

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.05.2006

CORAM

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

W.P. No.11475 of 2006 AND  
W.P.M.P.Nos.13060 and 13061 of 2006

M/s.Hindustan Lever Limited

111, G.S.T.Road,

Chromepet, Chennai - 600 044

Represented by its Legal Manager

T.S.Venkateswarn

... Petitioner

Vs.

The Commissioner of Central Excise (Appeals)

No.26/1, Mahatma Gandhi Road,

Chennai - 600 034.

... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India Praying for the issuance of a Writ of Certiorarified Mandamus calling for the records of the respondent comprised in its proceedings under Order No.02/01/2006 dated 25.01.2006 and the order dated 16.03.2006 in modification petition in respect of interim order No.02/0-1/2006 dated 25.01.2006 passed by the respondent in Appeal No.46/05(MIV) and quash the same as illegal and consequently issue a Mandamus directing the respondent to comply with the directions issued by CESTAT in its order 26.08.2005 passed in Appeal No.E/3224/04-Mum on merits without insisting on pre-deposit.

For Petitioner

: Mr. Habibullah Basha, Senior Counsel,  
for Mr. Sathish Parasaran.

For Respondent

: Mr. K.Ramakrishna Reddy, S.C.G.S.C.

WEB COPY  
O R D E R

When the above writ petition came up for admission the petitioner was directed to serve notice on the learned Central Government Standing Counsel and after notice Mr.K.Ramakrishna Reddy, learned Senior Central Government Standing Counsel appeared for the respondent.

2. The short facts that are necessary for the disposal of the writ petition are set out below:-

- (i) The dispute involved in the appeal in A.No.46/2005 (M-IV) (Old A.No.16/2004 (M-IV)) which is pending before the respondent relates to whether the product viz., New Creamy Pond's Moisturising Face Wash (NCPMFW) also known as Pond's Face Wash / New Pond's Moisturising Face Wash is classifiable under TSH 3304.00 of CETA, 1985 as a skin care preparation as claimed by the Department or under TSH 3402.90 as claimed by the appellant/petitioner herein.
- (ii) In the said appeal, the petitioner filed a stay application under Section 35 F of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') seeking stay and to dispense with the requirement of pre-deposit of duty. By an interim order No.02/0-1/2006 dated 25.01.2006, the respondent herein directed the petitioner to pre-deposit a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) on or before 15.03.2006 and directed that on payment of the said pre-deposit amount, payment of remaining/balance part of the duty demanded in the case will stand waived till the final disposal of the appeal. It was further ordered that it will be open to the petitioner herein, if convenient, to have the pre-deposit amount deposited immediately and thereafter file an application for out of turn hearing. Thereafter, the petitioner filed a modification petition before the respondent on 23.03.2006. But the said modification petition was also dismissed by the respondent. Being aggrieved by the said orders, the above writ petition has been filed.

3. The main contention of the petitioner that has been raised in the writ petition is that the petitioner earlier filed an appeal before the Central Excise and Service Tax Appellate Tribunal (CESTAT) vide Appeal No.E/2746/03 and the matter was remanded back with a direction to hear the appeal on time bar and decide the appeal in accordance with law. But the respondent by an order dated 09.08.2004 passed in Order No.47 of 2004 rejected the appeal as time barred. Again the petitioner preferred an appeal before the CESTAT in E.3224/04-Mum challenging the order dated 09.08.2004 and the CESTAT by an order dated 26.08.2005 held that the appeal preferred by the petitioner was within time and directed the respondent to decide the appeal 'on merits'. It is the case of the petitioner that along with the above said appeal, the petitioner filed a stay petition seeking stay of the operation of the order dated 09.08.2004 passed by the respondent and to dispense with the requirement of pre-deposit of duty under Section 35 F of the Act and the Tribunal while disposing of the appeal passed the following order, viz.,

"11. The stay petition filed along with the appeal is also disposed of accordingly as there exists prima facie case and in view of the fact that the appellants have already furnished Bank Guarantee of Rs.50,00,000/- (Fifty Lakhs).

12. In the result, stay application and appeal are allowed."

While disposing of the main appeal in favour of the petitioner the Tribunal vide its order dated 26.08.2005 expressly adverted to the Bank Guarantee of Rs.50,00,000/- already furnished and in that view of the matter and on appreciation of the prima facie case in favour of the petitioner, the Tribunal allowed the stay petition as well and hence the respondent ought not to have directed the petitioner to deposit a further sum of Rs.50,00,000/- which according to the petitioner is contrary to the order of the Tribunal. It is further contended that the petitioner has a prima facie case and the balance of convenience also entirely lie in favour of the petitioner for grant of interim orders as prayed for.

4. Mr. Habibullah basha, learned Senior Counsel appearing for the petitioner fairly submitted that the petitioner is not seriously pressing the contention that since the Tribunal has allowed the stay application, the respondent ought to have granted an unconditional stay without ordering further deposit of sum of Rs.50,00,000/-. But the learned Senior counsel strenuously contended that the CESTAT in its order has clearly held that a prima facie case exists in favour of the petitioner and when the Tribunal itself has held so, the respondent ought to have considered the same and granted the unconditional stay and waived pre-deposit. The learned senior counsel referred to the following observation of the respondent in the impugned order, which reads as follows:

"At the same time, since the issue concerned is not totally free from doubt and the appellants also contend that they have a good case on merits, requiring pre-deposit of the full amount of Central Excise duty demanded, as requested by the Department, would also be unjust to the appellant. The present appeal will also require indepth and detailed study and analysis, which exercise will not be possible to be completed in a hurry. Keeping all these factors in mind, I am of the opinion that in addition to the amount of Rs.50,00,000/- realized by the Department by way of liquidation of Bank Guarantee, a pre-deposit under Section 35 F of the Central Excise Act, 1944 of Rs.50,00,000/- would be in order, and meet the ends of justice in this case".



and submitted that the respondent having observed that the issue concerned is not totally free from doubt and the appeal will also require indepth and detailed study and analysis erred in not granting the unconditional stay and erred in ordering further deposit of a sum of Rs.50,00,000/-.

5. The learned senior counsel relied upon the following judgments:

- (i) 1994 (69) E.L.T. 193 (Cal.) (Bangaigoan Refinery and Petrochem Ltd., Vs. Collector of Central Excise (Appeals)).
- (ii) I.L.R.2000 KAR 25 (DB) (I.T.C. Ltd., Vs. Commissioner of Central Excise and Customs (Appeals), Calcutta).
- (iii) 2000 (118) E.L.T. 553 (S.C.) (Vijay Packaging System Ltd., Vs. Commissioner of Customs and Central Excise, A.P.)
- (iv) 2001 (128) E.L.T. 241 (Tribunal-Cal) (Heavy Engineering Corporation Limited Vs. Commissioner of Central Excise, Jamshedpur)
- (v) 2002 (144) E.L.T. 294 (Del-P 13) (Sony India Limited Vs. Union of India).
- (vi) 2003 (154) E.L.T. 347 (S.C.) (Mehsana District Co-operative Milk P. U. LTD Vs. Union of India)
- (vii) 2003 (156) E.L.T. 519 (Tribunal-Chennai) (Adwaiath Steels Limited Vs. Commissioner of Central Excise, Coimbatore)
- (viii) 2005 (182) E.L.T. 450 (ALL-DB) (Northern Doors (Private) Limited Vs. Commissioner of Central Excise, Kanpur).
- (ix) 2005 (184) E.L.T. 347 (ALL-DB) (I.T.C. Limited Vs. Commissioner (Appeals), Customs and Central Excise, Meerut-I).

and submitted that the reasoning given by the respondent in support of the impugned order is unsatisfactory and the respondent has not at all considered the prima facie merits and the balance of convenience and the respondent should have addressed its mind to the prima facie merits of the petitioner's case in the light of the observation made by the CESTAT.

5. The learned Senior Counsel further submitted that if it is established before the Appellate Authority / respondent herein that the petitioner has a very strong case on merit, the Appellate Authority is bound to examine the issue on merit prima facie and financial hardship does not mean as to whether the appellant is in a position to make the payment or not, but a prima facie case has to be examined as to whether the appellant is liable to make the payment at all and in case the appellant has a case on merit, the respondent cannot reject the application.

6. Per contra, Mr. K.Ramakrishna Reddy, learned Senior Central Government standing Counsel submitted that against the impugned order passed by the respondent, an appeal will lie to the CESTAT under Section 35 B of the Act and as such the writ petition itself is not maintainable. He further submitted that jurisdiction under Article 226 of the Constitution of India cannot be exercised only for the purpose of granting the relief of interim nature when the main matter is to be decided by another authority viz., the respondent herein. He further submitted that no financial hardship has been pleaded by the petitioner and the submissions made by the learned senior counsel for the petitioner are not based on the averments contained in the affidavit. He further submitted that the appeal filed by the petitioner before CESTAT was against the order of the Commissioner of Appeals rejecting the appeal filed by the petitioner on the ground of delay and the CESTAT held that the appeal was filed in time before the Commissioner of Appeals and holding so remitted back the matter to the Commissioner of appeals for denova consideration and there was no occasion for the CESTAT to consider the merits of the case and as such there was no occasion for the Tribunal to go into the prima facie case in favour of the petitioner and on the above submissions the learned Senior Central Government Standing Counsel submitted that the contention of the learned Senior Counsel on this aspect is liable to be rejected. In support of his contentions, he relied upon the decisions reported in 1994 (1) M.L.J. 664 (The Collector of Customs Vs. Madras Electric Castings P. Ltd.,) and 1985 (19) E.L.T. 22 (S.C.) (Assistant Collector of Central Excise Vs. Dunlop India Limited).

7. Since the maintainability of writ petition itself has been questioned that question has to be decided first. Mr. Ramakrishna Reddy, learned Senior Central Government Standing Counsel submitted that any person aggrieved by a decision or order passed by the Commissioner of Central Excise may appeal to the Appellate Authority. The said submission, in the view of this Court, is not acceptable for the following reasons:

"Section 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)) under Section 35A;"

A reading of the Section 35B (1) (a) clearly shows that an appeal lies to the Tribunal against a decision or order passed by the Commissioner of Central Excise if that decision or order is passed by the Commissioner of Central Excise as an adjudicating authority.

But it is not the contention of Mr. Ramakrishna Reddy, learned Senior Central Government Standing Counsel for respondent that the impugned order is an order passed by the Commissioner of Central Excise as an adjudicating authority. Hence, Section 35B (1) (a) is not attracted. An appeal under Section 35B (1) (b) lies to the Tribunal against an order passed by the Commissioner of Appeals under Section 35A. But the impugned order is not an order passed under Section 35A, but is an order passed under Section 35F of the Act. When Section 35B of the Act enumerates appealable orders against which the appeal lies to the Tribunal, the appeal can be filed to the Tribunal only, against those enumerated orders alone, not against any other orders. Therefore, the contention of Mr. K.Ramakrishna Reddy is not acceptable.

8. The learned senior counsel Mr. Habibullah Basha also relied upon 1984 (18) E.L.T. 538 (Tribunal) (Bhushan Industrial Company (P) Ltd., Vs. Collector of Central Excise, Chandigarh) and 1985 (19) E.L.T. 83 (Tribunal) (International Computers Vs. Collector of Central Excise), wherein the CEGAT New Delhi has held that an appeal against rejection of stay petition is not maintainable under Section 35 B of the Act. The said two decisions supports the view taken by this Court. Accordingly this Court holds that the above writ petition is maintainable and no appeal will lie to CESTAT against the order of the Commissioner of Appeals passed under Section 35F of the Act.

9. (i) In 1994 (69) E.L.T. 193 (Cal.), it is laid down as follows:

"31. As already seen the phrase "undue hardship" would cover a case where the appellant has a strong prima facie case. The phrase also in my view covers a situation where there is an arguable case in the appeal. In the former case the Appellate Authority should dispense with the pre-deposit altogether on the basis of the authorities referred to earlier. In the latter case the authority would have to safeguard the interest of the revenue".

(ii) In I.L.R. 2000 KAR 25, it is held as follows:

"26. While considering the case of 'undue hardship' the authority is required to examine the prima facie on merits of the dispute as well. Pleading of financial disability would not be the only consideration. Where the case is fully covered in favour of the assessee by a bonding precedent like that of the judgment of the Supreme Court, jurisdictional High Court or a Special Bench of the Tribunal, then to still insist upon the deposit of duty and penalty levied would certainly cause 'undue hardship' to the assessee. Absence of the financial



hardship in such a case would be no ground to decline the dispensation of pre-deposit under the proviso to Section 35F. The power to dispense with such deposit is conferred under the authorities has to be exercised precisely in cases like this type and if it is not exercised under such circumstances then this Court will require it to be so exercised".

(iii) In 2000 (118) E.L.T. 553 (S.C.), it is observed as follows:

"2. Considering the facts of the present case inasmuch as the Tribunal itself has found that the appellant has a prima facie case and the appellant is before the B.I.F.R., we are of the opinion that it will be appropriate and in the interest of justice if the appeal filed by the appellant before the Tribunal is heard without the appellant being required to pay the disputed amount of excise duty".

(iv) In the decision reported in 2002 (144) E.L.T. 294 (Del.), the Head Note reads as follows:

"Stay/Dispensation of pre-deposit (Customs) - Prima facie, import, neither in CKD or SKD condition nor in ready to assemble sets - Assembly operations undertaken by petitioner for manufacturing colour televisions being complicated, prima facie, Rule 2 (a) of Rules of Interpretation of First Schedule to Customs Tariff Act, 1975 inapplicable - Show cause notice also, prima facie, appears to be time-barred in absence of any suppression of facts, bill of entry having been submitted at the time of arrival of goods and goods having been duly dispatched as components of colour televisions - Strong prima facie case made out in favour of petitioner - Stay granted."

(v) In the decision reported in 2003 (154) E.L.T. 347 (S.C.), it is observed as follows:

"The reasoning given in support of such order is wholly unsatisfactory. The appellate authority has not at all considered the prima facie merits and has concentrated upon the prima facie balance of convenience in the case. The Appellate Authority should have addressed its mind to the prima facie merits of the appellants case and upon being satisfied of the same determined the quantum of deposit taking into consideration the financial hardship and other such relevant factors."

- (vi) In the decision reported in 2005 (182) E.L.T. 450 (S.C.), the Head Note reads as follows:  
"Stay/Dispensation of pre-deposit - While deciding the application Court must apply its mind as to whether the appellant has a strong prima facie case 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 restrain on the appellant - Such findings of High Court in the case of ITC Ltd., Vs. Commissioner in Civil Misc. Writ Petition No.1219 of 2003 having not been considered by the Central Excise Act, 1944".
- (vii) In the decision reported in 2005 (184) E.L.T. 347 (All.), it is observed as follows:  
"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 restrain 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 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 to nugatory/illusory."

10. Mr. K.Ramakrishna Reddy, learned Senior Central Government Standing Counsel relied upon the case of The Collector of Customs Vs. Madras Electric Castings P. Ltd., reported in 1994 (1) M.L.J. 664. In paragraph 7 of the said decision, it is laid down as follows:

"Therefore, it is clear that jurisdiction under Article 226 of the Constitution cannot be exercised only for the purpose of granting the relief of interim nature, when the main matter is to be decided by another authority and further consequence



of granting such interim relief is to infructuate the very order of confiscation as pointed out above".

11. In the considered view of this Court, the facts on the above case and the facts of the case on hand are totally different. Likewise, the issue involved in both the cases are different. In 1994 (1) M.L.J. 664, on the ground that the granting of the interim relief sought for in that case will infructuate the very order of confiscation, the Hon'ble Division Bench held so. But, the present writ petition is directed against an interim order passed by the Appellate Authority and even if any interim relief is granted, it will not infructuate the appeal pending before the Appellate Authority. Whatever be the order that may be passed in this writ petition, it will not in any way affect the disposal of the appeal pending before the respondent herein and as such the above decision is not applicable to the facts of this case. Therefore, the contention of the learned Standing Counsel is not acceptable.

12. He also relied upon the case of Assistant Collector of Central Excise, West Bengal Vs. Dunlop India Limited and others reported in 1985 (19) E.L.T. 22 (S.C.). In that decision, paragraph 5 reads as follows:

"5. We repeat and deprecate the practice of granting interim order which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other relevant considerations".

In paragraph 7 of the said decision, it is held as follows:

"7. ... In cases where denial of interim relief may lead in public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due regard to the public interest, a Court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There

are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. We often wonder why in the case indirect taxation where the burden has already been passed on to

the consumer, any interim relief should at all be given to the manufacturer, dealer and the like:"

In the same judgment, in paragraph 13, it is observed as follows:

"13. ... We consider that where matters of public revenue are concerned, it is of utmost importance to realize that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the interest. We are very sorry to remark that these considerations have not been borne in mind by the High Court and interim order of this magnitude had been granted for the mere asking. The appeal is allowed with costs."

13. The decision reported in 2000 (118) E.L.T. 553 (S.C.) is not applicable to the facts of this case as in that case, the appellants were before the B.I.F.R. and taking that factor into account waiver was ordered. In 2003 (154) E.L.T. 347 (S.C.), the Honourable Supreme Court of India remanded the matter back to the Appellate Authority for determining the issue under Section 35F of the Act, as the Appellate Authority has not at all considered the prima facie merits of the case and the judgment of the Supreme Court reported in 1985 (19) E.L.T. 22 (S.C.) (3 judges) was not brought to the notice of the Honourable Court.

14. In the light of the law laid down by the Supreme Court in 1985 (19) E.L.T. 22 (S.C.), the correctness of the impugned order passed by the respondent has to be judged. In the impugned order dated 25.01.2006, the respondent has considered the fact that the Adjudicating Authority has decided the issue of classification with relation to the impugned product viz., Face Wash and has confirmed the demand of differential duty and the differential duty demanded is Rs.3,13,17,442/- and the amount realized by way of liquidation of Bank Guarantee was only Rs.50,00,000/- and further sum of Rs.2,63,17,442/- was still required to be deposited in terms of Section 35 F of the Act. Considering the fact that the huge amount is due and also considering the fact that the issue concerned is

not totally free from doubt and also taking into account the contention of the appellant regarding the merits of the case, ordered the pre-deposit of a sum of Rs.50,00,000/- under Section 35 F of the Act. While passing the said order the respondent relied upon the decision of the Apex Court reported in the case of Empire Industries Limited Vs. Union of India reported in A.I.R. 1986 S.C. 662 equivalent to 1985 (3) S.C.C. 314. The above said reasoning recorded by the Appellate Authority / respondent herein is totally in conformity with the law laid down by the Honourable Supreme Court of India in the cases reported in 1985 (19) E.L.T. 22 (S.C.) and 1985 (3) S.C.C. 314.

15. In 1985 (3) S.C.C. 314, in paragraph 60, it is observed as follows:

"If we may venture to suggest, in fiscal matters specially in cases involving indirect taxes where normally taxes have been realized from the consumers but have not been paid over to the exchequer or where taxes are to be realized from consumers by the dealers or others who are parties before the Court, interim orders staying the payment of such taxes until final disposal of the matters should not be passed. It is a matter of balance of public convenience. Large amounts of taxes are involved in these types of litigations. Final disposal of matters unfortunately in the present state of affairs in our Courts takes enormously long time and non-realisation of taxes for long time creates an upsetting effect on industry and economic life causing great inconvenience to ordinary people. Governments are run on public funds and if large amounts all over the country are held up during the pendency of litigations, it becomes difficult for the Governments to run and it becomes oppressive to the people. Governments' expenditures cannot be made on bank guarantees or securities. In that view of the matter as we said before, if we may venture to suggest for consideration by our learned brethren that this Court should refrain from passing any interim order staying the realizations of indirect taxes. This will be healthy for the economy of the country and for the Courts".

16. In the light of the law laid down by the Honourable Supreme Court of India in the above decisions, this Court is of the view that the decisions of other High Courts and the Tribunals that are relied upon by the Learned Senior Counsel will not in any way be helpful to the petitioner's case. Therefore, for the foregoing reasons this Court holds that the impugned orders dated



25.01.2006 and 16.03.2006 passed by the respondent are perfectly legal and unassailable. Accordingly, the writ petition fails and the same is dismissed. However, since the time granted by the respondent to comply with the order of the respondent has expired on 20.04.2006, the petitioner shall have two weeks time from today to deposit the sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) as directed by the respondent herein and on such deposit the appeal pending before the respondent will be taken up for hearing on priority basis and disposed of on merits and in accordance with law as expeditiously as possible.

No costs. Consequently, the connected W.P.M.P.s are closed.

Sd/-  
Asst. Registrar/  
Vacation Officer

/true copy/

Sub Asst. Registrar.

srk/rpa

To,

The Commissioner of Central Excise (Appeals)  
No.26/1, Mahatma Gandhi Road,  
Chennai - 600 034.

1 cc to Mr.Satish Parasaran, Advocate, Sr. 23507  
1 c to MR.K.Ramakrishna Reddy, SCGSC, Sr. 23496

W.P. No.11475 of 2006 AND  
W.P.M.P.Nos.13060 and 13061 of 2006

JRG (CO)  
kk 24/5

WEB COPY