

**(2013) 01 P&H CK 0034**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** CWP No. 13288 of 2012

Surya Air Products (P) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision:** Jan. 15, 2013

**Acts Referred:**

- Central Excises and Salt Act, 1944 - Section 35, 35F, 35G
- Consumer Protection Act, 1986 - Section 2(o)
- Customs Act, 1962 - Section 122, 129, 129B, 129E, 130
- Foreign Exchange Management Act, 1999 - Section 35
- Income Tax Act, 1961 - Section 253

**Citation:** (2013) 199 ECR 191 : (2013) 293 ELT 658 : (2014) 25 GSTR 118

**Hon'ble Judges:** Ritu Bahri, J; Hemant Gupta, J

**Bench:** Division Bench

**Advocate:** Sanjay Bansal, with Rajiv Sharma, for the Appellant; Sunish Bindlish, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

Hemant Gupta, J.

A preliminary objection has been raised by the Revenue relying upon the judgment of Hon'ble Supreme Court in [Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another](#), that the writ petition against an order deciding an application for waiver of condition of pre-deposit of duty is an appealable order in terms of Section 35G of the Central Excise Act, 1944 (for short "the Act"), therefore, the present writ petition challenging an order passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "the Tribunal") is not maintainable. Before we consider the respective arguments of the parties, certain statutory provisions of the Act as well as the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (for short "the Rules") need to be extracted. The same are as

under:

The Central Excise Act, 1944

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.

35G. Appeal to High Court--(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment, if the High Court is satisfied that the case involves a substantial question of law.

Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982

28A. Procedure for filing and disposal of stay petitions.--(1)(a) Every application preferred under the provisions of the Acts for stay of the requirement of making deposit of any duty demanded or penalty levied shall be presented in triplicate by the appellant in person or by his duly authorized agent, or sent by registered post to the Registrar or any other officer authorized to receive memoranda of appeals, as the case may be, at the Headquarters of the Bench having jurisdiction to hear the appeal in respect of which the application for stay arises;

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28C, Procedure for filing of and disposal of Miscellaneous Application.--The provisions of the rules regarding the filing of stay applications shall, in so far as may be, apply to the filing of applications under this rule (mutatis mutandis).

2. Mr. Sanjay Bansal, learned senior counsel for the petitioner has vehemently argued that only an order of final adjudication is appealable and not each and every order passed by the Tribunal. Learned counsel for the petitioner has argued that the judgment of the Hon"ble Supreme Court in Raj Kumar Shivhare's case (supra) is distinguishable inasmuch as in the said case, the Supreme Court was examining the provisions of Foreign Exchange Management Act, 1999, whereas Section 35 of the said Act specifically provides that any person aggrieved by "any decision or order" of the Appellate Tribunal may file appeal to the High Court, whereas u/s 35G of the Act, an appeal lies to the High Court from "every order passed in appeal" by the Appellate Tribunal. It is contended that the order for waiver of pre-deposit of duty is not an order passed in appeal, as order passed in appeal is referable only to the final adjudicatory order. In support of his arguments, Mr. Sanjay Bansal relied upon [Shaw Wallace and Co. Ltd. Vs. Income Tax Appellate Tribunal and Others](#), , [Visvas Promoters P. Ltd. Vs. The Income Tax Appellate Tribunal Chennai Bench "B" and The Assistant Commissioner of Income Tax](#), and [Lakshmi Vilas Bank Ltd. Vs. Income Tax Appellate Tribunal and Others](#),

3. Mr. Jagmohan Bansal also supported the arguments raised by Mr. Sanjay Bansal and also relied upon [Commissioner of Central Excise, Kol-II and Another Vs. Shree Gobinddeo Glass Works Ltd. and Others](#), and [J.M. Ramachandra and Sons Vs. Customs Excise and Gold \(Control\) Appellate Tribunal and Another](#), in support of the argument that an order passed by the Appellate Tribunal is not appealable.

4. On the other hand, Mr. Sunish Bindlish, learned counsel for the Revenue relied upon [Indoworth India Ltd. Vs. Customs, Excise and Service Tax Appellate Tribunal and Commissioner of Customs and Central Excise, Auram Jewellery Export \(P\) Ltd. Vs. Union of India \(UOI\)](#), and [Vijay Plas Fabs \(P\) Ltd. Vs. Cestat, Chennai](#), to contend that an order passed by the Appellate Tribunal is an appealable order.

5. Having heard learned counsel for the parties at length, we find that an order passed by the Appellate Tribunal on an application to seek waiver of pre-deposit of duty imposed is an appealable decision. Section 35F of the Act makes it obligatory for the persons desirous of appealing against decision of the Central Excise Authorities to deposit with the adjudicating authority the duty demanded or the penalty levied. The proviso contemplates that such requirement can be dispensed with, if it causes undue hardship subject to such conditions as it may deem to appropriate to impose so as to safeguard the interest of the Revenue. Section 35G of the Act contemplates that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal. Therefore, in terms of Section 35G of the Act, every order, which is passed in appeal, is an appealable order. The expression "every order" will mean an order, which decides any of the substantive rights of the parties.

6. Rule 11 of the Rules empowers the Tribunal to reject the memorandum of appeal, if the documents referred to in Rule 9 are not produced within the time limit

allowed. The procedure for filing and disposal of a stay petition is mentioned in Rule 28A, whereas the procedure for filing and disposal of a miscellaneous application is contemplated in Rule 28C as that of filing of stay applications.

7. A reading of Section 35F of the Act shows that deposit of duty and/or penalty is required to be made during the pendency of appeal and that the Appellate Authority can dispensed with the pre-deposit of the amount on such conditions, as it deemed fit to impose. Therefore, an application for stay including that of application for waiver of pre-deposit of duty is an application in pending appeal. The deposit of the duty before filing of an appeal is not a condition precedent for presentation of memorandum of appeal, but such deposit is necessary for hearing of the appeal. Since the application for waiver of pre-deposit of duty is an application filed during the pendency of appeal, any order passed on such application is an order passed in appeal by the Appellate Tribunal against which an appeal is maintainable before this Court u/s 35G of the Act.

8. Though in *Raj Kumar Shivhare's* case (supra), the Hon'ble Supreme Court was examining Section 35 of the Foreign Exchange Management Act, 1999 which provides for an appeal against any decision or order of the Appellate Tribunal, but the Court held that any order or decision of the Appellate Tribunal would mean all decisions or orders of the Appellate Tribunal, which are appealable to the High Court. It observed as under:

28. In Black's Law Dictionary the word "any" has been explained as having a "diversity of meaning" and may be "employed to indicate all and every as well as some or one and its meaning in a given Statute depends upon the context and subject matter of Statute". The aforesaid meaning given to the word "any" has been accepted by this Court in [Lucknow Development Authority Vs. M.K. Gupta](#), . While construing the expression "service of any description" u/s 2(o) of Consumer Protection Act, 1986 this Court held that the meaning of the word "any" depends upon the context and the subject matter of the Statute and held that the word "any" in Section 2(o) has been used in wider sense extending from one to all (para 4 at page 793 of the report). In the instant case also when a right is conferred on a person aggrieved to file appeal from "any" order or decision of the Tribunal, there is no reason, in the absence of a contrary statutory intent, to give it a restricted meaning.

29. Therefore, in our judgment in Section 35 of FEMA, any "order" or "decision" of the Appellate Tribunal would mean all decisions or orders of the Appellate Tribunal and all such decisions or orders are, subject to limitation, appealable to the High Court on a question of law.

9. Though in the Foreign Exchange Management Act, 1999, the expression used is "any "order" or "decision" of the Appellate Tribunal", whereas the expression used in Section 35G of the Act is "every order". The expression "every order" and "any

order or decision" used in Foreign Exchange Management Act, 1999 are substantially same in its rigour and consequences. Therefore, the judgment in Raj Kumar Shivhare's case (supra) concludes the issue raised by the Revenue against the petitioner.

10. Apart from the aforesaid judgment, considering the Act, the Bombay High Court in Indoworth India Ltd. case (supra) has held that an order directing deposit of amount is an order made in appeal and, therefore, appealable in terms of Section 35G of the Act. It was observed as under:

4. ...Now considering aforesaid two provisions the question arises as to whether the order directing a party to deposit the amount before the Appellate Tribunal is an order made in appeal and if the answer is in the affirmative, whether an appeal lies u/s 35G of the Central Excise Act, 1944. We have no hesitation in holding that an order directing the deposit of the amount is an order made in appeal. Section 35F opens with the words "where in any appeal under this Chapter". The order of deposit is thus an order made in appeal. In fact, there is no other proceeding pending before the appellate authority. In fact, there are no separate proceedings, which deals with the issue of deposit. Any order for deposit must be said to have been made in an appeal only. Therefore, where such an order made, it will be an order from which the appeal will lie u/s 35G of the Central Excise Act.

11. In Auram Jewellery Export (P) Ltd. case (supra), the Allahabad High Court was considering the pari materia provisions of Sections 129B and 129E of the Customs Act, 1962. The Court held to the following effect:

11. According to us, the words, "every order passed in appeal" do not apparently exclude the jurisdiction of the High Court in determining the question of pre-deposit as u/s 129E of the Act. Question of appeals etc. are to be governed by Chapter XV of the Act, which includes both, the final order and any order in connection with the appeal. Therefore, unless it is specifically excluded under such Chapter, we do not find any thing contrary from the plain reading of Chapter XV, particularly. Section 130 of the Act made for appeal to High Court. Had it been the case of only final order, there was no scope for the Legislature to incorporate the aforesaid words u/s 130 that "every order passed in appeal" is appealable, because solitary final order is required for disposing the appeal. That apart, the order impugned necessitated deposit and in default, automatic dismissal of the appeal. Hence, the order impugned possesses essence of finality.

12. In Shaw Wallace & Co. Ltd. and Visvas Promoters (P) Ltd. cases (supra), the judgments relied upon by the learned Counsel for the Petitioners, the issue examined was in respect of an order passed in rectification application as not appealable in terms of Section 253 of the income tax Act, 1961. The rectification applications are filed only after final decision of the Authority. Therefore, the judgments referred to by learned counsel for the petitioner have no applicability to

the facts of the present case.

13. In Shree Gobinddeo Glass Works case (supra) referred to by Mr. Jagmohan Bansal, the primary issue examined was; whether the appeals preferred could be dismissed for non-compliance of the orders passed by the Tribunal directing pre-deposit u/s 35F of the Central Excise Act, 1944 and u/s 122 of the Customs Act, 1962. The Court has held to the following effect:

20. It is obvious from the said proviso pre-deposit in pending hearing appeal is required where appeal is filed against any order in connection of which any duty is demanded in respect of the goods which are not under the control of Central Excise authorities or any penalty levied under this Act. It, therefore, follows that where duty is demanded in respect of the goods which are not under control of Central Excise authority or penalty levied in order to secure the revenue the provision for pre-deposit has been made it mandatory, selectively a number of appeals contemplated in Section 35F of the said Act. In the sequel where pre deposit is not required at all, for example if any duty is levied in relation to any goods and it transpired later on levy of such duty and realization thereof is not warranted under the law then appeal could be preferred and in that case no pre deposit is required. Another example in case where goods in question on which the duty is levied is in custody and control of the Central Excise authorities then in such a situation no pre-deposit is required.

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23. Section 35F is an independent one and language of the provision appears to be mandatory and in all cases as mentioned therein and the power of dispensation of pre-deposit is also provided in fit cases. The rules framed under the Act cannot provide for any additional right or provision, which are inconsistent with the provision of the Act itself. The learned Trial Judge has taken the help of few provisions of the rule as well as some notifications. We think those are of no help to dilute the provision of pre-deposit or the ratio of the Supreme Court decisions of the aforesaid two cases.

14. The said observations, in fact, are not supporting the argument raised by the learned counsel for the petitioner.

15. In J.M. Ramachandra & Sons case (supra), the issue examined by the Delhi High Court was doctrine of merger and when an application for condonation of delay was declined in exercise of the appellate jurisdiction of the Tribunal in respect of determination of rate of duty of customs or to the value of goods, appealable to the Hon'ble Supreme Court in terms of Section 129 of the Customs Act, 1962. It was held that an order of declining condonation of delay is not appealable to the Supreme Court u/s 130E of the said Act. Even the said judgment does not address the issue raised in the present petition.

16. Keeping in view the ratio of the judgment in Raj Kumar Shivhare's case (supra) and that of Bombay High Court and Allahabad High Court in Indoworth India Ltd. and Auram jewellery Export (P) Ltd. cases (supra) respectively, we find that an order passed by the Tribunal on an application for waiver of pre-deposit of duty is an order passed in appeal and is, thus, appealable in terms of Section 35G of the Act.

17. In view of the fact that the petitioner has effective alternative remedy of appeal against an order passed by the Tribunal, we refrain ourselves from exercising the writ jurisdiction of this Court. Consequently, the present writ petition is dismissed.