) can review its own order, hence no application for modification of such order can be entertained. It was also stated in the said letter that the said order had been passed with the approval of the Commissioner (Appeals).

7. Feeling aggrieved, by the order dated 14-9-04, the Petitioner filed a Civil Misc. Writ Petition No. 1441 (Tax) of 2004 (connected with petition) and challenged the order dated 14-9-04 passed by the Respondent No. 2. After filing of the said writ petition,

Commissioner (Appeals) by order dated 27-9-04 dismissed the appeal of the Petitioner for non-compliance of the stay order passed u/s 35F of the Central Excise Act, 1944. Hence, the present writ petition.

8. Heard learned Counsel for the parties and perused the record.

9. It is submitted by the learned Counsel for the Petitioner that 17th August, 2004 was fixed before the Commissioner (Appeals) for hearing on the stay/waiver application and on 16th August, 2004, as a precautionary measure, the Petitioner had submitted an application for adjournment which was received in the office of the Commissioner (Appeals) on the very same date i.e. 16-8-04. The office of the Commissioner (Appeals) for the reason best known did not place the adjournment application before the Commissioner (Appeals), who proceeded to decide the stay/waiver application ex parte on 17th August, 2004, even though the order was passed on 19th August, 2004. Thereafter, an application for recall/review of the said order was filed, which stood rejected and consequently the appeal too was dismissed for non-compliance of the order dated 19-8-09 passed on the stay-cum-waiver application.

10. The contention of the learned Counsel for the Petitioner is that for no fault of the Petitioner he is being made to suffer and recovery proceedings have been initiated, and the finished products and other goods have been attached.

11. At this juncture, it will be useful to refer to Paragraph 16 of the counter-affidavit wherein it has been admitted that the adjournment letter was received on 16-8-04 which was seen at the dak stage on 17-8-04 by Commissioner (Appeals). But at this dak stage it was not possible to pass any order on the letter without seeing the file. The Paragraph 16 of the counter-affidavit filed by the Respondents is reproduced below:

That the contents of paragraph No. 9 of the writ petition are not admitted as stated. It is further submitted that the adjournment letter was received late on 16-8-04, which was seen at the dak stage on 17-8-04 by Commissioner (Appeals). But at the dak stage it was not possible to pass any order on the letter without seeing the file.

12. From a bare perusal of the aforesaid facts it is quite clear that the Commissioner (Appeals) decided the stay-cum-waiver application ex parte without providing any opportunity to the Petitioner of hearing and did not take into account the adjournment application filed by the Petitioner though admittedly it was received in the office of the Respondent-Commissioner (Appeals) on 16-8-04, and this fact appears to have not come to his knowledge on 17-8-04. The aforesaid facts clearly shows that the Commissioner (Appeals) showed undue haste in dismissing the waiver/stay application, which led to the dismissal of the appeal of the Petitioner. The approach of the Commissioner (Appeals) should be justice oriented and doctrine of fairness is complimentary to principles of natural justice to ensure rule of law and to prevent failure of justice which is evolved to ensure rule of law and to

prevent failure of justice. The Commissioner has committed a manifest error and a serious procedural illegality by not granting reasonable opportunity to the Petitioner. The order passed should be in conformity with the principle of justice, equity and good conscious. The undue haste and speed with which the impugned order has been passed, in our opinion, should be discouraged.

13. In view of the above, the order dated 27-9-04, 19-8-04 and 14-9-04 passed by the Commissioner (Appeals), Central Excise, Meerut-II, Respondent No. 1 are hereby quashed and the appeal filed by the Petitioner before the Respondent No. 1 is restored.

14. The Petitioner undertakes to file a certified copy of this order within a period of 30 days from today before the Respondent No. 1, Commissioner (Appeals), Central Excise, Meerut-II, who shall pass appropriate orders on the stay/waiver application of the Petitioner in accordance with law within a period of three months from today after giving proper opportunity of hearing to the Petitioner.