(2013) 07 P&H CK 0058

In the Punjab And Haryana At Chandigarh

Case No : C.W.P. Nos. 1672, 1701 and 1779 of 2013

Surya Pharmaceutical Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 31-07-2013

Acts Referred:

Citation : (2014) 301 ELT 331

Hon'ble Judges : Rajive Bhalla, J;Bharat Bhushan Parsoon, J

Bench : Division Bench

Judgement

Rajive Bhalla, J.—By this common order, we shall dispose of Civil Writ Petition Nos. 1672, 1701 and 1779 of 2013 as they involve adjudication of common questions of law and facts. The facts are being taken from CWP No. 1672 of 2013. The short-point that arises for adjudication, in these writ petitions, is whether Section 35(1)(b) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") confers an alternative remedy of appeal, against an order passed by the Commissioner (Appeals), u/s 35F of the Act.

2. Counsel for the petitioner submits that an order passed u/s 35F of the Act is not appealable, whether u/s 35(1)(b) of the Act or any other provision. Section 35(1)(b) of the Act provides for an appeal against an order passed u/s 35A of the Act. An order passed u/s 35F is an order passed in exercise of powers independent of powers conferred by Section 35A of the Act and is, therefore, not appealable u/s 35(1)(b) of the Act. It is further submitted that the Madras High Court has already held in Hindustan Lever Limited Vs. The Commissioner of Central Excise (Appeals), that an order passed u/s 35F of the Act is not appealable.

3. Counsel for the respondents submits that an appeal is filed before a Commissioner (Appeals) u/s 35 of the Act. The procedure for deciding an appeal is prescribed by Section 35A of the Act. Section 35F of the Act requires an assessee to pre-deposit the amount demanded by the revenue but the first proviso to Section 35F empowers the Commissioner (Appeals) to entertain the

appeal by dispensing with the condition of pre-deposit. An order passed under the first proviso to Section 35F is an order passed by an Appellate Authority, constituted u/s 35 of the Act, in the exercise of its appellate powers and would, therefore, necessarily be appealable to the CESTAT. The petitioner should, therefore, be relegated to his remedy of filing an appeal.

4. We have heard counsel for the parties, perused the paper-book as well as relevant statutory provisions, which read as follows:

35. Appeals to Commissioner (Appeals). - (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.

35A. Procedure in appeal. -

(1) The Collector (Appeals), shall give an opportunity to the appellant to be heard, if he so desires.

(2) The Collector (Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Collector (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable.

(3) The Collector (Appeals), may, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Collector (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time limit specified in Section 11A to show cause against the proposed order.

(4) The order of the Collector (Appeals) disposing of the appeal shall be in writing and shall state the points for determination the decision thereon and the reasons for the decision.

(5) On the disposal of the appeal, the Collector (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority and the Collector of Central Excise.

35B. Appeals to the Appellate Tribunal. - (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) u/s 35A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise u/s 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Central Excise, either before or after the appointed day, u/s 35A, as it stood immediately before that day;

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35F. Deposit, pending appeal, of 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 where 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.

5. An assessee aggrieved by an order, passed by an Assessing authority, may file an appeal u/s 35 of the Act. Section 35A of the Act enumerates the procedure for filing and deciding an appeal. The power to entertain and decide an appeal and as a consequence to pass final and interim orders flows from Section 35 and Section 35A of the Act. Section 35F of the Act, which requires an assessee to pre-deposit the amount demanded by the revenue and empowers the Commissioner (Appeals) to waive the amount so demanded, is integral to the scheme of appellate powers conferred by Section 35 and Section 35A of the Act. Section 35F of the Act commences with the words, "... where in any appeal under this Chapter ..." thereby leaving no ambiguity that power u/s 35F can only be exercised when an appeal has already been filed under Chapter VIA. Section 35F of the Act thus can only be invoked if an appeal has already been filed. We, therefore, hold that an order passed by the Commissioner (Appeals) exercising power u/s 35F, is an order passed in an appeal filed u/s 35 read with Section 35A of the Act and shall be appealable to the CESTAT as an order appealable u/s 35B(1)(b) of the Act. A perusal of the judgment in Hindustan Lever Ltd.''s case (supra) reveals that significance of the opening words of, namely, "... where in any appeal under this Chapter ..." were not noticed or considered. We, therefore, express our respectful disagreement with the ratio recorded in the said judgment. In view of what has been stated hereinabove, the petitioners are relegated to their alternative remedy of filing an appeal before the CESTAT. In case such appeal is filed within two months from today, the delay, if any, on account of pendency of this writ petition shall be considered sympathetically.

