

(2011) 07 AHC CK 0362
In the Allahabad High Court
Case No : Writ Tax No. 924 of 2011

Optho Remedies (P.) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35A, 35F

Citation : (2011) 274 ELT 45

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Arun Tandon, J.—Heard learned counsel for the parries.

2. M/s. Optho Remedies Pvt. Ltd. has filed this writ petition against an order passed by the Commissioner (Appeals) in proceedings u/s 35F of the Central Excise Act, 1944 (herein after referred to as the Act, 1944) in a pending Appeal u/s 35A of the Act, 1944.

3. Petitioner Company had challenged the order-in-original made by the Joint Commissioner of Central Excise, Allahabad dated 30-8-2010 by way of an Appeal u/s 35A of the Act, 1944. Along with the Appeal the petitioner Company also made an application for waiver of the disputed amount with reference to the provisions of Section 35F of the Act, 1944 termed as stay application. Along with the application, the petitioner in order to establish that they had a prima facie strong case relied upon the six judgments of the Tribunal for the proposition that the value of the goods manufactured on behalf of loan licensee are not to be added in computing the aggregate value of the goods manufactured by the Company. Therefore, it was contended that the finding recorded by the Additional Commissioner for coming to the conclusion that the benefit of SSI exemption was wrongly claimed by the petitioner after computing and adding the aggregate value of the clearance of the goods manufactured by the loan licensee is legally

not justified.

4. The application u/s 35F has been disposed of under the impugned order requiring the petitioner Company to deposit 50% of the total amount of excise duty and penalty imposed vide order under appeal within two weeks. In case of default, the appeal shall stand dismissed.

5. Counsel for the petitioner with reference to the application made u/s 35F of the Act, 1944 which has been brought on record as Annexure-14 points out that the judgments in the case of 1999 (84) ECR 673 , 2002 (101) ECR 333 , 2004 (169) ELT 103 , Releef Pharmaceuticals v. C.C.E., Aurangabad reported in 2006 (195) E.L.T. 78 (Tribunal - Mumbai) and Omega Pharmaceuticals v. C.C.E., Surat reported in 2006 (196) E.L.T. 332 (Tribunal - Mumbai) were specifically referred and relied in support of the contention that the computation of the aggregate value of the goods manufactured by the loan licensee is not to be added for the purposes calculating the aggregate value of the clearance of goods made by the petitioner company. He submits that the judgment of the Tribunal which are binding upon the Commissioner (Appeals) have not been considered while recording a finding that the petitioner did not have a prima facie strong case, under the impugned order. He submits that the judgments relied upon have completely been ignored and, therefore, the order of the Commissioner (Appeals) cannot be legally sustained. It has also been brought to the notice of the Court that in respect of similar matter of different year, proceedings were pending before the Central Excise Service Tax Appellate Tribunal in Excise Appeal No. 1165 of 2009 wherein an order was passed in 13-11-2009 staying the recovery of the disputed amount with the observation that the appeal itself shall be finally decided. He submits that the hearing of the appeal has already been completed and orders was reserved on 18-8-2010. The final order has not been delivered till date.

6. Although there is no averment in the present petition qua up to date status of the Excise Appeal No. 1165 of 2009, counsel for the petitioner Shri Madhav Rao has made an statement before this Court that he is also a counsel in the said appeal and the Court may record his statement as an honest officer of the Court that the final orders in the Appeal No. 1165 of 2009 have yet not been delivered.

7. Acting on the statement so made by the counsel, the Court has proceeded to deal with the appeal on merits.

8. Shri Shambu Chopra, counsel for the department contended that orders have been passed on an application described as Stay Application, therefore, in such proceedings, it is not necessary to deal with the judgments relied upon by the petitioner in extensio. He further points out that the judgment relied up by the petitioner are those of the Tribunal only.

9. I have heard learned counsel for the parties and have gone through the records of the present writ petition.

10. No purpose would be served by keeping the writ petition pending inasmuch interest of substantial justice would be served by disposing of the petitioner as under.

11. A Division Bench of this Court in the case of ITC Limited Vs. CC (Appeals) and CE and Others, in paragraph 35 has held as follows :

In view of the above, the aforesaid authorities make it clear that the Court should not grant interim relief/stay of the recovery merely by asking of a party. It has to maintain a balance between the rights of an individual and the State so far as the recovery of sovereign dues is concerned. While considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a strong prima facie case on merit. In case it is covered by the judgment of a Court/Tribunal binding upon the Appellate Authority, it should apply its mind as to whether in view of the said judgment, the appellant is likely to succeed on merit. If an appellant having strong prima facie case, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restraint on the appellant running in a good financial condition. The arguments that appellant is in a position to deposit or if he succeeds in appeal, he will be entitled to get the refund, are not the considerations for deciding the application. The order of the Appellate Authority itself must show that it had applied its mind to the issue raised by the appellant and it has been considered in accordance with the law. The expression "undue hardship" has a wider connotation as it takes within its ambit the case where the assessee is asked to deposit the amount even if he is likely to exonerate from the total liability on disposal of his appeal. Dispensation of deposit should also be allowed where two views are possible. While considering the application for interim relief, the Court must examine all pros and cons involved in the case and further examine that in case recovery is not stayed, the right of the appeal conferred by the legislature and refusal to exercise the discretionary power by the authority to stay/waive the pre-deposit condition, would be reduced nugatory/illusory. Undoubtedly, the interest of the Revenue cannot be jeopardized but that does not mean that in order to protect the interest of the Revenue, the Court or Authority should exercise its duty under the law to take into consideration the rights and interest of an individual. It is also clear that before any goods could be subjected to duty, it has to be established that it has been manufactured and it is marketable and to prove that it is marketable, the burden is on the Revenue and not on the manufacturer.

12. Examining the orders of the Commissioner (Appeals), this Court finds that there is complete non-consideration of the six judgments which had been relied upon by the counsel for the petitioner in support of his plea for establishing a strong prima facie case. Such non-consideration of the judgment vitiates the order impugned. Therefore, in the facts and circumstances of the case, without calling for any further affidavits in the present petition, it would be appropriate to

set aside the order impugned and to direct the Commissioner (Appeals) to reconsider the application made u/s 35F termed as Stay Application in light of the judgment of the Division Bench, referred to above and after taking note of the judgments referred by the petitioner for arriving at a satisfaction as to whether the petitioner has a strong prima facie case or not.

13. It is needless to emphasise that the Division Bench has held that if the Appellant has a strong prima facie case, then the issue of financial hardship is of not much substance.

14. In view of the aforesaid the order dated 15-6-2011 is hereby quashed. The application is restored to its original number. Let the Commissioner (Appeals) decide the application, after affording opportunity of hearing to the petitioner, preferably within four weeks from the date a certified copy of this order is filed before him.

15. Writ petition is allowed subject to the observations made herein above.