

(2011) 10 AHC CK 0028
In the Allahabad High Court
Case No : Writ Tax No. 1483 of 2011

Optho Remedies (P) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 11-10-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Constitution of India, 1950 — Article 226

Citation : (2012) 276 ELT 327

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Arun Tandon, J.—Heard Shri M.P. Devnath, Advocate assisted by Shri Nishant Mishra, Advocate for the petitioner and Shri Shambhu Chopra, learned counsel for the respondents.

2. Petitioner had approached this Court earlier by means of Civil Misc. Writ Petition (Tax) No. 924 of 2011 in the matter of consideration of his application made u/s 35F of the Central Excise Act with the allegation that various judgments relied upon by the petitioner for establishing his strong prima facie case had not been considered by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Allahabad, while deciding his application for waiver titled as Stay Application referable to Section 35F of the Central Excise Act. Such writ petition filed by the petitioner was decided by this Court vide judgment dated 11th July, 2011 [Optho Remedies (P.) Ltd. Vs. Union of India,] and it was held that the Tribunal should have considered the judgments relied upon by the petitioner in support of his prima facie case. With reference to the Division Bench judgment of this Court in the case of ITC Limited Vs. CC (Appeals) and CE and Others, specifically paragraph-35, it was observed that if the assessee has a very strong prima facie case, covered by the earlier judgment of Tribunal or court of law, then the issue of the financial difficulties is not of much relevance,

3. Accordingly the order of the Commissioner (Appeals) was set aside and he was directed to reconsider the waiver application termed as stay application. In light of observations made in the judgment of this Court as well as in light of the Division Bench Judgment of this Court in the case of I.T.C. Ltd. (supra). On remand, the Commissioner (Appeals) has reconsidered the waiver application referable to Section 35F of the Central Excise Act and has disposed of the same under the impugned order dated 9th September, 2011. The Assessee has been directed to deposit 50% of the amount of Central Excise Duty demanded along with penalty imposed within two weeks of the receipt of the order to report compliance within one week of deposit. Appeal has been directed be listed thereafter. In case of non-compliance of the condition so imposed, it has been directed that the appeal shall stand dismissed.

4. On behalf of the petitioner, the order impugned is being challenged on following grounds :

(a) In respect of earlier assessment year, the Tribunal had granted 100% stay of the deposited amount, such order of the Tribunal should have been followed in toto by the Commissioner (Appeals) in view of the law laid down by the Apex Court in the case of Vishnu Traders v. State of Haryana and Ors. .

(b) Commissioner (Appeals) has misread the judgment of the Tribunal in the case of 1999 (84) ECR 673 ,

(c) There has been complete non-consideration of the judgment of the Apex Court in the case of M/s. Pawan Biscuits Co. Private Ltd. Vs. Collector of Central Excise Patna, .

5. Learned counsel for the petitioner made an attempt to take the Court to the various agreements executed between the petitioner and the loan licensees for establishing that the loan licensees were manufacturers in their own right and they were not performing the job work on behalf of the assessee. Therefore, their turnover was not liable to be clubbed with that of the assessee.

6. At the very outset this Court may record that the present writ petition arises out of proceedings u/s 35F of the Central Excise Act, where only prima facie case of the assessee has to be examined in the matter of consideration of the waiver application. Exercise of jurisdiction in the consideration of prima facie case by the Commissioner is therefore, subject matter to be examined by this Court in the present writ proceedings. It may be recorded that unless the assessee is successful for establishing that the view taken by the Commissioner (Appeals) while considering the prima facie case is perverse and no reasonable man can come to the conclusion, there shall hardly be any scope for this Court to interfere under Article 226 of the Constitution of India. If two views are possible on the prima facie case, this Court will not exercise its discretion and interfere with the order passed by the Tribunal only because other view may also be an acceptable view. This Court is not required at this stage of the proceedings to record any conclusive opinion on the merits of the case pleaded by the assessee. Therefore,

this Court will confine its exercise of jurisdiction only to examine as to whether in the facts of the present case the finding recorded by the Commissioner (Appeals) on the issue of prima facie case is perverse or so as to the extent that no reasonable man can come to the said conclusion or not.

7. In the aforesaid background that this Court finds that the first ground raised by the assessee has specifically been taken note of by the Commissioner (Appeals). Even otherwise, it may be recorded that the order passed by the Tribunal, while considering the waiver application made in respect of previous year proceeding vide order dated 13th November, 2009, observed as follows:

Having heard the matter for a considerable time, we find it appropriate to fix the matter for final disposal. We, accordingly, direct the matter of stay application to be listed along with appeal itself for final disposal on 21st January, 2010. The appellants in this case challenge the order passed by the Commissioner on 6th February, 2009, whereby the duty to the tune of Rs. 1,24,03,608/- is sought to be recovered on the allegation against the appellants about clandestine removal of the goods evading the liability of excise duty. The learned advocate appearing for the appellants has attempted to demonstrate that the documents which are required to be considered to ascertain whether there has been clandestine removal of the goods evading the liability of excise duty have not been properly analyzed and assessed by the adjudicating authority. In that regard, attention was drawn to the Profit & Loss A/c of 25th annual report for the year 2004-05 and more particularly. In relation to the entries pertaining to the sale of the commodities stated to have been procured either by way of purchase from other manufactures or having obtained from the job workers at Ahmedabad and nearby areas. Attention was also drawn to the invoices and transport documents in relation to the clearance of sales tax liability and transportation of the product from Ahmedabad to Allahabad copies of which are placed in Volume I & II of the documents produced before the Tribunal which are stated to be the part of the documents relied upon and placed before the adjudicating authority and ignored by the adjudicating authority. In the circumstances, we find it appropriate to dispose of the matter finally rather than disposing of merely the application for stay.

2. In case the respondent wants to place on record any document disclosing the consideration of all these documents by the adjudicating authority while deciding the matter, the same shall be placed on record on or before 16th December, 2009 with advance copy thereof to the appellants.

3. Meanwhile, the respondent shall not take any coercive step against the appellants in relation to the order in question. Stand over to 21st January, 2010."

8. It will be seen that the Tribunal has not recorded any finding on the prima facie merits of the case of the assessee, so far as the issue in hand is concerned. The Tribunal has only considered that certain documents, which were on record, as canvassed by the assessee had been ignored by the Commissioner (Appeals)

while passing the impugned order. It is only in this background that the Tribunal permitted the assessee to file further documents and thereafter proceeded to observe that no coercive action shall be taken against the appellants till the disposal of the appeal.

9. This Court has no hesitation to record that the issue which has been raised for challenging the order impugned before the Commissioner (Appeals) qua loan licensees being manufactures in their own right and not preforming job work was not subject matter of consideration before the Tribunal in the matter culminating in the order dated 21st October, 2010. Therefore, such interim order has absolutely no relevance on the prima facie case, which has been pleaded by the assessee before the Commissioner (Appeals) giving rise to the present writ petition.

10. Now turning to the second issue raised on behalf of the assessee, this Court finds that the Commissioner (Appeals) has rightly distinguished the judgment which was heavily relied upon by the assessee in the case of Mayo India Ltd. (supra) on facts. It has been recorded that there from reading of the agreement entered into between the petitioner and loan licensees, it was prima facie established that the assessee continued to exercise complete supervision and control over the manufacturing activities of the goods in question. Therefore, it has been held that loan licensees were only performing job work for the assessee and were not independent manufacturers as was pleaded by the petitioner.

11. Prima facie finding so recorded by the Tribunal cannot be said to be perverse. This Court finds that the Tribunal in the case of Mayo India Ltd. (supra) has specifically observed in paragraph-6 as follows :

6..... The department has not adduced any evidence to show that the appellants were exercising control and supervision over the manufacturing activities in the premises of the manufacturers. There is no allegation contained also in the show cause notice that the appellants and the manufacturers of the product were related persons.

12. The Commissioner (Appeals) therefore, cannot be said to have committed an error in the facts of the present case, while recording a finding that the loan licensee were only performing job work for the assessee. So far as the judgment of the Apex Court in the case of Pawan Biscuit Company (supra) is concerned, this Court may record that petitioner had relied upon five judgments before the Commissioner (Appeals). All five judgments have been considered and distinguished. Petitioner did not refer to the judgment in the case of Pawan Biscuit Company (supra) before the Tribunal. Even otherwise, the judgment in the case of Pawan Biscuit Company (supra) does not lay down any binding legal precedent, which the Commissioner (Appeals) can be said to have ignored while considering the impact of the order of the Tribunal passed in respect of the assessee for the previous years, specifically in the circumstance when the issue which was considered in the interim order of the Tribunal qua previous year

proceedings was entirely on different ground vis-a-vis the one, which had been canvassed before the Commissioner (Appeals) at the time of consideration of the application u/s 35F of the Central Excise Act giving rise to this petition.

13. It may also be recorded that the Hon'ble Supreme Court of India in the case of Vishnu Traders (supra) in paragraph-3 has held that in the matter of interlocutory orders, principle of binding precedent cannot be said to apply. As a matter of fact there is no binding precedent applicable in the facts of the present case. The cause has to be judged on its own merit and the peculiar fact, specifically those emerging from the agreement entered into between the petitioner and the loan licensees. Agreement has been considered by the Commissioner (Appeals) in extenso and after noticing the various paragraphs of the agreement so entered into, a prima facie finding has been recorded that the loan licensees were only performing job work for the assessee and they were not manufacturers in their own right.

14. There is no illegality in the order of the Commissioner (Appeals) which may warrant any interference under Article 226 of the Constitution of India.

15. At this stage, learned counsel for the assessee comes up with a plea that this Court may grant some indulgence in the matter of deposit of 50% of the disputed amount. He submits that the assessee shall deposit part of the demand in cash and for the remaining, he may be permitted to furnish security other than cash or bank guarantee.

16. Learned counsel for the department could raise no reasonable objection to request so made.

17. In view of the stand so taken by the assessee before this Court, this Court finds it just and proper to substitute the part of the order of the Commissioner (Appeals) insofar as it directs payment of 50% of the disputed amount in cash as under :

Assessee may deposit Rs. 20 lacs in cash within one month from today and for the remaining amount in terms of the order of the Commissioner (Appeals), he may furnish security other than cash or bank guarantee to the satisfaction of the Commissioner (Appeals) within the same period. In case of default the petitioner shall not be entitled to the benefits of this order.

18. The present writ petition is dismissed subject to the observations made above.